

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ONEIL ALLEN, a.k.a. Allen Oneil, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Beverly Van Ness (NY 1409416)
Attorney-at-Law
5 Union Square West
Frnt 1 #1347
New York, NY 10003
Tel. (917) 456-6918
bvanness.law@gmail.com

Attorney for Petitioner ONEIL ALLEN

QUESTIONS PRESENTED

1. Whether, for a person to be liable as an accomplice for a substantive narcotics sale arranged and consummated by another, the person must have (a) knowledge that the specific sale will occur and (b) provide aid to further that specific sale.

2. Whether, absent a Pinkerton charge [Pinkerton v. United States, 328 U.S. 840 (1946)], a co-conspirator can be liable for a substantive crime committed by another co-conspirator even though the alleged accomplice did not have actual knowledge of the substantive crime and did not personally participate in the acts constituting it.

3. Whether the intent element of accomplice liability must be based on the accomplice's advance knowledge of the substantive crime to be committed by a co-defendant, even when the crime is not a "double-barreled" one requiring two actions, as was the 18 U.S.C. § 924(c) offense at issue in Rosemond v. United States, 572 U.S. 65, 71 (2014).

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner Oneil Allen was a defendant in the district court (E.D.N.Y. Docket No. 18-cr-561 [DLI]), and appellee in the court of appeals. Keith Wyche was a co-defendant in the district court and an appellee in the court of appeals. The defendants were tried together, and a single summary order was issued on their direct appeals. A third defendant in the district court, Kyron Graham, pled guilty before trial and a judgment against him was issued on November 18, 2019.

Respondent is the United States of America, in both the district court and on appeal to the court of appeals.

The issue raised in this Petition for *certiorari* pertains to Petitioner Allen alone.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RELATED CASES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

 A. Proceedings Below 5

 B. Statement of Relevant Facts 6

 1. The Trial Evidence 6

 2. The Court of Appeals’ Opinion 9

REASONS FOR GRANTING THE PETITION 10

 I. THE SECOND CIRCUIT’S AIDING AND ABETTING DECISION
 CONFLICTS WITH THIS COURT’S PRECEDENT 10

 II. THE SECOND CIRCUIT’S OPINION ALSO CONFLICTS WITH
 AN ALTERNATE STANDARD FOR ACCOMPLICE LIABILITY
 DISCUSSED BY THIS COURT IN CIVIL CASES 15

III. THERE IS A SPLIT AMONG COURTS OF APPEALS AS TO WHETHER THE GOVERNMENT MUST PROVE THAT AN ACCOMPLICE HAS ADVANCE KNOWLEDGE OF THE CRIME COMMITTED BY ANOTHER TO BE HELD LIABLE FOR IT, WHEN, AS HERE, THE OFFENSE IS NOT ONE THAT REQUIRES MORE THAN ONE DISTINCT ACTION..... 18

IV. IN THE ALTERNATIVE, SUMMARY REVERSAL IS WARRANTED..... 20

CONCLUSION..... 21

APPENDIX

Court of Appeals’ Opinion, United States v. Wyche, 2025 U.S. App. Lexis 30350; 2025 WL 3239763 (2d Cir. Nov. 20, 2025) 1a

Court of Appeals’ Order Denying Rehearing (January 28, 2026) 10a

TABLE OF AUTHORITIES

CASES

<u>Halberstam v. Welch</u> , 705 F. 2d 472 (D.C. Cir. 1983)	16
<u>Klein v. Martin</u> , 607 U.S. 213 (2026) (<i>per curiam</i>)	20
<u>Mays v. Hines</u> , 592 U.S. 385 (2021) (<i>per curiam</i>)	20
<u>Moore v. Texas</u> , 586 U.S. 133 (2019) (<i>per curiam</i>)	20
<u>Nye & Nissen v. United States</u> , 336 U.S. 613 (1949)	4, 13, 14
<u>Pavan v. Smith</u> , 582 U.S. 563 (2017) (<i>per curiam</i>)	20
<u>Pereira v. United States</u> , 347 U.S. 1 (1954)	4, 13
<u>Pinkerton v. United States</u> , 328 U.S. 640 (1946)	4
<u>Rosemond v. United States</u> , 572 U.S. 65 (2014)	2, 9, 10, 14-15, 18
<u>Smith & Wessen Brands, Inc. v. Estados Unidos Mexicanos</u> , 605 U.S. 280 (2025)	3, 15, 16, 18
<u>Twitter, Inc. v. Taamneh</u> , 598 U.S. 471 (2023)	3-4, 15, 16, 18-19
<u>United States v. Arciniega-Zetin</u> , 755 Fed. Appx. 835 (10th Cir. 2019)	20
<u>United States v. Encarnacion-Ruiz</u> , 787 F. 3d 581 (1st Cir. 2015)	19
<u>United States v. Goldtooth</u> , 754 F. 3d 763 (9th Cir. 2014)	19
<u>United States v. Grant</u> , 809 Fed. Appx. 474 (10th Cir. 2020)	20
<u>United States v. Outlaw</u> , 946 F. 3d 1015 (8th Cir. 2020)	19

<u>United States v. Nosal</u> , 844 F.3d 1024 (9th Cir. 2015)	19
<u>United States v. Persaud</u> , 605 Fed. Appx. 791 (11th Cir. 2015)	19
<u>United States v. Rodriguez-Martinez</u> , 778 F.3d 367 (1st Cir. 2015)	19
<u>United States v. Seabrooks</u> , 839 F.3d 1326 (11th Cir. 2016)	19

CONSTITUTION AND STATUTES

United States Constitution, Amend. V	1-2
18 U.S.C. § 2	2, 10, 12
28 U.S.C. § 1254	1

PETITION FOR WRIT OF CERTIORARI

Petitioner Oneil Allen respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming his federal conviction of a specific narcotics sale as an accomplice.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at United States v. Wyche, 2025 U.S. App. Lexis 30350; 2025 WL 3239763 (2d Cir. Nov. 20, 2025). Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 10a) was denied in an unreported decision (Pet. App. 30a).

JURISDICTIONAL STATEMENT

The Court of Appeals issued its opinion and entered judgment on November 20, 2025 (Pet. App. 1a), and denied petitioner's timely petition for panel rehearing and rehearing *en banc* (Pet. App. 10a) on January 28, 2026 (Pet. App. 30a).

This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall be . . . deprived of liberty . . . without due process of law.

18 U.S.C. § 2 provides, in pertinent part:

a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

INTRODUCTION

This case presents the opportunity for the Court to clarify several important principles relating to liability as an aider and abettor. Its decision in Rosemond v. United States, 572 U.S. 65 (2014), reviewed and reiterated the basic standard, which uses a two-part test: the accomplice must both act with the intent to facilitate the substantive crime of another (the *mens rea* element) and provide some affirmative aid to further that offense (*actus reus* element). The crime at issue in Rosemond was using or carrying a firearm while engaged in a crime of violence or a drug trafficking crime. 18 U.S.C. § 924(c). The Court held that for such compound offenses having more than one action, the alleged accomplice must be aware in advance of both: “the intent must go to the specific and entire crime charged . . . predicate crime plus gun use.” 572 U.S. at 76, 78. The *actus reus* element, in contrast, is not so expansive. The accomplice’s commission of an affirmative act facilitating any element or phase of the offense is sufficient. Id. at

72-75. Post-Rosemond, a split has developed among courts of appeal as to whether the advance knowledge requirement extends to crimes, such as drug distribution at issue in this case, that are not double-barreled. In its decision, the Second Circuit has seemingly held it does not, since there is no proof that Petitioner was aware of the specific sale made by his co-defendant alone that was charged in count four.

This Court has also reviewed an accomplice's civil liability for the entirety of the culpable conduct of another. This requires a showing of such "pervasive, systemic, and culpable assistance" to a series of acts by the other person that it constitutes aiding and abetting each one. Twitter, Inc. v. Taamneh, 598 U.S. 471, 501-02, 506 (2023). In other words, "a secondary defendant's role in an illicit enterprise can be so systemic that the secondary defendant is aiding and abetting every wrongful act committed by that enterprise." Id., at 496; cited with approval in another civil case, Smith & Wessen Brands, Inc. v. Estados Unidos Mexicanos, 605 U.S. 280, 281, 292 (2025).

A prime example of this theory of accomplice liability, discussed in Twitter, was a woman's liability for damages arising from a death occurring during a burglary committed by her long-term domestic partner. Although she did not participate in the crime or any other burglary her partner committed, she routinely

assisted him by creating and falsifying records concerning the stolen property and laundering the money obtained from selling it. This conduct “was so intentional and systematic that she assisted each and every burglary [her partner] committed.” 598 U.S. at 485-87, 495. The Court commented that this form of tort liability “begins to blur with conspiracy liability, which typically holds co-conspirators liable for all reasonably foreseeable acts taken to further the conspiracy.” Id., at 496, citing Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). But Pinkerton liability is unavailable to sustain a conviction if the theory was not charged to the jury. Pereira v. United States, 347 U.S. 1, n. * (1954); Nye & Nissen v. United States, 336 U.S. 613, 618 (1949). Petitioner’s jury did not receive such an instruction.

In this case, there was evidence that two defendants conspired to sell drugs over a period of time, and individually sold drugs to multiple people. But there was no evidence that Petitioner, the alleged accomplice, knew his co-defendant would engage in the substantive drug sale at issue in count four, and no evidence that he intentionally provided any aid to facilitate that specific sale. Instead, the Second Circuit relied on a prior course of conduct that, at most, made it reasonable for Petitioner to assume his co-defendant would make other sales on his own. By

the Second Circuit's logic, Petitioner would thus be liable for every and all substantive sales the co-defendant independently made in perpetuity.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Oneil Allen and co-defendant Keith Wyche were charged with conspiracy to sell narcotics and related substantive drug offenses. One, count four, was a specific sale to a named buyer (Sarah Wieboldt) on October 27, 2017, which caused her serious physical injury in violation of §§ 841(a)(1) and 841(b)(1)(C). It was undisputed that Wyche alone arranged for and consummated this sale. There was no evidence that Petitioner knew about the sale, either in advance or as it occurred, and the government did not contend he did. Nor was there any proof that he provided any direct accomplice aid to further this sale.

Both men were convicted of count four and other charges after a jury trial. Petitioner's petition to this Court concerns only the sufficiency of the proof underlying his conviction of count four; he does not seek review of the other issues raised on his appeal. Petitioner is serving a 30-year sentence for count four (lesser concurrent terms were imposed on his two other convictions). After the affirmance, Petitioner timely filed a petition for rehearing and rehearing *en banc*, which was summarily denied.

B. Statement of Relevant Facts

1. The Trial Evidence

The defendants were charged with drug conspiracy and drug distribution between February 2017 and September 2018. The parties stipulated that Petitioner was incapable of drug-dealing from March 20th through July 6, 2017, and there was no evidence he sold drugs himself before this period. Through evidence of sales to confidential informants, including Wieboldt, the government proved that each man sold drugs on 10 or more occasions until their arrests in September 2018; this included once each to Wieboldt in addition to Wyche's October 27th sale. Wieboldt's general assertions about other sales they made to her, when she was not being surveilled as an informant, were not corroborated.

Petitioner and Wyche never sold drugs together, and they used their own cars to drive to the spots picked to make a sale.¹ The locations varied, and there was no evidence the men ever used the same one. The only common element between them was the use of the same cell phone number to solicit drug sales. On

¹ Just once, in July 2018, Wyche used Petitioner's car. This was nine months after Wyche's count four sale to Wieboldt. On all other occasions, Wyche drove his white jeep. Petitioner was never seen using Wyche's vehicle (Petitioner's opening brief on appeal [App. Br.] at 6-9). In the Second Circuit's decision affirming the judgment, addressing the proof of conspiracy (count one), its statement that the two men "shared vehicles" is a gross overstatement (see Order at *7).

some days Wyche would send a group text from his cell phone – using the alias “Marco” – saying he was available. If anyone responded, Wyche would set a location and make the sale alone. On other days Petitioner would send a similar text on his cell phone, using the alias “James,” and service on his own those people who happened to respond. The two men shared a number but each had separate cell phones, and their customer lists were overlapping in some respects but not identical (see citations to record in App.Br. at 3, 5-9, 11, 24 -25 incl. n. 10, and his reply brief [“Rep.Br.”] at 2-6, 8-9). Wyche had 15 contacts that were not listed in Petitioner’s phone – including Sarah Wieboldt, the count four buyer (Rep. Br. at 3). Neither man was privy to the messages sent and received by the other (see Rep.Br. at 3-6, discussing the contents of the four cell phones recovered by police, two at Wyche’s residence and two at Petitioner’s home).² The Second Circuit did not dispute any of these facts in its opinion.

² When discussing the count one conspiracy evidence in its opinion, the Second Circuit stated that in phones seized from Petitioner’s house, “Appellants discussed the sale of drugs” (Order at “8, citing Govt. appendix at 268-84). Notably, there were only two messages on Petitioner’s phones that mentioned Marco [the co-defendant’s alias], both on July 26, 2017. Each said “It’s Marco, this is my new number, delete the old one” (excerpt from Govt. Exhibit 202A, one of Petitioner’s phones, in govt. appendix on appeal at 275). Petitioner had returned to Staten Island that month, after a 3 1/2-month absence, and may have used the name Marco to avoid customer confusion. In any event, these texts were not found in the phones recovered from Wyche’s residence (see Rep. Br. at 4-5).

Petitioner resided in Somerset, NJ. Drug paraphernalia and cash (but no drugs) were found in his apartment after his arrest. Wyche had two residences, one on Manor Road in Staten Island (very close to where he sold drugs to Wieboldt on October 27, 2017), and another place in Union, NJ, where his car was often observed. Petitioner's home was almost 30 miles from each of Wyche's residences.

The authorities never obtained a warrant to search Wyche's New Jersey home (App. Br. at 9-10 and 24 at n. 10). This seriously undermined the government's argument that Petitioner's apartment, where he clearly resided as government photographs showed (see Petitioner's Appendix on direct appeal at A. 48-57), was used as a joint "stash house" by the men. So did the fact that Wyche was only seen outside Petitioner's apartment a few times – all during a particular four-day period in mid-July, 2018 – and a GPS tracking device installed by police around that time never placed him at or near Petitioner's residence. Moreover, mid-July 2018 was nine months after Wyche's sale to Wieboldt in October 2017, the subject of count four. There was no proof that Petitioner even lived at the Somerset apartment when this sale occurred (App.Br. at 25-27, Rep.Br. at 6-8). Understandably, the Second Circuit did not rely on, or even mention, the government's debunked joint stash house contention in affirming Petitioner's

conviction.

In essence, the two men acted as independent contractors, using the same phone number, on different days, to communicate with potential customers. They did not share profits, and could not see the messages sent and received by each other on their separate phones.

2. The Court of Appeals' Opinion

The Second Circuit cited the Rosemond standard for accomplice liability – “A person is liable for aiding and abetting a crime if he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. *See Rosemond v. United States*, 572 U.S. 65, 68 (2014) (Order at *11)” – but did not track the elements factually. Instead, the Second Circuit concluded that Petitioner aided and abetted Wyche’s October 27, 2017 sale to Wieboldt “by participating in cultivating Wieboldt as a customer and transacting drug sales from the same shared phone number that Wieboldt used to arrange for the purchase of drugs that led to her overdose” (see Order at *11-12). This was based on proof that “[Petitioner] and Wyche both consistently sold heroin to Wieboldt in the summer of 2017 and used a shared phone number to facilitate drug transactions with her” (Order at *11). They were “around almost daily,” she testified, and “the two were more professional in their dealing than other dealers” she used (id.).

This was the only evidence cited to prove Petitioner’s complicity in the October 27th sale. The *mens rea* element set forth in Rosemond, that the accomplice must provide aid “with the intent of facilitating the offense’s commission” (572 U.S. 65, 71), was not addressed at all.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT’S AIDING AND ABETTING DECISION CONFLICTS WITH THIS COURT’S PRECEDENT.

18 U.S.C. § 2 “has two components As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense’s commission.” Rosemond v. United States, 572 U.S. 65, 71 (emphasis added). Applying this standard to the evidence here, Petitioner’s conviction of count four should have been dismissed for insufficient evidence. It was his co-defendant who sent an email blast out on October 27, 2017, saying he was available, and Wyche alone whom Wieboldt contacted; Wyche set up the location for the transaction, and appeared by himself to consummate it. Petitioner had no knowledge of this sale, either beforehand or as it was happening: his cell phone did not reveal messages to and from Wyche’s cell phone. Moreover, it was mere happenstance that Wieboldt – or anyone else – purchased drugs from Wyche that

day. Potential customers could have been unavailable, or using another dealer to procure drugs (Wieboldt testified she had other dealers besides Wyche and Petitioner), or not interested in buying heroin that day. Indeed, records for the shared phone number, government GX 408, show 26 days prior to October 27th when Wieboldt's phone number was contacted but she did not respond. Thus, Petitioner could not assume that she would be around or interested in purchasing on October 27th or any other day if Wyche reached out to her. Further, Wyche could have chosen not to solicit any sales on a particular day or days for any number of reasons. Nevertheless, the Second Circuit affirmed Petitioner's conviction as an accomplice for aiding a sale he knew nothing about and could not have reasonably predicted.

Stretching the *mens rea* element far beyond this Court's holding in Rosemond, the Second Circuit would find this element proved with respect to any sale to a prior customer that the two men alternately serviced, not only on October 27, 2017, but at any time in the future. The intent to facilitate rested on past sales each man had made, and Petitioner's apparent supposition that his co-defendant would make further sales to these individuals on unspecified date(s).

Turning to the *actus reus* element, the affirmative acts relied on by the Second Circuit were that Petitioner helped "cultivate" Wieboldt as a customer

during the summer of 2017, months before the sale at issue, and that he and Wyche used the same cell phone number to independently arrange sales. The latter is akin to the two men standing on the same corner to hawk drugs on different days, with many of the same customers showing up to make purchases. Petitioner's use of the common phone number did not "aid[], abet[], counsel[], command[], induce[] or procure[]" a sale by Wyche as § 2 requires; the number was simply the means by which sales were arranged by each man individually. The customers communicated with whoever emailed that he was available to provide drugs, and would have done the same even had each man had different numbers. It was the content of the solicitation, not the number through which it was communicated, that mattered, and each man made his own solicitations.

Moreover, that Petitioner helped "cultivate" Wieboldt as a customer in the past could not carry over as accomplice aid to Wyche in perpetuity. Indeed, the joint "cultivation" assertion is factually incorrect. Wyche had secured Wieboldt as a steady customer long before she met Petitioner. Wieboldt's first purchase was from Wyche, not Petitioner. She testified she was introduced to Wyche (known to her as Marco) in the summer of 2017. He gave her his phone number, and she met him "[a]lmost daily for several months; he was her "go to dealer" (transcript 732-34). She did not say when she first met Petitioner, but the parties stipulated he was

not available to sell drugs between March 20th and July 6th. Thus, for the first half of the summer, Wyche was on his own and “cultivated” Wieboldt on his own. She was already firmly committed to Wyche before Petitioner came on the scene. And when he did, Wieboldt did not know from one day to the next who would send an email solicitation, and never claimed she continued to use Wyche because of anything Petitioner did. Rather, an email was sent, she sometimes chose to respond, and the deal was done. It made no difference to her who sold her the drugs, either man would do.

The Second Circuit gave lip service to the two-element accomplice liability standard, but it did not follow it. Instead, it seemingly applied a “reasonably foreseeable” standard, using the conspirators’ past sales, separately arranged through a shared number, to hold Petitioner accountable for any sale Wyche made to Wieboldt thereafter.

As already discussed, a Pinkerton theory of liability was not charged to Petitioner’s jury, and could not be used to sustain his conviction of count four. See Pereira v. United States, supra, 347 U.S. 1, n. *; Nye & Nissen v. United States, supra, 336 U.S. 613, 618. Indeed, if a reasonably foreseeable standard was sufficient for conviction in circumstances such as this one, a Pinkerton instruction would never be required: an accomplice’s intent to facilitate independent sales by

his co-conspirator could be established simply by the pair's prior course of conduct during the conspiracy.

The Second Circuit has thus muddied and misapplied a clear standard for accomplice liability, established at common law and reaffirmed by this Court as applicable to the federal aiding and abetting statute. The government relies on that statute in innumerable cases, including but not limited to narcotics prosecutions, and whether or not a conspiracy count is also charged. Now, an alleged accomplice's intent to further a co-defendant's crime can be made manifest by the commission of similar crimes by each man in the past, even when each is unaware of the number or details of the other's offenses. And any conduct by the alleged accomplice can be morphed into an act that facilitates future offenses by another even if it does not, in fact, affirmatively aid that offense.

In Rosemond, this Court reaffirmed the bedrock of accomplice liability: "To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as something he that he wishes to bring about' and 'seek by his action to make it succeed.'" 572 U.S. 65, 76, quoting Nye & Nessen v. United States, 336 U.S. 613, 619 (1949). The venture at issue here is not the charged conspiracy, but the substantive sale by Wyche to Wieboldt on October 17, 2017. That is "the specific . . . crime" charged in count four, which the

government was required to prove Petitioner intended to and did facilitate. See Rosemond, 572 U.S. at 76. The Second Circuit’s decision opens the door to the use of a different standard by all courts of appeal, a standard that is difficult to enunciate and apply. This Court’s review is required.

II. THE SECOND CIRCUIT’S OPINION ALSO CONFLICTS WITH AN ALTERNATE STANDARD FOR ACCOMPLICE LIABILITY DISCUSSED BY THIS COURT IN CIVIL CASES.

In a relatively recent civil case, this Court discussed the traditional rules for proving accomplice liability, discussed above, as applicable to a tort claim:

The point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue. The focus must remain on assistance to the tort for which plaintiffs seek to impose liability. When there is a direct nexus between the defendant’s acts and the tort, courts may more easily infer such culpable assistance. But, the more attenuated the nexus, the more courts should demand that plaintiffs show culpable participation through intentional aid that substantially furthered the tort.

Twitter, Inc. v. Taamneh, 598 U.S. 471, 506 (2023) (emphasis added). Addressing a different standard of liability – which is similar to the Second Circuit’s rationale for affirming Petitioner’s conviction of count four – the Court continued, “[a]nd, if a plaintiff’s theory would hold a defendant liable for all the torts of an enterprise, then a showing of pervasive and systemic aid is required to ensure that defendants

actually aided and abetted each tort of that enterprise.” Id.; see also Smith & Wessen Brands, Inc. v. Estados Unidos Mexicanos, 605 U.S. 280, 281, 292 (2025), also a civil case.

As illustrative of this theory, the Court discussed Halberstam v. Welch, 705 F. 2d 472 (D.C, Cir. 1983), and held that defendant Hamilton was properly held liable for her partner Welch’s murder of a burglary victim even though Hamilton was not present. “Hamilton’s assistance to Welch was so intentional and systematic that she assisted each and every burglary committed by Welch; any time that Welch left the house to burglarize, he would have relied on Hamilton’s assistance in laundering the stolen goods and transforming them into usable wealth. . . . Thus, Hamilton did aid and abet Welch in burglarizing [the victim’s] home,” as to which the victim’s murder was “a foreseeable consequence.” Twitter, 598 U.S. at 485-87, 495.

The Court noted that this theory of liability “begins to blur with conspiracy liability, which typically holds co-conspirators liable for all reasonably foreseeable acts taken to further the conspiracy” when a Pinkerton charge is given. Id., at 496. To our knowledge, the theory has not been applied directly in a criminal case, certainly not by this Court. But it is superficially reminiscent of the justification proffered by the Second Circuit for affirming Petitioner’s conviction: he helped

“cultivate” Wieboldt as a customer in the summer by selling heroin to her as Wyche did, using the same shared phone number to set up those sales, which was also the one Wyche used to arrange the Wieboldt sale in late October (Order at *11). As a result, he could be held liable as an accomplice for that specific sale even though he was not present.

But the defendants here were more akin to independent contractors than typical co-conspirators or partners in crime. Neither gave pervasive and systemic aid to sales by the other. The two men never sold together and had no way of checking to see what sales, if any, the other was making on a given day. They lived 30 miles apart, did not share a residence or a joint stash house, and did not use each other’s cars (save for one occasion nine months after Wyche’s count four sale to Wieboldt) or each other’s cell phones. Their customer lists were not identical, and there was no evidence they shared profits or jointly purchased product or supplies. They each sold heroin, but so, unfortunately, did countless others in the New York area. The one point of commonality was their use of the same cell phone number to solicit and consummate sales.

This case presents an opportunity for this Court to consider this alternate theory of aiding and abetting liability, discussed in Twitter and reaffirmed in Smith & Wessen, in a criminal context. As noted in Smith & Wessen, “aiding and

abetting is most commonly ‘a rule of secondary liability for specific wrongful acts.’

. . . It is possible for someone to aid and abet a broad category of misconduct, but then his participation must be correspondingly ‘pervasive, systemic, and culpable.’” 605 U.S. 280, 292, quoting Twitter, 598 U.S. at 494, 502.

III. THERE IS A SPLIT AMONG COURTS OF APPEALS AS TO WHETHER AN ACCOMPLICE MUST HAVE ADVANCE KNOWLEDGE OF THE CRIME COMMITTED BY ANOTHER TO BE HELD LIABLE FOR IT, WHEN, AS HERE, THE CRIME IS NOT ONE THAT REQUIRES MORE THAN ONE DISTINCT ACTION.

The record below is devoid of evidence that Petitioner knew Wyche would sell heroin to Wieboldt on October 27, 2017, or on any other day for that matter. At best, he could only assume that Wyche might do so when Wyche had use of the shared phone number. In short, Petitioner did not have advance knowledge of the sale charged in count four, but only a supposition that Wieboldt might be a customer of Wyche’s in the future. In Rosemond, 572 U.S. 65, 78, this Court held that the accomplice’s foreknowledge of the offense is required. Rosemond dealt with a so-called “double-barreled” crime (572 U.S. at 71), one that included more than one action (carrying a firearm during a drug-trafficking crime). The Court held that the accomplice’s intent must encompass the entire offense, its full scope and circumstances. This would provide the accomplice with an opportunity to prevent the crime or walk away from it before it occurs. Id. 77-78.

Since Rosemond was handed down, courts of appeals have differed as to its application to crimes that require but a single action – such as substantive drug distribution, as charged against Petitioner in count four. The First, Eighth and Ninth Circuits have held the advance knowledge requirement pertains to all offenses. United States v. Encarnacion-Ruiz, 787 F. 3d 581, 591 (1st Cir. 2015) (offense of production of child pornography); United States v. Rodriguez-Martinez, 778 F.3d 367, 371-72 (1st Cir. 2015); (attempted narcotics possession); United States v. Outlaw, 946 F. 3d 1015, 1018 (8th Cir. 2020) (involvement in heroin sale during course of drug conspiracy); United States v. Nosal, 844 F.3d 1024, 1040 (9th Cir. 2015) (computer fraud); United States v. Goldtooth, 754 F. 3d 763, 768-69 (9th Cir. 2014) (robbery).

In contrast, the Eleventh Circuit initially limited the advance knowledge requirement to § 924(c) crimes only, United States v. Persaud, 605 Fed. Appx. 791, 800-01 (11th Cir. 2015). But it subsequently hedged. United States v. Seabrooks, 839 F.3d 1326, 1335 (11th Cir. 2016) (“we need not decide” the issue, “because even if we were to assume that Rosemond somehow applies to a § 922(i) crime,” it did not apply when the defendant continued to participate in the offense after its full scope became manifest). The Tenth Circuit is also on the fence. See United States v. Grant, 809 Fed. Appx. 474, 479-80 (10th Cir. 2020); United States v.

Arciniega-Zetin, 755 Fed. Appx. 835, 844 (10th Cir. 2019).

In this case, the Second Circuit has implicitly rejected Rosemond's advance knowledge rule with respect to crimes that are not "double-barreled." The Second Circuit found Petitioner liable as an accomplice for Wyche's sale to Wieboldt on October 27, 2017, despite a lack of proof that Petitioner knew of it either before it occurred or while it was taking place. This lack of knowledge, which was repeatedly stressed in his appellate briefs and his rehearing petition, has never been contested.

If *certiorari* is granted in this case, the Court will be able to resolve the matter definitively.

IV. IN THE ALTERNATIVE, SUMMARY REVERSAL IS WARRANTED.

The law concerning accomplice liability is well-settled and the relevant facts in this case are not in dispute. The Second Circuit's decision affirming Petitioner's guilt of count four – a crime committed by Wyche of which he was unaware, and that he did nothing to further – is clearly erroneous. Under these circumstances, summary reversal would be appropriate. *See, e.g., Klein v. Martin*, 607 U.S. 213 (2026) (*per curiam*); *Mays v. Hines*, 592 U.S. 385 (2021) (*per curiam*); *Moore v. Texas*, 586 U.S. 133 (2019) (*per curiam*); *Pavan v. Smith*, 582 U.S. 563 (2017) (*per curiam*). This would afford justice to Petitioner, and ensure that the Second

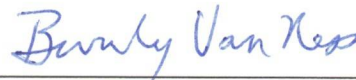
Circuit's opinion is not followed by that court or any other. As previously noted, accomplice liability cases are legion across the country, and the Second Circuit's opinion is at odds with this Court's clear precedents.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: April 20, 2026



BEVERLY VAN NESS
Attorney-at-Law
Counsel for Petitioner Oneil Allen

APPENDIX

Court of Appeals' Opinion, United States v. Wyche, 2025 U.S. App. Lexis

30350, 2025 WL 3239763 (2d Cir. Nov. 20, 2025) 1a

Court of Appeals' Order Denying Rehearing (January 28, 2026) 10a



United States v. Wyche

United States Court of Appeals for the Second Circuit

November 20, 2025, Decided

No. 24-2579, 24-2581

Reporter

2025 U.S. App. LEXIS 30350 *; 2025 LX 518531; 2025 WL 3239763

UNITED STATES OF AMERICA, Appellee, v. KEITH WYCHE, **ONEIL ALLEN**, a.k.a. ALLEN ONEIL, Defendants-Appellants, KYRON GRAHAM, Defendant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from judgments of the United States District Court for the Eastern District of New York (Dora L. Irizarry, Judge).

[United States v. Wyche, 2022 U.S. Dist. LEXIS 109014, 2022 WL 2199140 \(E.D.N.Y., June 20, 2022\)](#)

Core Terms

overdose, heroin, sentence, district court, fentanyl, conspiracy, phone, guideline, cross-examination, uncharged, sufficiency of evidence, serious bodily injury, light most favorable, trier of fact, harmless, beyond a reasonable doubt, aiding and abetting, drug conspiracy, phone number

Case Summary

Overview

Key Legal Holdings

- Evidence of uncharged non-fatal overdoses of Militello and Maher was properly admitted because it demonstrated Wyche was dealing drugs during the conspiracy timeframe, showed the phone number used throughout the conspiracy was involved in drug dealing, and explained the investigative process that led to identifying the defendants.
- Sufficient evidence supported Wyche's conviction

for Price's death where cell tower data showed Wyche's phone moving from his home to Price's residence, text messages matched patterns from Wyche's other phones, and medical evidence established fentanyl as the but-for cause of death despite other substances in Price's system.

- Allen's conviction for aiding and abetting the distribution that caused Wieboldt's overdose was supported by evidence that Allen and Wyche jointly sold heroin to Wieboldt, shared a phone number for drug transactions, and Allen participated in cultivating Wieboldt as a customer.

Material Facts

- Wyche and Allen operated a drug trafficking conspiracy from February 2017 to September 2018.
- They shared phone numbers and vehicles to facilitate drug sales.
- Sarah Wieboldt purchased heroin from Wyche on October 27, 2017, which caused her non-fatal overdose.
- Vincent Price died from a fentanyl overdose on April 18, 2017, after purchasing drugs from Wyche.
- Police found drug paraphernalia, cash, and a customer list at a residence connected to both defendants.

Controlling Law

- [Federal Rule of Evidence 404\(b\)](#) regarding admissibility of evidence of other crimes.
- [21 U.S.C.S. §§ 841\(a\)\(1\), 841\(b\)\(1\)\(C\)](#), and 846

governing drug trafficking offenses and enhanced penalties when serious bodily injury or death results.

- Aiding and abetting liability principles under *Rosemond v. United States*.

Court Rationale

The Second Circuit found that evidence of uncharged overdoses was properly admitted as direct evidence of the conspiracy, not as [Rule 404\(b\)](#) evidence. The court determined that any errors in limiting cross-examination were harmless given the substantial evidence of guilt. The court found sufficient evidence supported all convictions, including cell phone records, witness testimony, and physical evidence connecting defendants to the drug conspiracy and specific overdose incidents. Wyche's sentence was deemed reasonable given the severity of his crimes, his criminal history, and the fact that he continued selling drugs despite knowing they caused overdoses.

Outcome

Procedural Outcome

The Second Circuit affirmed the district court's judgments of conviction for both defendants and upheld Wyche's 480-month sentence as both procedurally and substantively reasonable.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Criminal Law & Procedure > Appeals > Reversible Error > Evidence

[HN1](#) [↓] **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's evidentiary rulings for abuse of discretion and will disturb a ruling only where the decision to admit or exclude evidence was manifestly erroneous. Even if a decision was manifestly erroneous, the appellate court will affirm if the error was harmless.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

[HN2](#) [↓] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Evidence of uncharged criminal activity is not considered other crimes evidence under [Fed. R. Evid. 404\(b\)](#) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial. Such evidence is admissible as long as it is relevant and satisfies the probative-prejudice balancing test of [Fed. R. Evid. 403](#).

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

[HN3](#) [↓] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

There is no undue prejudice under [Fed. R. Evid. 403](#) where the uncharged conduct did not involve conduct more serious than the charged crime.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Evidence > ... > Examination > Cross-Examinations > Scope

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

[HN4](#) [↓] **Examination of Witnesses, Cross-Examination**

A district court is accorded broad discretion in controlling the scope and extent of cross-examination. When a trial judge has improperly curtailed cross-examination, an appellate court applies harmless-error analysis to determine whether, assuming that the damaging potential of the cross-examination was fully realized, the error was harmless beyond a reasonable doubt.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Sufficiency of Evidence

Evidence > Inferences & Presumptions > Inferences

Evidence > Weight & Sufficiency

[HN5](#) **De Novo Review, Sufficiency of Evidence**

Courts review challenges to the sufficiency of evidence de novo, and will uphold a conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A defendant seeking to overturn a conviction on the grounds that the evidence was insufficient bears a heavy burden. In assessing the sufficiency of the evidence, courts must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Weight & Sufficiency

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

[HN6](#) **Conspiracy, Elements**

When a defendant challenges the sufficiency of the evidence in a conspiracy case, deference to the jury's findings is especially important because a conspiracy by its very nature is a secretive operation. Courts cannot disturb the jury's verdict if the evidence, viewed in the light most favorable to the government, could have led a reasonable juror to conclude beyond a reasonable doubt that the defendants knew the conspiracy existed,

intentionally joined it with specific intent to commit the object of the conspiracy, and knew or could reasonably foresee that the conspiracy involved the alleged type of drugs.

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Elements

[HN7](#) **Delivery, Distribution & Sale, Elements**

To convict under [21 U.S.C.S. 841\(b\)\(1\)\(C\)](#), the jury is required to find that (1) defendants knowingly or intentionally distributed a substance containing heroin to the victim, and (2) serious bodily injury resulted from the use of that substance.

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Elements

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Weight & Sufficiency

[HN8](#) **Delivery, Distribution & Sale, Elements**

Lay testimony and circumstantial evidence may be sufficient to establish the identity of the substance involved in an alleged narcotics transaction. Such proof may include evidence of the physical appearance of the substance, that the substance produced the expected effects, and that the substance was used in the same manner as the illicit drug.

Criminal Law & Procedure > Accessories > Aiding & Abetting

[HN9](#) **Accessories, Aiding & Abetting**

A person is liable for aiding and abetting a crime if the person (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. The affirmative act requirement for accomplice liability raises a low hurdle for the government. All that is required is that the defendant facilitated one component of the offense and provided more than a minimal amount of aid.

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Factors

Criminal Law &
 Procedure > Sentencing > Appeals > Proportionality
 & Reasonableness Review

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Findings

[HN10](#) [↓] **Imposition of Sentence, Factors**

A sentence is procedurally unreasonable if the sentencing judge fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [18 U.S.C.S. 3553\(a\)](#) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence. A sentence is substantively unreasonable if it cannot be located within the range of permissible decisions.

Criminal Law & Procedure > ... > Sentencing
 Guidelines > Departures From Guidelines > Notice

Criminal Law & Procedure > Sentencing > Ranges

[HN11](#) [↓] **Departures From Guidelines, Notice**

When a sentence falls squarely within the Guidelines range, the district court has no obligation to provide the defendant with notice pursuant to [Fed. R. Crim. P. 32\(h\)](#). Nor is the court required to consider the criteria for an upward departure under [USSG § 5K2.1](#), which permits a district court to go above the Guidelines range where death resulted from the defendant's criminal conduct.

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Factors

[HN12](#) [↓] **Imposition of Sentence, Factors**

[18 U.S.C.S. 3553\(a\)\(6\)](#) requires a district court to consider nationwide sentence disparities, but does not require a district court to consider disparities between

co-defendants.

Counsel: For Defendant-Appellant Oneil: BEVERLY VAN NESS (Natali Todd, Brooklyn, Allen: NY, on the brief), New York, NY.

For Defendant-Appellant: CARL A. IRACE (Gary Schoer, Syosset, NY, Keith Wyche: on the brief), East Hampton NY.

For Appellee: GILBERT M. REIN (Anthony Bagnuola, Irisa Chen, on the brief), Assistant United States Attorneys, for Joseph Nocella, Jr, United States Attorney for the Eastern District of New York, NY.

Judges: PRESENT: DENNY CHIN, RICHARD J. SULLIVAN, BETH ROBINSON, Circuit Judges.

Opinion

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the September 23, 2024 and September 26, 2024 judgments of the district court are **AFFIRMED**.

Keith Wyche and **Oneil Allen** ("Appellants") appeal from judgments of conviction following a joint jury trial in which they were found guilty of (1) conspiracy to distribute and possess with intent to distribute heroin and fentanyl, in violation of [21 U.S.C. §§ 841\(b\)\(1\)\(C\)](#) and [846](#) (Count One); (2) distribution and possession with intent to distribute heroin and fentanyl, in violation of [21 U.S.C. §§ 841\(a\)\(1\)](#) and [841\(b\)\(1\)\(C\)](#) (Count Two); and the distribution of heroin [*2] that resulted in the non-fatal overdose of Sarah Wieboldt, in violation of [§§ 841\(a\)\(1\)](#) and [841\(b\)\(1\)\(C\)](#) (Count Four). Wyche was further convicted of distributing fentanyl that resulted in the overdose death of Vincent Price, in violation of [21 U.S.C. §§ 841\(a\)\(1\)](#) and [841\(b\)\(1\)\(C\)](#) (Count Three). The district court sentenced Wyche to 480 months' imprisonment and Allen to 360 months' imprisonment. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as needed to explain our decision.

1. The District Court Properly Allowed Evidence of Uncharged Overdoses.

Allen challenges the district court's admission of evidence related to the uncharged nonfatal overdoses of

Vincent Militello and William Maher.¹ [HN1](#)^[↑] We review a district court's evidentiary rulings for abuse of discretion and will disturb a "ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. Williams*, 930 F.3d 44, 58 (2d Cir. 2019) (internal quotation marks omitted). Even if a decision was "manifestly erroneous," we will affirm "if the error was harmless." *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015) (internal quotation marks omitted).

Appellants contend that the district court erroneously admitted evidence of the two drug overdoses pursuant to [Federal Rule of Evidence 404\(b\)](#), which governs the admissibility [*3] of crimes, wrongs, or acts other than those charged in the indictment. [HN2](#)^[↑] But "evidence of uncharged criminal activity is not considered other crimes evidence under [Fed. R. Evid. 404\(b\)](#) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (internal quotation marks omitted). Such evidence is admissible as long as it "is relevant and satisfies the probative-prejudice balancing test of [Rule 403 of the Federal Rules of Evidence](#)." *United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994) (internal quotation marks omitted).

Here, the District Court did not abuse its discretion by admitting evidence related to the overdoses of Militello and Maher. The overdoses were not "evidence of other crimes" but rather "evidence of the very crime charged" in the indictment, *United States v. Lyle*, 919 F.3d 716, 736 (2d Cir. 2019) - a conspiracy involving Wyche and Allen to distribute heroin and fentanyl from February 2017 to September 2018, Allen App'x at 43. The uncharged overdoses demonstrated that Wyche was dealing drugs in July 2017, and that the phone number Wyche used throughout the conspiracy was involved in drug dealing. See *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989); Allen App'x at 161. The evidence was also used to demonstrate the investigative [*4] process that led to the identification of Appellants as drug dealers.

The evidence was also clearly relevant, and its

¹ Pursuant to [Federal Rule of Appellate Procedure 28\(j\)](#), Wyche and Allen also join and adopt each other's arguments, to the extent such arguments are applicable to their respective convictions.

probative value was not "substantially outweighed" by the evidence's prejudicial effect. [Fed. R. Evid. 403](#). [HN3](#)^[↑] It is well established that there is no undue prejudice under [Rule 403](#) where the uncharged conduct did not involve conduct more serious than the charged crime. See *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990); see also *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000). Here, the admission of two non-fatal overdoses were not unduly prejudicial as Appellants were charged with the non-fatal overdose of Wieboldt, and Wyche was charged with the fatal overdose of Price. Moreover, the prejudicial effect of this evidence was tempered by the fact that the parties stipulated that Allen was not involved in the non-fatal overdose of Maher. Considering the evidence in context, we cannot say that the district court abused its discretion in admitting evidence of the uncharged overdoses.

2. Any Error the District Court Committed in Curtailing Cross-Examination was Harmless.

Appellants next argue that the district court effectively prevented them from cross-examining government witnesses by repeatedly correcting the form of their attorneys' questions and admonishing counsel in front of the jury. [*5] [HN4](#)^[↑] But a district court "is accorded broad discretion in controlling the scope and extent of cross-examination." *United States v. Sampson*, 898 F.3d 287, 308 (2d Cir. 2018) (internal quotation marks omitted). And even if we conclude that "the trial judge has improperly curtailed cross-examination," we "apply harmless-error analysis" to determine "whether, assuming that the damaging potential of the cross-examination were fully realized,' the error was harmless beyond a reasonable doubt." *United States v. Rosa*, 11 F.3d 315, 336 (2d Cir. 1993) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Although it could be argued that some of the district court's *sua sponte* objections were erroneous, we conclude that any error was harmless, and in most of the instances where the district court improperly curtailed cross-examination, Appellants' defense lawyers were allowed to rephrase their questions to elicit the intended testimony. See Gov't App'x at 110-11, 124. A review of the record reflects that Appellants were still able to fully cross-examine the government's witnesses. And as discussed above, there was ample evidence establishing that Appellants were guilty of the offenses for which they were charged. For these

reasons, we conclude that the district court's error was harmless.

3. The Evidence Admitted at Trial Was Sufficient to Sustain [*6] Appellants' Convictions.

[HN5](#) [↑] "We review challenges to the sufficiency of evidence *de novo*, and will uphold a conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [United States v. Dupree, 870 F.3d 62, 78 \(2d Cir. 2017\)](#) (internal quotation marks omitted). "A defendant seeking to overturn a conviction on the grounds that the evidence was insufficient bears a heavy burden." [United States v. Vasquez, 267 F.3d 79, 90 \(2d Cir. 2001\)](#) (internal quotation marks omitted). In assessing the sufficiency of the evidence, we "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." [United States v. Rosemond, 841 F.3d 95, 113 \(2d Cir. 2016\)](#) (internal quotation marks omitted).

a. The Drug Trafficking Conspiracy

[HN6](#) [↑] "When a defendant challenges the sufficiency of the evidence in a conspiracy case, deference to the jury's findings is especially important" because "a conspiracy by its very nature is a secretive operation." [United States v. Santos, 541 F.3d 63, 70 \(2d Cir. 2008\)](#) (internal quotation marks omitted). "We cannot disturb the jury's verdict if the evidence, viewed in the light most favorable to the government, could have led a reasonable juror to conclude [*7] beyond a reasonable doubt," [Rosa, 11 F.3d at 340](#), that the defendants "knew the conspiracy existed, intentionally joined it with specific intent to commit the object of the conspiracy, and knew or could reasonably foresee that the conspiracy involved the alleged . . . type of drugs," [Dupree, 870 F.3d at 78](#).

Here, there was ample evidence from which a rational jury could find that Appellants knowingly and intentionally participated in the underlying drug conspiracy. Among other evidence, the jury heard Sarah Wieboldt testify that in the summer of 2017, her "two main dealers" were Allen and Wyche, that she would contact Allen or Wyche to purchase heroin by texting a phone number that they shared, and that at her first

transaction with Allen she was not required to use heroin in his presence because Wyche "had already vouched" for her. Gov't App'x at 164-66, 169, 171. Furthermore, NYPD Detective Phillip Vaccarino testified that the Appellants shared vehicles to further the drug conspiracy, and that they were observed outside a house in Somerset, New Jersey (the "Somerset Residence") that was later raided and found to contain thousands of dollars in cash, sifters, grinders, a scale, glassine envelopes, and a customer list. Phones [*8] seized from the Somerset Residence contained text messages in which both Appellants discussed the sale of drugs. *Id.* at 268-84. Viewing the evidence in the light most favorable to the government, as we must, we conclude that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [United States v. Atilla, 966 F.3d 118, 128 \(2d Cir. 2020\)](#) (quoting [Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 \(1979\)](#)).

b. The Wieboldt Overdose.

Wyche argues, for the first time on appeal, that the evidence at trial was insufficient to establish that the substance that caused Wieboldt to overdose was heroin, or that her overdose constituted serious bodily injury as required under [21 U.S.C. § 841\(b\)\(1\)\(C\)](#). Allen asserts that the evidence was insufficient to show that he aided and abetted the specific drug sale made by Wyche to Wieboldt that caused the overdose.

[HN7](#) [↑] To convict under [section 841\(b\)\(1\)\(C\)](#), the jury was required to find that (1) defendants knowingly or intentionally distributed a substance containing heroin to Wieboldt, and (2) serious bodily injury resulted from the use of that substance. See [21 U.S.C. § 841\(b\)\(1\)\(C\)](#). Here, the government introduced sufficient proof that heroin was the substance distributed to Wieboldt on October 27, 2017. [HN8](#) [↑] We have long recognized that "lay testimony and circumstantial evidence may be sufficient [*9] . . . to establish the identity of the substance involved in an alleged narcotics transaction." [United States v. Flores, 945 F.3d 687, 707 \(2d Cir. 2019\)](#) (internal quotation marks omitted). Such proof may include evidence "of the physical appearance of the substance," "that the substance produced the expected effects," and that "the substance was used in the same manner as the illicit drug." [United States v. Bryce, 208 F.3d 346, 353-54 \(2d Cir. 1999\)](#), as amended on denial of reh'g [2000 U.S. App. LEXIS 731 \(Jan. 19, 2000\)](#) (internal quotation marks omitted).

Wieboldt testified that the substance she purchased from Wyche "looked like a typical bag . . . of heroin," that she felt "very high" after she "sniffed" the substance, and that she overdosed after attempting to sniff a second bag of the substance. Gov't App'x at 174-75. Phone records indicated that Wieboldt texted Allen requesting "one bundle," a common way to refer to ten bags of heroin. *Id.* at 158-59, 187. And this testimony was corroborated by the government's expert, who testified that heroin is "tannish in color" and that sniffing heroin is one mode of consuming it. *Id.* at 238, 241. This evidence easily permitted the jury to find that Appellants sold Wieboldt a substance containing heroin.

There is also sufficient evidence to establish that the overdose was caused [*10] by Appellants distribution of heroin, and that the overdose led to serious bodily injury under [section 841\(b\)\(1\)\(C\)](#). Wieboldt testified at trial that she purchased heroin from Wyche, sniffed it, and then almost immediately overdosed. *Id.* at 174-75. This chain of events obviously supported the inference that Wieboldt's consumption of heroin was a but-for cause of the overdose, particularly since Wieboldt testified that she did not use any other substances on the day of her overdose. *Id.* at 192.

And the evidence presented at trial was more than sufficient to establish that Wieboldt's overdose constituted a serious bodily injury under the statute, which is defined as bodily injury which involves "a substantial risk of death." [21 U.S.C. § 802\(25\)](#). Wieboldt testified that she "very quickly stopped breathing" after she overdosed, that she was revived only after first responders administered Narcan, and that she had to be hospitalized to ensure that she was breathing on her own. Gov't App'x at 159. Based on this testimony, the jury reasonably concluded that Wieboldt faced a substantial risk of death, and thereby sustained serious bodily injury, from the use of heroin.

There was also sufficient evidence to support Allen's conviction on the Wieboldt [*11] overdose under an aiding-and-abetting theory. [HN9](#) [↑] A person is liable for aiding and abetting a crime if he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. See [Rosemond v. United States, 572 U.S. 65, 68, 134 S. Ct. 1240, 188 L. Ed. 2d 248 \(2014\)](#). "The affirmative act requirement for accomplice liability raises . . . a low hurdle for the government." *United States v. Delgado, 972 F.3d 63, 74 (2d Cir. 2020), as amended* (Sep. 1, 2020). All that is required is that the defendant "facilitated one component" of the offense and provided

more than a "minimal amount of aid." *Id.*

As discussed above, there was extensive evidence showing that Allen aided and abetted Wyche's distribution of the heroin that caused Wieboldt's overdose. Allen and Wyche both consistently sold heroin to Wieboldt in the summer of 2017 and used a shared phone number to facilitate drug transactions with her. Wieboldt testified that the Appellants were, through their joint number, "around almost daily," and that the two were more professional in their dealing than other dealers. Gov't App'x at 197-98. From this evidence, a rational trier of fact could have found that Allen aided and abetted the sale of heroin on October 27, 2017 by participating in cultivating Wieboldt as a customer, and transacting [*12] in drug sales from the same shared phone number that Wieboldt contacted to arrange for the purchase of drugs that led to her overdose.

c. The Price Overdose (Wyche Only)

Wyche separately argues that there was insufficient evidence to establish that he sold fentanyl to Vincent Price on April 18, 2017, the day Price fatally overdosed, because the government could not prove that the phone (referred to as the "Marco 5 Phone") used to contact Price belonged to him. Wyche Br. at 22-26. But there was ample evidence from which a rational jury could find that Wyche used the Marco 5 Phone to contact Price.

For starters, Price saved the Marco 5 Phone number under the name "Marco," which was Wyche's nickname in this drug conspiracy. See Gov't App'x at 164-66. Text messages were repeatedly sent from the Marco 5 Phone to Price, which matched both the content and pattern of messages sent from a phone seized from Wyche's residence that was also used in the course of the drug conspiracy. *Id.* at 33, 39-40. In addition, the Marco 5 Phone was used to communicate with the same customers as a different phone seized from Wyche's residence. See *id.* at 298, 309. Officer Vaccarino testified that phone records [*13] for the Marco 5 Phone led him to surveil John Kane, who later purchased heroin and fentanyl from an unidentified individual driving Wyche's white Jeep. *Id.* at 44-46. And cell-tower location data showed the Marco 5 Phone moving from the vicinity of Wyche's home to Price's residence at the time of the sale on the day that Price died. Wyche App'x 57-59. Viewed in its totality and in the light most favorable to the government, this evidence was more than sufficient to prove that Wyche sold fentanyl to Price on April 18, 2017.

Wyche also argues that there was insufficient evidence to establish that the fentanyl consumed by Price was a "but-for" cause of Price's death. But the jury was presented with ample evidence to establish that Price's use of fentanyl on April 18, 2017 was the "straw that broke the camel's back" and caused his death. [Burrage v. United States, 571 U.S. 204, 211, 134 S. Ct. 881, 187 L. Ed. 2d 715 \(2014\)](#). In particular, the jury heard that Price's body was found with a belt tied around his arm, with a hypodermic needle with liquid containing fentanyl next to him. Gov't App'x at 3-8. The jury also heard testimony from experts about the potency and lethality of fentanyl, including that "fentanyl is [fifty] times stronger than heroin" and that "if [a substance] [*14] is injected intravenously, the effect is almost immediate." *Id.* at 152, 244. Melissa Pasqual-Styles, a deputy chief medical examiner at the Office of Chief Medical Examiner opined that Price "was alive for a period of time with cocaine and alcohol" in his system, then "[o]ok a terminal shot of fentanyl" that "put[] him over the edge and caused his death." *Id.* at 226. She also testified that the quantity of fentanyl in Price's blood - 24 nanograms per milliliter — was sufficient to "cause [Price's] diaphragm to seize" and to kill him. *Id.* at 225. From this evidence, a rational jury could readily conclude that fentanyl was the but-for cause of Price's death, notwithstanding the other substances already in his body.

4. Wyche's Sentence was Procedurally and Substantively Reasonable.

Finally, Wyche challenges the procedural and substantive reasonableness of his 480-month sentence. [HN10](#) [↑] A sentence is procedurally unreasonable if the sentencing judge "fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [\[18 U.S.C.\] § 3553\(a\)](#) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." [United States v. Robinson, 702 F.3d 22, 38 \(2d Cir. 2012\)](#) (citing [\[*15\] Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 \(2007\)](#)). And a sentence is substantively unreasonable if it "cannot be located within the range of permissible decisions." [United States v. Cavera, 550 F.3d 180, 189 \(2d Cir. 2008\)](#) (*en banc*) (internal quotation marks omitted).

Wyche argues that his sentence was procedurally unreasonable because the district court's imposition of a 480-month sentence constituted a "*de facto* departure"

for which he did not receive proper notice as required by [Fed. R. Crim. P. 32\(h\)](#). But Wyche's sentence did not fall outside of the authorized guideline range, which was 360 months to life imprisonment. [HN11](#) [↑] Because Wyche's forty-year sentence fell squarely within the Guidelines range, the district court had no obligation to provide Wyche with notice pursuant to [Rule 32\(h\)](#). Nor was it required to consider the criteria for an upward departure under [section 5K2.1 of the Sentencing Guidelines](#), which permits a district court to go above the Guidelines range where death resulted from the defendant's criminal conduct. Accordingly, we reject Wyche's argument that his sentence was procedurally unreasonable.

Wyche also argues that his forty-year sentence was substantively unreasonable. But a review of the record shows that the district court properly considered all of the [section 3553\(a\)](#) factors before imposing a within-guidelines sentence. In particular, the district [*16] court "considered the nature and the circumstances of the offense in question," noting that fentanyl had become a "real scourge in this country" and that "very few cases get more serious than this one." Wyche App'x at 128-29, 134. The district court also noted that the drug conspiracy had a long list of customers who were frequently targeted to purchase drugs, that the scheme had led to multiple individuals overdosing, including one overdose death, and that Wyche continued to sell drugs even though he was aware that "overdoses were happening from the product that [he] w[as] selling." *Id.* at 130. The district court also properly considered "the history and characteristics of the defendant," [18 U.S.C. § 3553\(a\)](#), and found it significant that Wyche had several prior drug-related convictions, including convictions for felony drug trafficking and possession of a firearm. Given the severity of the crime and the totality of the circumstances, we cannot say that it was substantively unreasonable for the district court to impose an aggregate sentence of forty years.²

² [HN12](#) [↑] To the extent that Wyche argues that his forty-year sentence constituted an unwarranted disparity in light of the thirty-year sentence imposed on Allen, he misreads [section 3553\(a\)\(6\)](#), which "requires a district court to consider nationwide sentence disparities, but does not require a district court to consider disparities between co-defendants." [United States v. Frias, 521 F.3d 229, 236 \(2d Cir. 2008\)](#) (emphasis added). In any event, it cannot be said that the district court abused its discretion in sentencing Wyche to an additional ten-years' imprisonment given that Wyche — unlike Allen — was convicted of distributing the lethal dose of fentanyl that resulted in the overdose death of Vincent Price.

For all these reasons, we conclude that Wyche's sentence was not procedurally or substantively unreasonable.

* * *

We have considered Appellants' remaining arguments and conclude [*17] that they are without merit. Accordingly, we **AFFIRM** the judgments of the district court.

End of Document

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of January, two thousand twenty-six.

United States of America,

Appellee,

v.

Kyron Graham,

Defendant,

Keith Wyche, Oneil Allen, AKA Allen Oneil,

Defendants - Appellants.

ORDER

Docket Nos: 24-2579 (Lead)

24-2581 (Con)

Appellant, Oneil Allen, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

