ORIGINAL

26-5012
No. ________

FILED
MAY 14 2026
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ABEL DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ABEL DIAZ
Reg. 60253-004
F.C.I. Ray Brook
P.O. Box 900
Ray Brook, NY 12977

QUESTION(S) PRESENTED

1. WHETHER SUBSTANTIVE STATUTORY-INTERPRETATION DECISIONS SUCH AS BAILEY V. UNITED STATES, 516 U.S. 137 (1995), BOUSLEY V. UNITED STATES, 523 U.S. 614 (1998), REHAIF V. UNITED STATES, 588 U.S. 225 (2019), AND RUAN V. UNITED STATES, 597 U.S. 450 (2022), APPLY RETROACTIVELY ON COLLATERAL REVIEW WHERE THOSE DECISIONS DEFINE THE SUBSTANTIVE MEANING OF A FEDERAL CRIMINAL STATUTE AND DEMONSTRATE THAT THE PETITIONER WAS CONVICTED WITHOUT PROOF OF ESSENTIAL STATUTORY ELEMENTS.

2. WHETHER 28 U.S.C. § 2255(h)(2), AS APPLIED TO A PRISONER ASSERTING LEGAL INNOCENCE BASED UPON AN INTERVENING SUBSTANTIVE INTERPRETATION OF A FEDERAL CRIMINAL STATUTE, VIOLATES THE SUSPENSION CLAUSE AND THE DUE PROCESS CLAUSE FOR FORECLOSING ANY JUDICIAL FORUM IN WHICH TO PRESENT SUCH INNOCENCE CLAIMS.

3. WHETHER THE CONSTITUTION PERMITS CONTINUED IMPRISONMENT UNDER 21 U.S.C. § 841(a)(1) AND 841(b) WHERE THE JURY NEVER FOUND BEYOND A REASONABLE DOUBT THE DRUG TYPE AND DRUG QUANTITY, AND MENS REA ELEMENTS NECESSARY TO AUTHORIZE THE SENTENCE IMPOSED.

4. WHETHER ACTUAL INNOCENCE UNDER BOUSLEY V. UNITED STATES, 523 U.S. 614 (1998) OVERRIDES PROCEDURAL BARRIERS WHERE INTERVENING DECISIONS ESTABLISH THAT THE PETITIONER WAS CONVICTED WITHOUT FINDINGS ON ESSENTIAL ELEMENTS OF THE OFFENSE.

5. WHETHER THE COURTS BELOW ERRED IN REJECTING PETITIONER'S LONG-STANDING MENS REA CLAIM WHERE PETITIONER ARGUED SINCE DIRECT APPEAL, RELYING UPON FEOLA V. UNITED STATES, 420 U.S. 671 (1975), THAT HE LACKED THE CRIMINAL INTENT NECESSARY FOR THE SUBSTANTIVE NARCOTICS OFFENSE, AND SUBSEQUENT DECISIONS INCLUDING UNITED STATES V. HERAS, 609 F.3d 101 (2d Cir. 2010), UNITED STATES V. COLLAZO, 984 F.3d 1308 (9th Cir. 2021), AND UNITED STATES V. COLSTON, 4 F.4th 1179 (11th Cir. 2021), CONFIRM THE IMPORTANCE OF PROVING THE REQUISITE MENS REA FOR DRUG CONSPIRACIES AND RELATED OFFENSES.

LIST OF PARTIES

Abel Diaz, Petitioner

United States of America, Respondent

STATEMENT OF RELATED CASES

- *United States of America v. Abel Diaz*, No. 1:00-cr-74-FAM, U.S. District Court, Southern District of Florida, Miami Division (Judgment entered 11-30-2000);
- *United States of America v. Abel Diaz*, No. 00-16413, U.S. Court of Appeal, Eleventh Circuit (direct appeal) Mandate issued 3-7-2002;
- *Abel Diaz v. United States of America*, No. 1:12-cv-22711, U.S. District Court, Southern District of Florida, Miami Division (2241), order denying issued 12-6-2012;
- *United States of America v. Abel Diaz*, No. 11-10958, U.S. Court of Appeal, Eleventh Circuit;
- *United States of America v. Abel Diaz*, No. 11-12313, U.S. Court of Appeal, Eleventh Circuit;
- *United States of America v. Abel Diaz*, No. 12-12685, U.S. Court of Appeal, Eleventh Circuit;
- *Abel Diaz v. United States of America*, No. 12-16498, U.S. Court of Appeal, Eleventh Circuit (appeal of denial of 2241, 1:12-cv-22711), vacated and remanded 11-5-2014;

STATEMENT OF RELATED CASES—Continued

- *United States of America v. Abel Diaz*, No. 15-11000, U.S. Court of Appeal, Eleventh Circuit (appeal of denial of 3582);
- *In re: Abel Diaz*, No. 16-11717, U.S. Court of Appeal, Eleventh Circuit:
- *In re: Abel Diaz*, No. 20-13451, U.S. Court of Appeal, Eleventh Circuit;
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 4:15-cv-237, U.S. District Court, South Carolina, Florence Division (2241) (transferred from SD FL - 1:12-cv-22107), opened as new case number;
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 4:19-cv-2423, U.S. District Court, South Carolina, Florence Division (2241);
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 16-7167, U.S. Court of Appeal, Fourth Circuit (application denying second or successive 2255);
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 20-7713, U.S. Court of Appeal, Fourth Circuit.
- Warden F.C.C. Coleman USP 1, 2022 U.S. Dist. LEXIS 244805 Case No. 5:22-cv-2228 (M.D.Fla. December 8, 2022);
- Warden F.C.C. Coleman USP 1, 2023 U.S. App LEXIS 23178, 2023 WL 5624536 (11th Cir. 2023).
- United States v. Diaz, 2024 U.S. Dist. LEXIS 234612, 2024, WL 5264271 (S.D.Fla. 31, 2024);
- United States v. Diaz, 2025 U.S. Dist. LEXIS 150829 (S.D. Fla. Aug. 5, 2025).

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No. ____________

IN THE

SUPREME COURT OF THE UNITED STATES

ABEL DIAZ — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

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

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

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Abel Diaz, respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit Court of Appeals entered February 17, 2026 denying petitioner's for second successive § 2255(h).

ABEL DIAZ Reg. 60253-004

Federal Correctional Institution

P.O. Box 900

Prose Petitioner

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals order is included in the Appendix, infra.

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JURISDICTION

This Court has jurisdiction to review the February 17, 2026 decision of the Eleventh Circuit Court of Appeals denying the petitioner's second or successive motion § 2255(h) pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on an presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private properly be taken of public use, without just compensation.

2. The Suspension Clause of the United States Constitution provides:

   The Suspension Clause forbids suspension of the writ of habeas corpus unless when in Cases of Rebellion or Invasion the public Safety may require it. U.S. Const. Art. 1, § 9, cl. 2. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty. The protection exists even in the face of otherwise valid jurisdiction stripping statutes where the Suspension Clause ensures that habeas remains available to ensure that no branch of government detains a person in violation of law.

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241--Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not expend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal Judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentence him and each of such district court shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the excercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treat-ment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255--Federal Custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and makes findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentences as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentence him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such government action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish be clear and convincing evidence that no reasonable doubt fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

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STATEMENT OF THE CASE

Twenty-year-old Abel Diaz was caught up in a sting operation which federal law enforcement had created and used repeatedly throughout the United States. The sting was built around law enforcement officer posing as a drug courier who had knowledge where a stash house was located at which a very large quantity of cocaine and cash could be stolen. The undercover officer would disclose the location of the stash house to young would be robbers in exchange for a cut of the proceeds of the robbery. Of course there was not stash house and were no drugs. It was all just a story that someone made up, which only the youngest and most gullible would believe. The concept was so incredible that the result was that the typical operation ensnared very young, naive and unsophisticated persons. This operation was not differente.

Abel Diaz had fled Castro's Cuba on a raft as a teenager and came to the United States after being interned at Guantanamo Bay and then paroled into the United States. He eventually found his way to Miami and the Cuban community there, although he hand no immediate family in Miami to turn to for support. He came to the United States with tenth grade Cuban education and did not speak English.

He had no father to look to for moral guidance and found himself associated with a group of similar situated aimless youths. Starting at age 18 he began to get in trouble. He was arrested for a grand theft shoplifting offense from a Miami deparment store (sentence to probation), and another arrest for a misdemeanor shoplifting of a Tommy Hilfiger cap from another retail outlet (probation), then another misdemeanor attempted theft at a department store, then a burglary of a commercial structure (probation) and another grand theft charge, shoplifting at another department store (four months in jail), then a fight in a nightclub charged as misdemeanor disorderly conduct (probation), and the a driving under the influence of alcohol charge (apparently a fine only), followed by driving on suspended license (36 days jail), then possession of a false drivers license and resisting an officer without violence (6 months jail).

It was while he was in jail for this last driving related offense that he was approached about this sting operation and ended up agreeing to participate. He was told that there was 25 kilograms of cocaine and $500.000 cash in this stash house, his for the taking. Kilograms of cocaine in Miami 2000 cost at least $20,000 uncut, so the lure here was $500.000 of cocaine and $500.000 cash, a million dollars total. For shoplifter whose last haul was six dresses out of Burdines Department Store, this was a temptation too great to resist.

The other participant all pled guilty for relatively low sentences, but Mr. Diaz felt that he was not guilty because he believed that he had been entrapped. He went to trial on an entrapment defense and was found guilty. His guidelines were determined to be 30 years to life (this was November 2000, shortly after Apprendi but before Booker). The district judge on these facts sentenced Mr. Diaz to life imprisonment.(On 2008 Diaz's sentenced was reduced to 420 months).

PERTINENT PROCEDURAL AND LEGAL FACTS

Mr. Diaz was indicted before Apprendi v. New Jersey, 530 U.S. 466 (2000) was decided. The original indictment charged four counts: count one, conspiracy to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine; count two, attempt to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine; count three, knowing use and carrying of a firearm during and in relation to a drug trafficking crime; and count four, conspiracy to possess, use and carry firearm during and relation to a drug trafficking crime. Before trial but after Apprendi issued, the Government obtained a superseding indictment which modified the charges in counts one and two to add the phrase "that is, five kilograms or more" before the reference to the mixture or substance containing cocaine.

At the charge conference the Government, with Apprendi in mind, requested the Court require a special jury verdict on drug quantity but the court refused. The instructions given the jury did not advise the jury that drug quantity was an element of the offense as to which they must reach a unanimous verdict.

The jury returned a not guilty verdict on count two, attempt to possess five or more kilograms of cocaine, but general guilty verdicts on counts one, three and four.

On appeal, Mr. Diaz raised the Apprendi drug quantity issue.The petitioner also argued that under Feola v. United States, 420 U.S. 671 (1975), the government need to prove the "criminal intent necessary for the substantive offense".

The Eleventh Circuit, in an unpublished decision denied relief finding (1) that there was no Apprendi error, and (2) even if there were, it was not plain error because it did not affect Mr. Diaz's substantial rights.

> in his fifth and final contention, Diaz argues that his life sentence on Count I violate the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the district court did not properly instruct the jury to find the specific drug quantity involved in the conspiracy beyond a reasonable doubt and, as a result, there was no quantity determination by the jury. Because Diaz did not object on this ground, we review his claim only for plain error. See United States v. Swatzie, 228 F.3d 1287, 1281 (11th Cir. 2000), cert denied, 121 S. Ct. 2600 (2001).
>
> ...
>
> After the guilty verdict was returned on Count I, Diaz was sentenced under § 841(b)(1)(A)(ii)(II) to life imprisonment. Under § 841(b)(1)(C), the maximum sentence Diaz could have received without a quantity finding was twenty years....
>
> The district court, in its instructions to the jury, told them that "Count I charges the defendant with knowingly and intentionally conspiring or agreeing with others to possess with intent to distribute five or more kilograms of cocaine,in violation of federal law...."The court also stated that "What the evidence in the case must show beyond a reasonable doubt is: First, that two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment; and second, that the defendant, knowing the unlawful purpose of the plan, willfully joined in it."
>
> The government argues that from these instructions, the jury reasonably understood that it could not convict Diaz unless it found that at least five kilograms of cocaine were involved in the offense, and the jury verdict of guilty necessarily encompassed that finding. Thus, there was no constitutional error. We agree.
>
> Moreover, even if the instruction had not been adequate to ensure that the jury verdict encompassed a finding as to the five kilograms, the error would not have affected Diaz's substantial rights because the evidence before the jury firmly established that the object of the conspiracy involved more than

> five kilograms and that Diaz was well aware of this fact. A jury, therefore, could not have found Diaz guilty of the conspiracy to to possess with intent to distribute without also finding that five or more kilograms were involved in the conspiracy. Swatzie, 228 F.3d at 1284. The fact that the drugs involved were fictitious does not affect our analysis. Thus, no plain error occurred.

[A copy of the unpublished opinion of the Eleventh Circuit can be found in the district court docket for the Southern District of Florida. in case number 1:00-cr-74, Doc. 106].

After the Eleventh Circuit denied petitioner's direct appeal the Eleventh Circuit one months later decided the case United States v. Acevedo, 285 F.3d 1010 (11th Cir. 2002). This case is similar in fact to petitioner's issues under Apprendi. Mr. Diaz's opinion was unpublished. Just one month late in a published opinion on identical operative facts the Eleventh Circuit found that it was Apprendi error to simply include drug quantity in the indictment but not charge the jury with drug quantity in the indictment but not charge the jury with drug quantity as an element of the offense. In Acevedo, the error was found to be harmless because Acevedo was sentence to less than twenty years imprisonment, the statutory maximum had no drug quantity been established. Mr. Diaz was sentenced to life imprisonment.

Subsequent collateral proceeding was filed by Mr. Diaz under 28 U.S.C. § 2255 were denied.

Following the Supreme Court's decisions in Rehaif and Ruan, petitioner sought authorization to file a second or successive § 2255 motion, arguing that those decisions constituted substantive changes in statutory interpretation demonstrating that petitioner was convicted without jury finding on essential element under the mens rea statute.

The Eleveth Circuit denied authorization, holding that Rehaif and Ruan were not "new constitutional rules" under § 2255(h)(2).

This petition follows.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. WHETHER SUBSTANTIVE STATUTORY-INTERPRETATION DECISIONS SUCH AS BAILEY V. UNITED STATES, 516 U.S. 137 (1995), BOUSLEY V. UNITED STATES, 523 U.S. 614 (1998), REHAIF V. UNITED STATES, 588 U.S. 225 (2019), AND RUAN V. UNITED STATES, 597 U.S. 450 (2022), APPLY RETROACTIVELY ON COLLATERAL REVIEW WHERE THOSE DECISIONS DEFINE THE SUBSTANTIVE MEANING OF A FEDERAL CRIMINAL STATUTE AND DEMONSTRATE THAT THE PETITIONER WAS CONVICTED WITHOUT PROOF OF ESSENTIAL STATUTORY ELEMENTS.

The reasons for granting the writ in this case is based that this case presents an important and recurring question regarding the retroactive application of substantive statutory interpretation decisions. This case presents an unresolved constitutional question:

whether Congress may constitutionally foreclose any judicial forum for a federal prisoner asserting actual innocence based on substantive statutory interpretation decision of this Court.

Petitioner remains imprisoned for conduct that, under subsequent Supreme Court statutory interpretation decisions, is not criminal absent jury findings never made. The jury never found:

that petitioner acted knowingly and intentionally,

that the offense involved cocaine,

or that the offense involved five kilograms or more.

Absent such findings, petitioner could not constitutionlly be sentenced under § 841(b)(1)(A).

BAILEY, BOUSLEY, REHAIF AND RUAN ARE SUBSTANTIVE STATUTORY DECISION THAT APPLY RETROACTIVELY

This Court has repeatedly distinguished substantive decisions interpreting the meaning of criminal statutes from procedural rules regulating the conduct of trials.

In Bailey v. United States, this Court narrowed the meaning of "use" under 18 U.S.C. § 924(c). Subsequently, in Bousley v. United States, this Court recognized that prisoners convicted under an erroneous interpretation of a criminal statute may pursue collateral relief upon a showing of actual innocence.

The same principle governs Rehaif v. United States and Ruan v. United States. Rehaif clarified that the Government must prove a defendant knew of his prohibited status. Ruan clarified that criminal liability under the Controlled Substance Act requires proof that a physician knowingly or intentionally acted in an unauthorized manner.

Like Bailey, these decisions did not create new constitutional rules. Rather, they explained what the statutes always meant. Under this Court's retroactivity jurisprudence, substantive decisions apply retroactively because they alter the range of conduct that Congress criminalized.

Petitioner submits that the lower courts have improperly denied review of statutory innocence claims solely because such claims do not fit within § 2255(h)(2)'s requirement of a new rule of constitutional law.

II. SECTION 2255(h)(2), AS APPLIED TO LEGALLY INNOCENT PRISONER, VIOLATES THE SUSPENSION CLAUSE AND THE DUE PROCESS.

The Suspension Clause guarantees that federal courts remain open to test the legality of executive detention. Where an intervening statutory decision demonstrates that a prisoner was convicted without proof of conduct criminalized by Congress, continued imprisonment raises serious constitutional concerns.

Petitioner submits that § 2255(h)(2), as interpreted by the lower courts, creates a constitutional anomaly. Prisoners asserting constitutional claims my obtain review, while prisoners asserting actual innocence based upon statutory interpretation are left without any judicial forum.

The Constitution does not permit the imprisonment of a person for conduct that Congress has not criminalized.

This Court has repeatedly recognized the fundamental importance of habeas corpus as a safeguard against unlawful detention.

The question presented is exceptional important because it affects thousands of federal prisoners seeking review of convictions rendered invalid by subsequent statutory interpretation decisions.

JONES V. HENDRIX, 599 U.S. 463 (2023) LEFT UNRESOLVED THE CONSTITUTIONAL QUESTION PRESENTED HERE

In Jones v. Hendrix, this Court held that inability to satisfy § 2255(h) does not itself render § 2255 inadequate or ineffective. But Jones expressly left unresolved whether the Suspension Clause requires relief for legally innocent prisoners lacking any available forum.

That unresolved constitutional question is squarely presented here.

If neither § 2255 nor § 2241 permits review of a credible innocence claim based on substantive statutory interpretation, then no mechanism exists to prevent unconstitutional detention for non-criminal conduct.

The Constitution does not tolerate such a result.

III. PETITIONER'S CONVICTION AND SENTENCE RAISE SERIOUS QUESTIONS UNDER APPRENDI AND ALLEYNE.

The Eleventh Circuit erred in Diaz's direct appeal when it conclude that there was no Apprendi Constitutional error in Diaz's case. Apprendi requires both that the sentencing factor which increases the statutory maximum sentence (here from twenty years up to life, and life was imposed), must not only be charged in the indictment, but also be found by the jury after proof beyond a reasonable doubt. The jury was expressly told by the district court in its instructions to the jury that the only elements that the Government had to prove were that the defendant had conspirated to violate the law. The jury was not instructed that the Government must prove that the drug quantity at issue was five or more kilograms of cocaine. Including language in the indictment when the jury is not told that the language is anything more than surplusage cannot satisfy a Sixth Amendment jury verdict requirement. The district court itself expressly refused to submit the issue to the jury. The Government requested that the jury be given a special jury verdict to find drug quantity and this request was denied by the district court. See Apprendix- B, attached to this writ.

A general verdict standing alone would have satisfied Apprendi had the jury been instructed that drug quantity was an elements of the offense, but because the district court failed to instruct on drug quantity as an element of the offense, the general verdict likewise failed to satisfy Apprendi's requirement that the drug quantity be proved beyond a reasonable doubt as determined by a unanimous jury verdict. The district court's denial of the requested jury instructions, an instruction mandated by Apprendi, undermines and contradicts the Eleventh Circuit's conclusion that there was no Apprendi error.

This was Apprendi Constitutional error.1

Similarly, the Eleventh Circuit erred in finding that any error did not affect Mr. Diaz's substantial rights. In support of its conclusion the Eleventh Circuit only had this to support it: "because the evidence before the jury firmly established that the object of the conspiracy involved more than five kilograms and that Diaz was well aware of this fact. A jury, therefore, could not have found Diaz guilty of the conspiracy to possess with intent to distribute without also finding that five or more kilograms were involved in the conspiracy."

The Eleventh Circuit plainly overlooked that the jury was not correctly instructed under Post-Apprendi New Constitutional Law and the district court refused to provide the jury with the special jury verdict form. Also the Eleventh Circuit overlooked that the jury found Mr. Diaz not guilty of count two of the indictment, which charged Mr. Diaz with attempt to possess with intent to distribute the same cocaine charged in count one. Although inconsistent verdict standing alone are not enough to vacate a conviction, it is enough to call into a doubt whether the error was harmless. The same evidence and same jury could not even convict on count two, on facts which the Eleventh Circuit found harmless on count one. This is logically impossible. Indeed, what might explain the apparent inconsistency in the verdicts is the very matter at issue under Apprendi. Assuming, as we must, that the jury abided by its instructions, it was instructed

1 Mr. Diaz's opinion was unpublished. Just one month later and Mr. Diaz was in his writ certiorari under his direct appeal, the Eleventh Circuit decided Acevedo's opinion on identical operative facts the Eleventh Circuit found that it was Apprendi error to simply include drug quantity in the indictment but not charge the jury with drug quantity as an element of the offense. United States v. Acevedo, 285 F.3d 1010 (11th Cir. 2002). In Acevedo, the error was found to be harmless because Acevedo was sentenced to less than twenty years imprisonment, the statutory maximum had no drug quantity been established. Mr. Diaz was sentenced to life imprisonment.

as to the conspiracy count, that all it had to find the Government had prove that Mr. Diaz attempted to possess with intent to distribute cocaine, and the problem there for the jury was that there was no cocaine. There did not have to be any cocaine for the gravamen of the crime of conspiracy to have been committed but the jury must have concluded using commons sense that to be guilty of distributing cocaine, there must be some amount of cocaine to distribute, and there was none, much less not five kilograms or more. So, in light of these inconsistent verdicts, the conclusion is compelling that in fact the Apprendi error in the case affected Mr. Diaz's substantial rights, and this statutory maximum sentence for count one, conspiracy to distribute cocaine, must be capped at the statutory maximum when the Government had failed to prove five or more kilograms of cocaine, that is, twenty years.

Petitioner was indicted an superseding indictment on August 21, 2000, this Court decided Apprendi in June 2000. So petitioner did not ask this Court for retroactive effect, because Mr. Diaz's case is an Post-Apprendi new constitutional law. See Apprendi v. New Jersey, 530 U.S. 466 (2000). Mr. Diaz's indictment alleged the enhanced statutory § 841(b)(1)(A), but the district court did not instruct the jury under Post-Apprendi new law, and he refused to provide the jury with the special jury verdict. The jury returned a general verdict and did not find beyond a reasonable doubt the drug quantity or drug type necessary to authorize the enhanced sentence imposed. Aprpendi held that any fact increasing the statutory maximum penalty must be submitted to the jury and proved beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99 (2013), this Court extended this principle to facts increasing mandatory minimum sentenced. Petitioner received a life sentence despite the absence of jury findings on the facts necessary to authorize that punishment.

The constitutional legitimacy of continued imprisonment under such circumstances warrant review.

The Eleventh Circuit wrongly applied in Mr. Diaz's direct appeal the plain error review applied in United States v. Acevedo, 285 F.3d 1010 (11th Cir. 2002).

IV. WHETHER ACTUAL INNOCENCE UNDER BOUSLEY V. UNITED STATES, 523 U.S. 614, (1998) OVERRIDES PROCEDURAL BARRIERS WHERE INTERVENING DECISIONS ESTABLISH THAT THE PETITIONER WAS CONVICTED WITHOUT FINDINGS ON ESSENTIAL ELEMENTS OF THE OFFENSE.

Bousley recognized that actual innocence functions as a gateway through otherwise applicable procedural barriers.

The Supreme Court held that:

Procedural default may be excused where a petitioner demonstrates actual innocence. The miscarriage-of-justice exceptions exists to prevent the continued imprisonment of person convicted under an erroneous understanding of federal criminal law.

Petitioner is actually innocent because the jury never found the essential statutory elements subsequently clarified by Supreme Court precedent.

Petitioner submits and emphasize:

no mens rea instruction,

no "knowingly and intentionally", finding,

no drug quantity finding,

no drug type finding,

no special jury verdict form, and

acquitted on the attempt count. Thus:

Petitioner submits that where intervening decisions reveal that essential elements were never charged, never submitted to the jury, or never proven beyond a reasonable doubt, procedural rules must yield to the Constitution's fundamental commitment to accuracy and justice.

The jury never found all facts necessary to criminalize the charged conduct. That transforms the case from ordinary instructional error into: conviction for conduct outside the statute.

This Court should grant certiorari to clarify that federal courts authority to review claims of statutory innocence notwithstanding procedural obstacles.

The jury instruction in this case did not charge with the mens rea instruction under the § 841(a)(1) ""knowingly and intentionally". See Appendix- C, (Jury instruction in Mr. Diaz's jury trial). See also Appendix-B, (when the district court refused to provide the jury with the special jury verdict form under Post-Apprendi new Constitutional rule. This Court should grant certiorari to clarify that federal retain authority to review claims of statutory innocence notwithstanding procedural obstacles.

V. WHETHER THE COURTS BELOW ERRED IN REJECTING PETITIONER'S LONGSTANDING MENS REA CLAIM WHERE PETITIONER ARGUED SINCE HIS DIRECT APPEAL IN THE ELEVENTH CIRCUIT, RELYING UPON FEOLA V. UNITED STATES, 420 U.S. 671 (1975), THAT HE LACKED THE CRIMINAL INTENT NECESSARY FOR THE SUBSTANTIVE NARCOTICS OFFENSE, AND SUBSEQUENT DECISIONS INCLUDING HERAS V. UNITED STATES, 609 F.3d 101 (2d Cir. 2010), COLLAZO V. UNITED STATES, 984 F.3d 1308 (9th Cir. 2021), AND COLSTON V. UNITED STATES, 4 F.4th 1179 (11th Cir. 2021), CONFIRM THE IMPORTANCE OF PROVING THE REQUISITE MENS FOR DRUG CONSPIRACIES AND RELATED OFFENSES.

The failure to require proof of mens rea implicates fundamental Due Process concerns.

For more than two decades Petitioner has consistenly argued that the Government failed to prove the criminal intent required for conviction.

In United States v. Feola, this Court held "that criminal intent is necessary to violate the underlying crime in the substantive offense". Petitioner in his brief direct appeal he argued the under Feola that he did not has the criminal intent necessary to violate the substantive offense. The petitioner argued as follows:

"Since the entire scheme was a fiction, and since various amounts were discussed, the jury would have been hard pressed to decide that Diaz had conspired or attempted to possess any particular amount. There was no chemist, no physical evidence of drugs, no handling or inspection of drug-nothing but bravado. To hold Mr. Diaz accountable for the more severe offense, the government had to prove his involvement in an amount of cocaine in excess of five kilos; indeed, since there was no real cocaine in this sting, it had to charge of conspiracy, and prove Diaz's awareness that five or more kilos was the object of the conspiracy. See United States v. Feola, 420 U.S. 671, 686 (1975)("to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.").

See Appendix-D , Petitioner's direct appeal brief pag. 55.

The Eleventh Circuit Court of Appeals denied petitioner's appeal without deciding that under "Feola v. United States, petitioner can not be convict . for conspiracy under 846 if the government can not prove at least the degree of criminal intent necessary for the substantive offense".

On 2010, ten years later after Mr. Diaz was convicted and sentenced, and denied his direct appeal, the Second Circuit Court of Appeals decided United States v. Heras. The Second Circuit decided that "to convict Heras of conspiring or attempting to possess with intent to distribute cocaine in violation of § 841(a)(1), the government was required to prove that he acted with the specific intent that the cocaine at issue be distribute proving at least the degree of criminal intent necessary for the substantive offense".

On 2021, 11 years later the Sixth Circuit decided United States v. Trevino, 7 F.4th 414 (6th Cir. 2021), this Court of Appeals opined "[T]he fundamental characteristic of a conspiracy is a joint commitment to an 'endeavor which,if completed, would satisfy all of the elements of [the underlying substantive offense.'" Ocasio v. United States, 578 U.S. 282, 136 S. Ct. 1423, 1429, 194 L. Ed 2d 520 (2016)(second alteration in original)(quoting Salinas v. United States, 522 U.S. 52, 65, 118 S. C. 469, 139 L. Ed. 2d 352 (1997)). Conspiracy is a specific intent crime. United States v. Merriwater, 78 F.3d 1070, 1078 (6th Cir. 1996). Specific intent requires something more than "the knowing commission of an act that the law makes a crime." United States v. Kimes, 246 F.3d 800, 807 (6th Cir. 2001)(quoting United States v. Kleinbart, 27 F.3d 586, 592, n.4, 307 U.S. App. D.C. 136 (D.C. Cir. 1994)). The specific intent required for conspiracy is intent to further the conspiracy's "common unlawfull objective." Merriweather, 78 F.3d at 1078 (quoting United States v. Mitchell, 49 F.3d 769, 775, 311 U.S. App. D.C. 35 (D.C. Cir. 1995)). At least as a general matter, the government is not required to prove that the conspirators knew that their objective was criminal. See Collins, 78 F.3d at 1038 (citing Ingram v. United States, 360 U.S. 672, 678, 79 S. Ct. 1314, 3 L. Ed. 2d 1503, 1959-2 C.B. 334 (1959)). The government must prove only that the conspirators acted with "at least the degree of criminal intent necessary for the substantive offense" that was the object of the conspiracy. United States v. Feola, 420 U.S. 671, 686, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1995)(citing Ingram, 360 U.S. at 678); see also United States v. Tipton, 269 F. App'x 551, 555 (6th Cir. 2008)(recognizing that charging a conspiracy to commit a different underlying offense could alter the mens rea requirement).

On 2022, finally the Ninth Circuit Court of Appeals decided United States v. Collazo. In this specific case, the Ninth Circuit decided as follow:

> "To obtain conviction and particular sentence for conspiracy to distribute controlled substance under 21 U.S.C. § 846, government had to prove defendant's mental state was the same as if he had been charged with the underlying offense and did not need to prove knowledge (or intent) with respect to drug and quantity under 21 U.S.C. § 841.
> The government must prove that the defendant had the intent to effectuate the object of the conspiracy. A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of the substantive criminal offense. In order to sustain a judgment of conviction on a charge of conspiracy to violates a federal statute, the government must prove at least the degree of criminal intent necessary for the substantive offense itself."

Compare the Ninth Circuit decision under Feola, with petitioner's direct appeal in 2002 to the Eleventh Circuit when he appealed using the same argument that the Ninth Circuit require under the Feola's criminal intent necessary for the substantive offense.

Mr. Diaz the petitioner in this case argued in this direct appeal the follows:

"Since the entire scheme was a fiction, and since various amounts were discussed, the jury would have been hard pressed to decided that Diaz had conspired or attempted to possess any particular amount. There was no chemist, no physical evidence of drugs, no handling or inspection of drug-nothing but bravado. To hold Mr. Diaz accountable for the more severe offense, the government had to prove his involvement in an amount of cocaine in excess of five kilos; indeed, since there was no real cocaine in this sting, it had to charge of conspiracy, and prove Diaz's awareness that five or more kilos was the object of the conspiracy. See United States v. Feola, 420 U.S. 671, 686 (1975)("to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute. the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.").

See Appendix- D, Petitioner's direct appeal brief pag. 55.
If this Court compare both arguments under the Feola's decision by this Court, petitioner argued more than two decades (about 24 years before), that he was not guilty under the conspiracy charge under 846 because the government did not prove the "specific intent criminal objective under the attempt count which the jury found petitioner not guilty.

This Court must be grant this writ this certiorari to resolve the unconstitutional conviction and sentence that petitioner received without the government proving the mens rea holding in Ruan and Rehaif.

This is not a new issue that the petitioner did not argues before, to the contrary position from the Eleventh Circuit, petitioner argued in direct appeal in 2002 that the government did not prove the criminal intent necessary to violate the substantive offense. This is very important issue, because petitioner's case is a reverse sting operation which the government claim that petitioner had predisposition to commit this offense.

Where a jury never makes the findings necessary to establish criminal intent, serious due process concerns arise.

CONCLUSION

WHEREFORE, the Petitioner, Abel Diaz, respectfully request this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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