

No. 25-6161

ORIGINAL
COPY

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
OCT 02 2025

OFFICE OF THE CLERK
SUPREME COURT, U.S.

James Capers

— PETITIONER

(Your Name)

vs.

United States of America

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Second Circuit Court of Appeals, 23-6087-CR

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Capers

(Your Name)

United States Penitentiary McCrary

P.O. Box 3000

(Address)

Pine Knot, Kentucky 42635

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) In regards to 21 U.S.C. §846, to be in accordance with both Apprendi and Alleyne, to punish as 21 U.S.C. §841(b)(1)(A) (10 to life), must the jury find both the conspiracy amount (Apprendi) and the amount the defendant was personally responsible for (Alleyne), i.e. must two questions be answered?
- 2) In regards to 18 U.S.C. §1962(d), to be in accordance with Apprendi to punish beyond the statutory maximum of 20 years, where the jury instructions cited first and second degree murder, attempted murder, conspiracy to murder, and gave Pinkerton instructions, all under New York State Law, to take the statutory maximum to life, does the jury have to find more than that the underlying offense "involved [] murder"?
- 3) When these questions are brought up pro se for the first time on appeal after a remand for resentencing, where the issues were as above, is Capers properly challenging his sentence, or are these Constitutional challenges not properly brought on remand?

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	8
CONCLUSION.....	23

INDEX TO APPENDICES

APPENDIX A Second Circuit Order of Denial

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1) James Capers

United States Penitentiary McCreary
P.O. Box 3000
Pine Knot, KY 42635

2) United States Attorney for the Southern District of New York

Attorney for the United States of America
26 Federal Plaza
New York, New York 10278

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
1) Alleyne v. U.S., 133 S. Ct. 2151 (2013)-----	passim
2) Apprendi v. N.J., 530 U.S. 466, 120 S. Ct. 2348-----	passim
3) U.S. v. Aquirre-Rivera, * F.4th 405, 408 (5th Cir. 2021)-----	13
4) U.S. v. Arias-Santos, 39 F.3d 1070, 1078 (10th Cir. 1994)-----	21
5) U.S. v. Benitez, 809 F.3d 243, 250 (5th Cir. 2015)-----	16
6) U.S. v. Capers, 20 F.4th 105, 130 (2nd Cir. 2021)-----	2
7) U.S. v. Cargas-Oscampo, 747 F.3d 299, 303 (5th Cir. 2014) (en banc)-----	15
8) U.S. v. Chapman, 851 F.3d 363, 375-78 (5th Cir. 2018)-----	15
9) U.S. v. Clinto, 256 F.3d 311, 314 (7th Cir. 2001)-----	15
10) U.S. v. Daniels, 723 F.3d 562m 574 (5th Cir.) med. reh'd 729 F.3d 496 (5th Cir. 2013)-----	15
11) U.S. v. Davis, 139 S. Ct. 2319 (2019)-----	2, 8
12) U.S. v. DeLeon, 247 F.3d 593, 597 (5th Cir. 2001)-----	15
13) U.S. v. Delgado-Marerro, 774 F.3d 167, 186-189 (1st. Cir. 2014)-----	11
14) U.S. v. Dewberry, 790 F.3d 1022 (10th Cir. 2015)-----	20, 21
15) Edwards v. U.S., 523 U.S. 511, 513-14 (1008)-----	11
16) U.S. v. Haines, 803 F.3d 713, 741-42 (5th Cir. 2015)-----	15, 21
17) U.S. v. Kiekow, 872 F.3d 236, 245-46 (5th Cir. 2017)-----	15
18) U.S. v. Koss, 812 F.3d 460, 465 n. 3 (5th Cir. 2016)-----	16
19) U.S. v. Ellis, 868 F.3d 1155 (10th Cir. 2017)-----	22
20) U.S. v. Perez-Ruiz, 353 F.3d 1, 14 (1st Cir. 2003)-----	22
21) U.S. v. Pizaro, 772 F.3d 284, 296 (1st Cir. 2014)-----	22
22) U.S. v. Pierce, 940 F.3d 817 (2nd Cir. 2019)-----	12
23) U.S. v. Rogers, 228 F.3d 1318 (11th Cir. 2000)-----	11
24) U.S. v. Schuster, 948 F.2d 313 (7th Cir. 1991)-----	11
25) U.S. v. Sortel Rivera, 931 F.2d 1317 (9th Cir. 1991)-----	11
26) U.S. v. Suarez, 879 F.3d 626, 631-32 (5th Cir. 2018)-----	15
27) U.S. v. Thomas, 274 F.3d 655, 663 (2nd Cir. 2001) (en banc)-----	11
28) U.S. v. Tillman, 954 F.3d 628, 641 (4th Cir. 2019)-----	12
29) U.S. v. Torres, 869 F.3d 1089 (9th Cir. 2017)-----	12
30) U.S. v. Turner, 319 F.3d 716, 721-22 (5th Cir. 2003)-----	15

STATUTES	PAGE NUMBER
1) 18 U.S.C. §2	
2) 18 U.S.C. §924(c)	
3) 18 U.S.C. §924(j)	
4) 18 U.S.C. §1959(a)(1) & (2)	
5) 18 U.S.C. §1962(d)	
6) 21 U.S.C. §§841(b)(1)(A), (B), & (C)	
7) 21 U.S.C. §846	
8) 21 U.S.C. §848(e)	

OTHER	PAGE NUMBER
5th Circuit Model Jury Verdict Form-----	14, 15

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

OPINIONS BELOW

James Capers seeks Certiorari from an affirmation by the Second Circuit Court of Appeals dated July 8, 2025, from an appeal from an amended judgment of conviction entered on January 20, 2023 in the United States District Court for the Southern District of New York, by the Honorable John P. Cronan, United States District Judge, following the Second Circuit Court of Appeal's vacatur of the original judgment of conviction and remand for resentencing. The July 8, 2025 order of affirmation was from en banc review.

Superseding Indictment S5 15 CR. 607 (WHP) ("the Indictment") was filed on October 24, 2016, is six Counts. Count One charged Capers with racketeering conspiracy, in violation of 18 U.S.C. §1962(d). Count Two charged Capers with the murder of Allen McQueen in aid of racketeering, in violation of 18 U.S.C. §§1959(a)(1) and 2. Count Three charged Capers with participating in a narcotics distribution conspiracy, in violation of 21 U.S.C. §846. Count Four charged Capers with the murder of Allen McQueen in connection with a drug crime, in violation of 21 U.S.C. §848(e) and 18 U.S.C. §2. Count Five charged Capers with the murder of Allen McQueen through the use of a firearm in connection with the racketeering conspiracy charged in Count One and the narcotics distribution conspiracy charged in Count Three, in violation of 18 U.S.C. §§924(j) and 2. Count Six charged Capers with using, carrying, possessing, and discharging firearms during and in relation to the racketeering conspiracy charged in Count One and the narcotics distribution charged in Count Three, on occasions other than the murder of Allen McQueen, in violation of 18 U.S.C. §§924(c) and 2.

Trial commenced on November 28, 2016 and ended on December 7, 2016, when Capers was convicted on Counts One, Three, and Five, and acquitted on Counts Two, Four, and Six.

On June 2, 2017, the Honorable William Pauley sentenced Capers principally to 504 months imprisonment.

On October 29, 2018, the Second Circuit vacated Capers' conviction on Count Five in light of U.S. v. Davis, 139 S. Ct. 2319 (2019), affirmed in all other respects, and remanded to the District Court with

authorization to vacate the sentences and resentence the defendant on all counts due to the elimination of the sentence on Count Five. U.S. v. Capers, 20 F.4th 105, 130 (2nd Cir. 2021).

On remand, Capers case was reassigned to the Honorable John P. Cronan. On January 12, 2023, Judge Cronan resentenced Capers principally to 504 months imprisonment.

Capers filed a timely appeal, which was affirmed by the Second Circuit on December 10, 2024. He filed timely for en banc review, which was denied on July 8, 2025.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12/10/2024.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 7/8/2025, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §841(b) and 18 U.S.C. §846 are the rare statute that has variation in both the statutory minimum AND maximum based on offense conduct. As such, when a defendant is found guilty of such, the jury must find BOTH the drug type and quantity attributable to the conspiracy itself (Apprendi) AND the type and quantity that the defendant is responsible for (Alleyne). In Capers' case, the jury only found him guilty of the conspiracy, with no drug type and quantity attributable to the conspiracy, and then found his "personal amount".

18 U.S.C. §1962(d) carries a statutory maximum of 20 years, unless the predicate offense carries life, then §1962(d) carries life. In Capers' case the jury was only asked if the predicate offense "included [] murder", but were instructed with the elements of first and second degree murder, conspiracy to murder, and attempted murder. The jury verdict question is not precise enough to determine which of the listed crimes the jury found him guilty of in order to increase the statutory maximum, as only first degree murder carries a life sentence under New York State Law.

Capers alleges that the district court made an "Alleyne error". Under the due process clause of the United States Constitution, Capers cannot be sentenced beyond the statutory maximum for the offense he was found guilty of. By failing to have the jury find questions necessary to sentence beyond the statutory maximum of 20 years for both §851(b)(1)(C) and §1962(d), Capers due process rights and liberty interest are violated.

STATEMENT OF THE CASE

After being resentenced to 50 years at a resentencing hearing from an appeal where one of his counts of conviction was vacated, James Capers was resentenced to 50 years on the remaining counts (for (1) 18 U.S.C. §1962(d) - RICO Conspiracy; and (3) 21 U.S.C. §846 - Narcotics Distribution Conspiracy). On Appeal of resentencing, in a pro se supplemental brief, Capers claimed that he was sentenced beyond the statutory maximum of 20 years on Count 1 and 20 years on Count 3, as the jury verdict forms were inadequate to find him guilty of murder as an underlying offense on the RICO conspiracy, as it did not find him guilty of First Degree Murder in a special jury verdict form. He also claimed that the jury verdict form was inadequate to find him guilty of an underlying offense of 21 U.S.C. §841(b)(1)(A), as the jury was not asked to find both a drug type and weight for the conspiracy, in addition to the amount that Capers' was personally responsible for in the conspiracy.

Similarly, for Count 3, the jury was not asked to find the drug type and quantity that the conspiracy involved, along with the amount Capers' was personally responsible for. Capers claimed that, to be in accordance with both Apprendi and Alleyne, in order to sentence beyond the 20 year statutory maximum of 21 U.S.C. §841 (b)(1)(C), the jury must be asked to find the drug type and quantity in the conspiracy (Apprendi), as well as a separate question to determine the amount that the defendant was personally responsible for (Alleyne). Capers' jury verdict form only asked the second question.

For Count 1, Capers' jury verdict form only asked if the underlying conduct "included [] murder", after the jury was instructed in all the elements for New York State first and second degree murders, attempted murder, conspiracy to murder, and even Pinkerton instructions. Capers claims that this is inadequate to sentence him beyond the 20 year statutory maximum of 18 U.S.C. §1862(d).

Capers brought these claims for the first time on appeal of his resentencing. As such, he claimed that it was plain error to sentence him above the statutory maximum of 18 U.S.C. §1962(d) and 21 U.S.C. §841(b)(1)(C) when the jury verdict was not in compliance with Apprendi.

or Alleyne. He requested his sentence be vacated and the case remanded for resentencing in accordance with the proper statutory maximums.

The Second Circuit Court of Appeals, in an order affirming the sentence, the Court ruled that, "[Capers] has not provided binding precedent to show that any of his positions are clear under Supreme Court or Second Circuit law." But, Capers had cited Apprendi and Alleyne, as well as 5th Circuit case law where, to sentence at the 10 years to life level of 21 U.S.C. §841(b)(1)(A), the jury verdict form must ask for both the drug type and quantity for the conspiracy, as well as the amount the defendant was personally responsible for, and asked for that standard to be applied. He asked this of the en banc panel as well.

The Appellate Court then said that "Capers raised challenges to his convictions - including the constitutionality of the jury verdict and jury instructions - under the guise of 'attacking his sentence... [S]uch claims are outside the scope of this Court's prior decision in this case, which limited remand to resentencing.'" Order, p.7. But, clearly Capers' argument is one of sentencing. It is not challenging the convictions themselves, just what statutory maximums applied. If not at sentencing, when else would Capers have made these claims?

Capers admitted that these arguments were brought up for the first time on appeal, and thus subject to plain error analysis, but it does not appear that the Second Circuit did so. Capers respectfully requests the affirmation be vacated and the case remanded to the appellate court for reconsideration of all his non-frivolous arguments.

REASONS FOR GRANTING THE PETITION

Petitioner James Capers, pro se, an inmate with the Federal Bureau of Prisons currently incarcerated at United States Penitentiary McCreary in Pine Knot, Kentucky, currently serving a 50 year sentence in Case No.: 1:15-CR-00607-JPC out of the Southern District of New York, whose appeal of his resentencing in the Southern District was AFFIRMED by the Second Circuit and where En Banc review was DENIED, submit this petition for writ of Certiorari, and states the following:

Capers was indicted and went to trial on six (6) counts: 1) 18 U.S.C. §1962(d) - Racketeering Conspiracy; (2) Murder, or aiding and abetting murder, in aid of Racketeering; (3) 21 U.S.C. §846 - Narcotics Conspiracy; (4) 18 U.S.C. §843 - Murder or aiding and abetting Murder in connection with a drug crime; (5) 18 U.S.C. §924(j) - Use of a firearm resulting in Murder in a crime of violence; and (6) Possession or Use of a Firearm in furtherance of a crime of violence or a drug offense.

At trial, Capers was remarkably found NOT GUILTY on Count Two (murder in aid of racketeering); Count 4 (Murder in Connection with a drug cime); and Count Six (Possession of a firearm in a crime of violence or drug offense). He was found guilty on Counts One (RICO Conspiracy); Count Three (Narcotics Conspiracy); and Count Five (Use of a Firearm Resulting in Murder). He was sentenced to 504 months imprisonment on all counts.

Upon appeal, the Second Circuit vacated his conviction and sentence on Count Five (924(j)), as the underlying predicate, RICO Conspiracy as charged in Count 1, was not a crime of violence after United States v. Davis, ___ U.S. ___ (2019). Upon resentencing, Caper's guidelines sentence was again found to be LIFE imprisonment, but the court varied downward for a sentence of 504 months imprisonment.

Capers filed a timely appeal. He was assigned Counsel, who argued that the court improperly found him to be a career offender. However, Capers believed that there were more issues that he wanted the court to address. Counsel being opposed to these issues, Capers asked for and was granted permission to file a pro se supplement. Capers did so, bringing up the following issues:

- 1) The jury verdict form for Count 3 - 21 U.S.C. §846 - Narcotics Conspiracy - is not in compliance with Apprendi v. New Jersey 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Alleyne v. United States, 133 S. Ct. 2151 (2013), as the jury was not asked to find the type and weight of drugs that the conspiracy was responsible for, only what Capers himself was responsible for. As such, he was only subject to the 20 year statutory maximum of 21 U.S.C. §841(b)(1)(C).
- 2) The jury verdict form for Count 1 - 18 U.S.C. §1962(d) - RICO Conspiracy - is not in compliance with Apprendi, at the statutory maximum of §1962(d) is only 20 years unless the underlying predicate carried a life sentence, and then the statutory maximum is life. In Capers' case, the predicates for count one were (1) Murder under various theories (first degree, second degree, conspiracy, attempt, aid and abetting, even Pinkerton liability) in New York State; and (2) Narcotics Conspiracy. But the jury verdict form only asked the jury if the underlying offense "involved [] murder", which is insufficient to find Capers' guilty of New York State First Degree murder. Otherwise, lesser included offenses could have been found by the jury, and those offenses do not carry a life sentence. As such, the jury verdict form was a "general verdict" form. Additionally, the underlying predicate was (2) 18 U.S.C. §846 - Narcotics Conspiracy, but again, the jury verdict form was a "general verdict" as both the drug type and weight attributed to the conspiracy was not asked for.

In their order affirming the district court, the Second Circuit ruled that "Capers raise[d] numerous forfeited arguments". They said that "he has not provided binding precedent to show that any of his positions are clear under Supreme Court or Second Circuit law." They also ruled that "to the extent that Capers raises challenges to his convictions - including the constitutionality of the jury verdict and jur instructions - under the guise of 'attacking his sentence... such claims are outside the scope of this Court's prior decision in this case, which limited remand to resentencing.' Summary Order, pg. 7.

Capers challenges these findings.

JURY VERDICT FORM FOR COUNT THREE WAS A "GENERAL VERDICT"

Capers claims that the jury verdict form for Count 3 was a "general verdict": It only asked the jury:

Count Three:

Narcotics conspiracy

3. How do you find the Defendant James Capers with Respect to Count Three?

Not Guilty _____ Guilty X

If you find the defendant "not guilty" of Count Three, please skip Questions 3(a) and 3(b), and proceed to Question 4.

If you find the defendant guilty of Count Three, please answer the following questions.

a. Did the defendant conspire to distribute and possess with intent to distribute marijuana?

Yes X No _____

b. Did the defendant conspire to distribute and possess with intent to distribute cocaine base (in a form commonly known as "crack")?

Yes X No _____

If and only if you answered "yes" to the question 3(b), check the quantity of mixtures and substances containing crack cocaine you find the defendant responsible.

i. 280 grams or more X

ii. 28 grams or more _____

iii. Less than 28 grams _____

Case 17-1836, Document 29, 10/05/2017 at 84-85. Capers claims that question 3 is the "conspiracy amount" question required by Apprendi, and question 3(b) is the "personal amount" required by Alleyne. Because an amount of cocaine attributable to the conspiracy was not asked for and answered by the jury in the affirmative, Capers claims that this is a "general verdict" form as a result, and he cannot be sentenced beyond the 20 year statutory maximum of 21 U.S.C. §841(b)(1)(C).

Analysis:

Section 841(b) contains an extensive list of enhanced penalties depending on the type and amount of drugs possessed. 21 U.S.C. §841(b). Until recently, it was established practice not to ask the jury to determine the amount of drugs involved; indeed, juries were regularly charged that as long as they found that the defendant possessed a controlled substance, the amount of drugs involved was not important. See, e.g. U.S. v. Schuster, 948 F.2d 313 (7th Cir. 1991); U.S. v. Sotel Rivea, 931 F.2d 1317 (9th Cir. 1991). The reason for this was that the amount of drugs was considered to be relevant to only the punishment under the Sentencing Guidelines. See Edwards v. U.S., 523 U.S. 511, 513-14 (1998).

This changed with the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), holding that it is unconstitutional to remove from the jury the assessment of facts, other than a prior conviction, which might take a sentence beyond the unenhanced statutory maximum. Id. at 490. In the wake of Apprendi, Courts of Appeals have uniformly determined that in order to sentence a defendant to one of the enhancement provisions in §841(b), the amount of drugs involved must be submitted to the jury. See, e.g. U.S. v. Thomas, 274 F.3d 665, 663 (2nd Cir. 2001)(en banc).

As the Eleventh Circuit said in U.S. v. Rogers, 228 F.3d 1318 (11th Circuit 2000): "if a defendant is sentenced to a greater sentence than the statutory maximum based upon a quantity of drugs, if such quantity is determined by the sentencing judge rather than the trial jury [it is unconstitutional]. The statutory maximum must be determined by assessing the statute without regard to quantity. This means that sections §841(b)(1)(A) and (b)(1)(B) may not be utilized without regard to quantity. This means that these sections may not be utilized for sentencing without a finding of drug quantity by the jury." Id. at 1327.

Where the trial court failed to instruct the jury that it needed to determine quantity beyond a reasonable doubt, the First Circuit held that the jury's determination could not be used in calculating the sentence. U.S. v. Delgado-Marrero, 744 F.3d 167, 186-89 (1st. Cir. 2014).

The use of a special verdict form can create problems. In U.S. v.

Pierce, 940 F.3d 817 (2nd Cir. 2019), the jury was provided with a verdict sheet on which it checked that the defendant was guilty of conspiracy to possess narcotics with the intent to distribute. However, the jury answered "Not Proven" to the questions about the quantity of narcotics. The Second Circuit affirmed the district court's decision to set aside the guilty verdict because it was impossible to reconcile the jury's answers.

It should be noted that the failure to have the jury determine quantity is subject to the harmless error rule; the error will be deemed harmless if the defendant was sentenced within the statutory maximum without regard to quantity (i.e. 20 years for §841(b)(1)(C)). That did not happen in Capers' case, where the 50 year sentence required the statutory maximum of life of §841(b)(1)(A).

The specific drug thresholds are treated as elements of the aggravated crime, and not as mere sentencing factors. Therefore, they must "either be admitted by the defendant or found by the jury to be "reasonably foreseeable to the individual defendant". U.S. v. Tillmon, 954 F.3d 628, 641 (4th Cir. 2019).

In United States v. Torres, 869 F.3d 1089 (9th Cir. 2017), where the defendants were convicted of offenses involving a drug trafficking conspiracy, they argued that the jury instruction "should have required the jury to determine what drug quantity was both 'reasonably foreseeable to each defendant' and in furtherance of jointly undertaken activity'. Id. at 1098. This is essentially Capers' argument. The Ninth Circuit noted that, in its previous precedent, it had sentenced each conspirator under the "disjunctive formation". Under that approach, each defendant was sentenced based only on the quantity of drugs that he reasonably foresaw would be distributed or that fell within the scope of his own agreement with conspirators. Id. at 1104.

This approach was consistent with what the court thought was the approach of the Sentencing Guidelines. However, the Sentencing Guidelines had already been amended to require "conjunctive formulation": that defendants be held accountable only for the conduct of others that was both (i) in furtherance of the jointly undertaken criminal activity;

and (ii) reasonably foreseeable in connection with that criminal activity." Id., at 1104 (quoting U.S.S.G. §1b1.3 cmt. n. 2). The Ninth Circuit stated that, as a result: "[a]s it stands, our precedent either is in conflict or calls for us to apply the disjunctive formulation to sentencing under §841(b) and the conjunctive formulation to sentencing under the Guidelines, even though we adopted the disjunctive formulation under §841(b) in the first place to make the two approaches identical. That inconsistency cannot stand." Id. at 1108. However, the defendants did not object to the instruction on that basis, and the court concluded that the error was not plain. Therefore, it was not appropriate to resolve this inconsistency then. Id. at 1106-08.

In United States v. Aquirre-Rivera, 8 F.4th 405, 408 (5th Cir. 2021), in which the defendant was charged with conspiring to possess with intent to distribute one kilogram or more of heroin, the district court provided the jury with a verdict form containing three questions. The first question asked for a general verdict of "Guilty" or "Not Guilty", to which the jury responded "Guilty". The second question asked "Do you find beyond a reasonable doubt that THE OVERALL SCOPE OF THE CONSPIRACY INVOLVED AT LEAST [emphasis added] one kilogram or more of a mixture or substance containing a detectable amount of heroin?" The jury responded "Yes". The third question asked, "do you find beyond a reasonable doubt that the defendant knew or reasonably should have known that the scope of the conspiracy involved at least one kilogram or more of a mixture or substance containing a detectable amount of heroin?" The jury answered "No."

The Fifth Circuit held that because the drug quantity here was not a formal element of the conspiracy offense, the jury's answer to the second question "negated only the sentencing enhancement under §841(b), not the general guilty verdict. Id. at 411.

The jury specifically found that the government had proven the existence of a conspiracy involving one kilogram or more of heroin and that [the defendant] was a participant in that conspiracy. But the jury then concluded that the government had not proven beyond a reasonable doubt that [he] "knew or reasonably should have known that the scope of the conspiracy involved at least one kilogram or more of a mixture or

substance containing a detectable amount of heroin." This finding speaks only to the amount of drugs for which [defendant] could be held responsible - the drug quantity. Id.

Note that Capers claims that, to punish §841(b)(1)(A), two questions are needed to be answered by the jury, as in the 9th and 5th Circuits: (1) the drug type and amount for the overall scope of the conspiracy, and (2) the amount the defendant knew or reasonably should have known was involved in the conspiracy. Indeed, this is exactly how the 5th Circuit's model jury verdict form is structured:

2.97 CONTROLLED SUBSTANCES - CONSPIRACY

21 U.S.C. §846

Title 21, United States Code, Section 846, makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws of the United States. In this case, the defendant is charged with conspiring to _____ (describe the object of the conspiracy as alleged in the indictment, e.g. possess with intent to distribute a controlled substance, and give the elements of the object crime unless they are given under a different count of the indictment)...

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That two or more persons, directly or indirectly, reached an agreement to _____ (describe the object of the conspiracy);

Second: That the defendant knew of the unlawful purpose of the agreement;

Third: That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose;

Fourth: That THE OVERALL SCOPE OF THE CONSPIRACY [emphasis added] involved at least _____ (describe quantity) of

_____ (name of controlled substance); and

Fifth: That the defendant knew or reasonably should have known that the scope of the conspiracy involved at least _____ (describe quantity) of _____ (name controlled substance).

5th Circuit Model Jury Verdict Form. Capers contends that, to the extent that his verdict form does not comply with this verdict form, it is a "general verdict form" and he cannot be punished beyond §841(b)(1)(C).

The elements of a drug conspiracy in the 5th Circuit are described in U.S. v. Suarez, 879 F.3d 626, 631-32 (5th Cir. 2018), U.S. v. Chapman, 851 F.3d 363, 375-78 (5th Cir. 2017), U.S. v. Kiekow, 872 F.3d 236, 245-46 (5th Cir. 2017), and U.S. v. Cargas-Oscampo, 747 F.3d 299, 303 (5th Cir. 2014) (en banc).

The fourth element, prompted by the Apprendi doctrine, is required when the indictment alleges a quantity that would result in a mandatory minimum or enhanced statutory maximum penalty under §841(b). See Alleyne v. U.S., 133 S. Ct. 2151(2013); Apprendi v. N.J., 120 S. Ct. 2348 (2000); U.S. v. Turner, 319 F.3d 716, 721-22 (5th Cir. 2003); U.S. v. Clinton, 256 F.3d 311, 314 (5th Cir. 2001); U.S. v. DeLeon, 247 F.3d 593, 597 (5th Cir. 2001). The Fifth Circuit has described the inclusion of this fourth element as "preferable", but not required in all situations. U.S. v. Daniels, 723 F.3d 562, 574 (5th Cir.) modified in part on reh'd, 729 F.3d 496 (5th Cir. 2013). Generally, the exact quantity of the controlled substance need not be determined so long as the jury establishes a quantity at, or above a given baseline amount in the appropriate subsection of §841(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. See §841(b)(1)(B)(vii); DeLeon, 247 F.3d at 597 (holding that an indictment's allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy Apprendi and its progeny).

In a drug conspiracy in the 5th Circuit, two separate findings are required. One is the fourth element - type and quantity involved in the

entire conspiracy - and the other is the fifth element - type and quantity that each participant defendant knew or should have known was involved in the conspiracy. The need for these findings to be made by a jury was confirmed by the Fifth Circuit in U.S. v. Haines, 803 F.3d 713, 741-42 (5th Cir. 2015). Apprendi and Alleyne require the jury, rather than the court, to determine each defendant knew or should have known was involved in the conspiracy. Haines was reaffirmed in U.S. v. Benitez, 809 F.3d 243, 250 (5th Cir. 2015) and U.S. v. Koss, 812 F.3d 460, 465 n. 3 (5th Cir. 2016).

Haines addresses the issue of drug quantity rather than drug type. An individualized jury finding of drug type is also required when the conspiracy involved multiple types.

Capers respectfully requests that the standards of Haines be applied to his case. If done so, he could not be punished beyond the statutory maximum of §841(b)(1)(C) of 20 years. His sentence is illegal as a result, and he respectfully requests his sentence be vacated and remanded for resentencing.

JURY VERDICT FORM FOR COUNT 1 WAS A "GENERAL VERDICT" AS WELL

The jury verdict form for Count 1 - 18 U.S.C. §1962(d) - RICO Conspiracy - was also not in compliance with Apprendi:

COUNT ONE:

Racketeering Conspiracy

1. How do you find the defendant James Capers with respect to Count One?

Not Guilty _____ Guilty X

If you find the defendant "not guilty" of Count One, please skip questions 1(a), 1(b), and 1(c).

If you find the defendant guilty with respect to Count One, please answer the following questions:

a. Please indicate whether the Government proved the pattern of racketeering activity that the defendant agreed to commit involved the murder of Allen McQueen:

Not Proven _____ Proven X _____

b. Please indicate whether the Government proved the pattern of racketeering activity that the defendant agreed to commit involved a conspiracy to distribute or possess with intent to distribute narcotics:

Not Proven _____ Proven X _____

...

c. Did the Government prove that the defendant either had personal involvement with, or that it was reasonably foreseeable to him that the narcotics conspiracy involved, and it was within the scope of his agreement to distribute or possess with intent to distribute, 280 grams or more of a mixture or substance containing a detectable amount of cocaine base (in the form commonly known as "crack")?

Yes X No _____

Case 17-1836 Document 29, 10/05/2017 at 83-84. The underlying offenses for the RICO Conspiracy were:

- A. Acts involving murder, conspiracy to commit murder, and attempted murder in violation of New York State Penal Law;
- B. Acts involving robbery, conspiracy to commit robbery, and attempted robbery in violation of New York State Penal Law; and
- C. Acts involving, distributing, and possessing with intent to distribute, controlled substances including crack cocaine and marijuana in violation of federal law.

First, note that the narcotics conspiracy RICO predicate suffers the same deficiencies at Count 3: no conspiracy amount is asked for. Therefore Capers cannot be punished beyond the 20 year statutory maximum of §841(b)(1)(C). As this does not carry "life", Capers cannot be sentenced beyond the unenhanced statutory maximum of 18 U.S.C. §1962(d) of 20 years.

Next, we concentrate on question 1(a) of the jury verdict form. Capers claims that simply asking if the predicate act "included murder" is inadequate, as the jury instructions, and the indictment itself, charge "murder, conspiracy to commit murder, and attempted murder". How do we know which of these offenses the jury found? All "include" murder. In its instructions, the court grouped all in Category A, quoted above.

The court instructed the jury in the elements of New York State murder:

As I just explained, the indictment alleges that one of the categories of criminal violations that were committed or were intended to be committed as part of the Rico conspiracy were acts involving murder, conspiracy to murder, and attempted murder in violation of New York State Penal Law. [emphasis added]. In order for you to find that a person committed murder under New York State Law, the government must prove beyond a reasonable doubt that:

First, that the individual caused the death of the victim, or aided and abetted the same; and

Second, that the individual did so with the intent to cause the death of the victim or another person.

I will describe these two elements in greater detail in a moment. In determining whether the defendant agreed, as part of the

RICO conspiracy, that he or a co-conspirator would commit acts involving murder in violation of New York State Law, you may apply the instructions on aiding and abetting and conspiracy under New York Law that I gave you earlier. [emphasis added].

Sentencing Transcript, 116:2-18. Clearly, the predicate acts not only "included murder", but conspiracy to murder, attempted murder, and aiding and abetting murder, ALL IN VIOLATION OF NEW YORK STATE LAW. But look at the two elements that the government must prove: that the death was caused, and that it was intentional. But where is the "with malice aforethought" element? Is this first or second degree murder?

Next, the court attempts to define "includes murder:

Thus, you may find the RICO conspiracy involved acts involving murder either because you find that the defendant agreed that either he or a co-conspirator would personally conspire to commit, commit, or attempt to commit an act constituting murder under New York State Law, or because you find that he agreed that he or a co-conspirator would assist a third party in doing so.

Transcript, DE 169, 116:19-25. Clearly here, we now have a definition of "pattern or racketeering activity that [] involved [] murder." Jury Verdict Form, 17-1836 DE 29, question 1.a, pg. 1. "Involved murder" includes murder, attempted murder, and conspiracy to murder, ALL UNDER NEW YORK STATE LAW. Clearly, question 1.a of the jury verdict form is a "general verdict" that does not distinguish between murder, attempted murder, and conspiracy to murder.

Under "New York State Law" is a critical element, because under New York State Law, only First Degree Murder carries 25 to Life. The other crimes mentioned do not carry Life. Therefore, under 18 U.S.C. §1962(d) and Apprendi, because the jury did not find the elements of First Degree Murder, Capers cannot be sentenced above the 20 year statutory maximum of 18 U.S.C. §1962(d) without the enhancement.

AN ALLEYNE ERROR OCCURS AT SENTENCING

The Second Circuit's order denying Capers' appeal said that

"Capers raised challenges to his convictions - including the constitutionality of the jury verdict and jury instructions - under the guise of 'attacking the sentence... [s]uch claims are outside the scope of this Court's prior decision in this case which limited remand to resentencing.' Order, p. 7.

Capers claims that an Alleyne error occurs at sentencing:

In Alleyne v. U.S., 570 U.S. 99 (2013), the Supreme Court held that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury." Put another way, the Court held that a district court violates the Sixth Amendment if it imposes a sentence based on a judge-found (and not a jury-found) fact that increases a minimum sentence. See id. at 2163-64. Thus, in Alleyne, the Supreme Court reversed a mandatory-minimum sentence increased from five to seven years under 18 U.S.C. §924(c) (1)(A)(ii) for the defendant having brandished a firearm. Id. It did so because the district court, and not the jury, had found this fact that increased the mandatory-minimum sentence. Id. at 2163.

In Alleyne, the defendant's "brandishing" of the firearm was plainly an element of the crime. See id. at 2156; 18 U.S.C. §924(c)(1) (A)(ii). But Ellis's increased mandatory-minimum sentence depended on conspiracy-cocaine amounts, not the manner of using a firearm. So to succeed on his Alleyne argument, Ellis must still show that individually attributable cocaine amounts are an element of the cocaine-conspiracy charge. On this point, the government asserts that "this Court has not issued a published decision [after Alleyne] expressing stating what determination the jury must make when a defendant is charged with an offense that carries a statutory mandatory-minimum penalty." Appellee's Br. at 29-30). But the government is mistaken.

In U.S. v. Dewberry, 790 F.3d 1022 (10th Cir. 2015), decided two years after Alleyne, we said that, because 280 grams of crack cocaine would increase the statutory mandatory-minimum sentence, that drug amount "was an element of the offense and had to be proved at trial." Id. at 1029. (citing Alleyne, 133 S. Ct. at 2158). In Dewberry,

the district court properly had the jury make a special finding beyond a reasonable doubt about the amount of crack cocaine individually attributable to the defendant. Id. at 1029. The jury found that he had conspired to distribute at least 280 grams of crack cocaine. Id. In evaluating the defendant's sufficiency of evidence challenge, we said that "[a] defendant can be held 'accountable for that drug quantity which was within the scope of the agreement and reasonably foreseeable' to him" Id. at 1030 (quoting U.S. v. Arias-Santos, 39 F.3d 1070, 1078 (10th Cir. 1994)). We concluded that the government had presented sufficient evidence to prove that the defendant "could have foreseen that [his co-conspirator] would convert the powder cocaine into 280 grams or more of crack cocaine." Id. at 1030.

In view of the interplay between Alleyne and Deberry, we hold that the district court committed Alleyne error by convicting and sentencing Ellis on 21 U.S.C. §841(b)(1)(A) without the jury having found his individually attributable amount of cocaine as at least 5 kilograms of powder cocaine or 280 grams of crack cocaine. So we turn now to whether this Alleyne error requires a reversal. In doing so, we must first determine what standard of review applies. And that depends on whether Ellis preserved an objection in the district court to the Alleyne error.

In determining whether Ellis preserved an Alleyne objection, we must determine when an Alleyne error arises. Here, the Alleyne error arose when the district court sentenced Ellis to a life sentence under 21 U.S.C. §841(a)(1), (b)(1)(A), and 851. We see no reason to require that Ellis have objected during trial to the jury instructions or the general-verdict form to preserve an Alleyne objection. If the government wanted a heightened sentence under that subsection, it was obliged to ensure the jury received proper jury instructions and a special-verdict form with spaces enabling the jury to find Ellis' individually attributable powder and crack-cocaine amounts. See U.S. v. Haines, 803 F.3d 713, 740 (5th Cir. 2015) (concluding that defendants' challenge at their sentencing hearing to their mandatory minimum sentences based on conspiracy-wide heroin amounts, though not raised with an ideal level of specificity, were timely and sufficient to preserve their object-

ions); U.S. v. Pizaro, 772 F.3d 284, 296 (1st Cir. 2014) (concluding that defendant preserved an Alleyne objection even though he did not object until sentencing, reasoning that a party is not obliged to object to something "inimical to his cause", ensuring his eligibility for a longer sentence) (quoting U.S. v. Perez-Ruiz, 353 F.3d 1, 14 (1st Cir. 2003)). The district court did not commit an Alleyne error until it subjected Ellis to an increased mandatory-minimum sentence without the jury's attributing at least 280 grams of crack cocaine to Ellis individually.

U.S. v. Ellis, 868 F.3d 1155 (10th Cir. 2017) at 1169-71. We can see from Ellis that an "Alleyne error" occurs at sentencing. Presumably, a similar "Apprendi error" occurs at sentencing as well, as it is also "inimical to his cause" Perez-Ruiz, 353 F.3d.

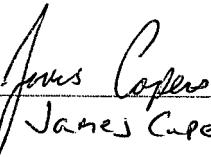
Now, the Second Circuit argued that Capers' resentencing was a "limited remand". But clearly, it was a *de novo* resentencing under the sentence packaging doctrine. At his original resentencing, Capers was sentenced to 504 months on the RICO conspiracy, 505 months on the narcotics conspiracy, and 504 months on §924(j). On resentencing, the District Court chose to resentence Capers to 504 months on a downward variance due to his age at the time of the offense. Capers did not make his "Alleyne error" argument at resentencing, but that was the proper time to do it, not at trial, and not at his original sentencing (where he still would have been facing sentence on the §924(j) count). As such, it was not "forfeited", as the Second Circuit claimed, simply brought up for the first time on appeal. As such, as Capers claimed, it was subject to a plain-error review, which the Second Circuit failed to do.

As Capers claim was not subjected to a plain-error analysis by the Second Circuit, he respectfully requests a limited remand for it to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


James Capers, pro se
Date: October 1, 2025