

Nos. 15-50509, 16-50048, 16-50117, 16-50195, 16-50345

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**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE

*v.*

ROBERT COLLAZO, LINO DELGADO-VIDACA, JULIO  
RODRIGUEZ, STEVEN AMADOR, ISSAC BALLESTEROS  
DEFENDANTS-APPELLANTS

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*On Appeal from the United States District Court  
for the Southern District of California  
13CR4514-BEN*

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**SUPPLEMENTAL BRIEF REGARDING EN BANC CONSIDERATION**

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**INTRODUCTION**

Over the last 25 years, the law of this Circuit has evolved so that the test for determining conspirator liability for drug amounts under § 841(b) requires a disjunctive showing that the drug amount was either “reasonably foreseeable” or “within the scope” of a conspirator’s own agreement. Meanwhile, the test for conspirator liability under the Sentencing Guidelines requires a conjunctive showing that the drug amount was both “reasonably foreseeable” and “in furtherance of the jointly undertaken criminal activity.” As this Court recognized in *United States v. Torres*, 869 F.3d 1089 (9th Cir. 2017), there is little logic supporting this distinction, since the

Court “adopted the disjunctive formulation under § 841(b) in the first place to make the two approaches identical,” and then failed to adjust the § 841(b) test after the language in the Guidelines was amended. *Id.* at 1108. Ultimately, this Court in *Torres* concluded that “en banc review will likely be necessary to sort the whole mess out,” when the Court is confronted with “a case where it matters.” *Id.* at 1106, 1108.

This is not the case where it matters. First, as to both Delgado and Rodriguez, the court imposed a sentence below 20 years—the maximum sentence that would have applied even with no finding of quantity at all—and the record confirms the court never contemplated a sentence below the 10-year mandatory minimum triggered by the quantity finding. The drug quantity finding was therefore immaterial to their sentences. Second, as to all of the Appellants, the evidence showed that the conspiracy involved far more than the amounts of heroin and methamphetamine required to trigger the increased statutory maximums, *and* that those amounts were “reasonably foreseeable” to and within the scope of the agreement for each Appellant. Just as in *Torres*, “[d]rug dealing was not something that happened on the sidelines—it was the primary object of the conspiracy of which all defendants were members.” *Id.* at 1107. Given the extensive wire-tap evidence and

cooperator testimony presented at trial, a jury would have found the relatively modest 50 and 100 gram amounts whether they were instructed in the disjunctive, conjunctive, or some *Pinkerton* formulation. This Court should—as it has in the past—decline to take the issue en banc here and instead address it where it is not merely academic.

Nevertheless, if this Court elects to consider the issue en banc, the United States agrees that the disjunctive test from *Banuelos* should be set aside. Under the plain statutory text of § 841(b) and § 846, the sentencing range for a drug-distribution conspiracy is tied to the type and amount of drugs that the conspiracy *as a whole* “involv[es].” That straightforward reading of the statute avoids the flaws inherent in either a guidelines formulation or the *Pinkerton* test that other courts have adopted. “[T]he Guidelines do not affect our interpretation of a statute such as § 841,” and there is no reason in the legislative history or language of the statute that should tether the meaning of “involving” to the guidelines. *Torres*, 869 F.3d at 1098. Nor is there reason to “conflat[e] liability for the crime of conspiracy and for substantive crimes committed by the conspiracy,” as the *Pinkerton* test suffers. *United States v. Jauregui*, 918 F.3d 1050, 1062 (9th Cir. 2019). All the statute requires is evidence that the conspiracy

“involved” a drug type and quantity to trigger the penalty enhancements, which was readily proven here.

#### STATEMENT

Appellants are associates of the Mexican Mafia, a criminal organization that controls narcotics trafficking, extortion, and other illegal activity inside the U.S. prison system. Supplemental Excerpts of Record (SER) 827-56. Through a system known as “thirds,” the organization uses the threat of violence to collect one third of the proceeds from all drugs smuggled into prison, as well as “rent” from drug dealers operating outside of prison in areas controlled by the organization. SER 84, 605, 846. These funds are then passed up through a multi-layered leadership hierarchy. SER 828-833. At the top of the “pyramid” of the organization are approximately 150 “made” members, and below them, one level down, are individuals known as “secretaries” who serve as “facilitators” and pass along the orders of the made members. SER 828-833, 849-50, 874, 887.

The Appellants fulfilled distinct roles within the Mexican Mafia. Delgado had been recently released from custody after serving as the cellmate of “made” member, Luis Garcia, and he worked to collect rent payments from gang members selling drugs in Mexican Mafia-controlled areas of Southern California. SER 85-

86, 203, 234-35, 254, 398, 2655. Amador, who served as a “secretary” to Luis Garcia, coordinated the distribution of narcotics into various prisons in Southern California and authorized violence on behalf of the organization. SER 673-77, 723, 1102, 1447. Collazo was in charge of a minimum security yard at the Donovan correctional facility, where he coordinated the regular importation of methamphetamine and heroin, and ensured that taxation from the sale of those drugs were passed up to the organization. SER 687, 766, 1069, 2740-42, 2830, 2860. Finally, Rodriguez was housed in Ironwood prison, where he imported heroin both for his own use and for resale on the “yard” to benefit the Mexican Mafia. SER 1375-1410, 1485-91.

Following a jury trial, each Appellant was found guilty of a RICO conspiracy, in violation of 18 U.S.C. § 1962(d), and conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 841(a)(1). The jury returned special verdict forms, however, attributing different drug amounts to each defendant on the drug conspiracy offense, and the court imposed the following sentences:

Defendant	§ 841(b) Special Verdict Form	Sentence
Delgado	50 grams methamphetamine	210 months (18 years)
Amador	100 grams heroin	292 months (24.5 years)
Collazo	100 grams heroin, and 50 grams methamphetamine	360 months (30 years)
Rodriguez	100 grams heroin	175 months (14.5 years)

#### DISCUSSION

1. In *Torres*, this Court observed that the law has evolved—or rather failed to evolve—so that the test for conspirator liability for drug quantity is based on a disjunctive test from a 1991 version of the Sentencing Guidelines that has since been amended. 869 F.3d at 1097; *United States v. Banuelos*, 322 F.3d 700, 705 (9th Cir. 2003). As the concurrence noted, this Court has never provided “a reasoned explanation” for why this test—based on the definition of “relevant conduct” in the Guidelines—should have controlled the interpretation of § 841(b) in the first place. And, as the majority noted, there is little logic supporting continued application of the old, disjunctive test, since the formulation was adopted solely to match the Guidelines, which have now been changed. *Torres*, 869 F.3d at 1108.

Nevertheless, while this Court noted the illogic of applying the disjunctive instruction, it ultimately concluded “[w]e are not

prompted to call for our court to revisit the broader issue en banc in the context of this case, because in the end it would not alter its outcome.” *Id.* at 1107. So here. As in *Torres*, the evidence here showed that far more than the modest amounts of heroin and methamphetamine required to trigger the increased statutory maximums were distributed in furtherance of the conspiracy, *and* that those amounts were “reasonably foreseeable” to each Appellant. Whether the jury had been instructed in the conjunctive, the disjunctive, or under some instruction based on *Pinkerton* liability, the outcome of this case would have been the same.

First, as to Delgado and Rodriguez, the court sentenced them below the statutory maximum of 20 years that would apply even with no finding of drug amount at all, and nothing in the record suggests that the district court would have imposed less than the 10-year mandatory minimum. See 21 U.S.C. § 841(c). As to these two Appellants, therefore, any error in the jury instruction is necessarily harmless. See *United States v. Sanchez-Cervantes*, 282 F.3d 664, 669 (9th Cir. 2002) (“even with no finding of a particular drug quantity, a sentence of twenty years or less would not violate *Apprendi*”).<sup>1</sup>

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<sup>1</sup> Although Appellants argue that their ultimate sentence was still affected by the jury’s finding—because the court applied the same disjunctive test when calculating their Guideline range—

Second, as to all the Appellants, there was substantial evidence that far more than 50 or 100 grams of methamphetamine or heroin fell within the scope of the conspiracy, was distributed in furtherance of the conspiracy, and was reasonably foreseeable to each Appellant.<sup>2</sup> First, the jury heard evidence—from dozens of recorded calls—demonstrating widespread drug distribution outside of prison, in “ounce” [28 grams], “quarter” ounce [7 grams], and “eight ball” [3.5 grams] quantities. See, e.g., SER 267, 2641, 2600, 2619, 2649, 2659. They also heard numerous recorded calls discussing the regular and repeated importation of methamphetamine and heroin into prison, in quantities described

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there is nothing to support this assertion. In fact, the district court recognized that a different conjunctive formulation applied in the guidelines context. SER 2067-70 (district court stepping off the bench to read *Becerra* and concluding that it applied to the “guidelines” and “sentencing” not to the jury’s findings). Then, at sentencing, the court simply adopted the base offense level from the PSR. On this record, there is nothing to suggest that the court was silently applying the incorrect, disjunctive test from the § 841(b) context when calculating the Guidelines at sentencing. See *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1174-75 (9th Cir. 2017) (en banc) (“we will not assume that the court applied the wrong legal standard”).

<sup>2</sup> As to Collazo—who was sentenced to 30 years’ custody, below the 40 year statutory maximum of 21 U.S.C. § 841(b)(1)(B)—the jury would have been required to find only *five* grams of pure methamphetamine to support the necessary statutory maximum.

as “pieces” [28 grams] and “half pieces” [14 grams]. See, e.g. SER 2734-36, 2747, 2763, 2775, 2891, 2912, 2969.

These intercepted calls were corroborated by the testimony of numerous cooperating witnesses, who described the purchase, distribution, and importation of aggregate quantities far greater than 50 or 100 grams. See, e.g. SER 300-05, 313 (describing the sale of “pound” quantities of methamphetamine); SER 769 (describing the monthly importation of “ounce” or “half ounce” quantities of methamphetamine in a single yard controlled by Collazo); SER 1392-93 (describing the regular importation of “50 grams” of heroin for Rodriguez to distribute in prison). The jury also received evidence of multiple seizures of heroin and methamphetamine—directly tied to the intercepted calls—along with DEA chemist testimony that the methamphetamine seized was 99 percent pure. See SER 245, 251, 268-69, 746, 757, 766 1486, 1344, 1374.

In addition to this evidence that the conspiracy as a whole involved more than 50 or 100 grams, there was also substantial evidence that these amounts fell within the scope of each Appellant’s agreement and was reasonably foreseeable to them. First, the jury heard evidence that the entire purpose of the Mexican Mafia was to import narcotics into the U.S. prison system. An expert witness on the Mexican Mafia, and a cooperating former

member of the organization, explained how the organization operates, nationwide, with “tens of thousands” of associates and a “pyramid” leadership structure, with approximately 135 to 150 “made members” at the top and their “secretaries” one level below. SER 828, 836. The witnesses explained how the organization collects “rent” from criminal street gangs in return for permission to sell drugs in certain areas outside of prison, SER 84, 605, 630, 846-50, as well as “thirds” or one third of any drugs sold within the prison system. SER 84, 605, 846.

Second, the jury then heard evidence about each Appellant’s role within that larger organization. Delgado reported directly to the fiancée of “made” member Luis Garcia, and worked to collect “rent” on his behalf from drug sales across Southern California. SER 85-86, 203, 234-35, 254, 398, 2655. Amador served as a “secretary” to Garcia—one level below the top of the organizational pyramid—and he was intercepted collecting rent money in various prisons, and authorizing violence on behalf of the organization. SER 673-77, 723, 1102, 1447. Collazo was in charge of an entire yard at Donovan prison, which he used to regularly import narcotics using “work crews,” and then collect rent payment from the sale of those narcotics to pass up the organization. SER 687, 766, 1069, 1072-73, 1111, 2740-42, 2634, 2830, 2860. Finally, Rodriguez was housed in

Ironwood prison, where he regularly imported heroin for resale on the “yard” and then passed along “rent” to Amador and others. SER 1375-1410, 1485-91. Given each Appellant’s high-level role in the overall organization, it no doubt fell within the scope of the individuals appellants’ agreement and was reasonably foreseeable that at least 50 to 100 grams of methamphetamine or heroin would be distributed in furtherance of the conspiracy. In fact the jury convicted Delgado, Amador, and Collazo, of a RICO conspiracy, and found that each had “knowledge that a co-conspirator, not necessarily the defendant, would commit” a conspiracy “to distribute more than 50 grams of pure methamphetamine.” SER 2098-2105.<sup>3</sup>

Finally, in addition to the evidence about each Appellant’s role in the Mexican Mafia, the jury heard numerous intercepted calls in which several of the Appellants, including Amador and Collazo—the only two sentenced to more than 20 years—personally discussed the distribution of substantial quantities of heroin and methamphetamine in prison. See, e.g., SER 2789 (Amador

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<sup>3</sup> Each of these defendants was subject to a statutory maximum life sentence on this count, with or without the § 841(b) finding. See 18 U.S.C. § 1963(a); Cf. *United States v. Buckland*, 289 F.3d 558, 572 (9th Cir. 2002) (*Apprendi* error in failing to charge drug amount “immaterial” when the statutory maxima on all of the counts combined was greater than the sentence imposed).

discussing putting a “piece” [28 grams] in a balloon to be smuggled into prison); 2792 (Amador: “I need a whole piece [28 grams]”); 2795 (Amador and Ballesteros discussing the price of “two pieces [56 grams]”); 2814 (Amador discussing a drug-filled balloon recovered from an inmate that was “as long as like, a whole finger”); SER 2929 (Amador: “They caught him with fifteen grams . . . They caught him with six balloons”); SER 2631 (Collazo discussing the color of the wrapping on a “plug” of heroin); SER 2740 (Collazo discussing the distribution of “six or eight” grams); SER 2830 (Ballesteros explaining that Collazo had permission to “get that piece”); SER 2631 (Collazo: “That’s a [successful delivery] homie. The mule wants some of the black [heroin]”).

Taken together, the evidence against all four Appellants was sufficient for the jury to find that the requisite amounts of methamphetamine and heroin were both “reasonably foreseeable” *and* within the scope of the agreement *and* distributed in furtherance of the overall conspiracy. This is true, regardless of whether the jury had been instructed using the disjunctive test of *Banuelos*, the conjunctive test from the Guidelines, or some other test based on *Pinkerton* principles. Because the outcome of this case would be the same, regardless of the precise wording of the instruction given, this is not a “case where it matters,” and this

Court need not call for initial en banc consideration. *Torres*, 869 F.3d at 1106.

2. If this Court nevertheless elects to consider the issue en banc, the United States agrees that the current disjunctive test defining “relevant conduct” from *Banuelos* should not provide the test for conspirator liability under § 841(b) and § 846. As the concurrence noted in *Torres*, the term “relevant conduct” does not appear anywhere in the statutes. *Id.* at 1106. Instead, the plain language of the drug statute imposes “conspiracy wide” liability, with penalties triggered simply by the amount of drugs “involve[ed]” in the unified conspiracy itself.

The language in § 846 originated in a 1988 amendment that was intended “to assure that all the penalties applicable to an underlying drug offense also apply to an attempt or conspiracy to commit the offense.” 134 Cong. Rec. S17, 360-02 (daily ed. November 10, 1988) (statement of Sen. Biden)); see also *United States v. Martinez*, 987 F.2d 920, 925 (2d Cir. 1993). Thus, Section 846 provides that whoever “attempts or conspires” to distribute drugs “shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. § 846.

Those penalties turn on the type and amount of drugs “involv[ed]” in the “violation.” 21 U.S.C. § 841(b)(1)(A). For the substantive offense, there is no mens rea attached to the drug type or quantity. *United States v. Jefferson*, 791 F.3d 1013, 1019 (9th Cir. 2015). All that is required is that the offender know that he is distributing a federally controlled substance, and proof that the offense actually “involved” a specific quantity and type of narcotic.

The very same statutory provision governs penalties for conspiracy offenses, as well. “Involving” must therefore have the same meaning. Under the plain statutory text, the sentencing range for a drug-distribution conspiracy is set by the type and amount of drugs that the conspiracy “involve[s],” independent of a conspirator’s individual contributions to the conspiracy or what is reasonably foreseeable to him.

The Supreme Court’s decision in *United States v. Cotton*, 535 U.S. 625 (2002), supports this interpretation. In *Cotton*, the Supreme Court held that the imposition of life sentences on defendants convicted of conspiracy under Section 846 did not warrant relief under the plain-error standard, even though the drug amount was not alleged in the indictment or found by the jury, as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because “overwhelming” and “essentially uncontroverted” evidence showed

that “the conspiracy involved at least 50 grams of cocaine base.” 535 U.S. at 633. The Supreme Court’s analysis focused on the drug quantity involved in the conspiracy as a whole. Three separate times, the Court referred to the fact that “the conspiracy involved at least 50 grams of cocaine base.” *Id.* at 632 n.2, 633; see *id.* at 633 (evidence “revealed the conspiracy’s involvement with far more than 50 grams of cocaine base”); *id.* at 633 n.3 (“the relevant quantity for purposes of *Apprendi*” was the amount of cocaine “that the conspiracy involved”). Nothing in the Court’s reasoning suggested that the statutory penalties for the conspiracy would vary for each defendant, depending on what fell within the scope of or was reasonably foreseeable to any given defendant.

The conspiracy-wide approach to sentencing is also consistent with the traditional rule that “a conspiracy is a single, unified offense,” *United States v. Pressley*, 469 F.3d 63, 66 (2d Cir. 2006) (per curiam), and thus a single “violation” for purposes of Section 841(b). Relying on this principle, Courts of Appeals have rejected the argument that, when determining the applicable sentencing range under Section 841(b), it is improper to aggregate multiple individual drug sales in furtherance of a single conspiracy. See *United States v. Law*, 528 F.3d 888, 906 (D.C. Cir. 2008); *Pressley*, 469 F.3d at 66 (collecting cases). In line with that

rationale, several courts of appeals have also held that statutory maximum sentences are based upon the amount of drugs in the conspiracy as a whole and are the same for all co-conspirators. See, e.g., *Derman v. United States*, 298 F.3d 34, 42-43 (1st Cir. 2002); *United States v. Turner*, 319 F.3d 716, 722-23 (5th Cir. 2003); *United States v. Seymour*, 519 F.3d 700, 710 (7th Cir. 2008) (“Once a jury has determined that a conspiracy involved a type and quantity of drugs, and has found a particular defendant guilty of participating in the conspiracy, the jury has established the statutory maximum sentence that any one participant in the conspiracy may receive”); *United States v. Stiger*, 413 F.3d 1185, 1193 (10th Cir. 2005) (“Booker does not alter the well-established rule that a finding of drug type and quantity for the conspiracy as a whole sets the maximum sentence that each coconspirator can constitutionally be given”).

It is true that most Circuits have rejected that reading, and have instead held that penalties for co-conspirators can be different, depending on the quantity of drugs that was reasonably foreseeable to the individual defendant. See *United States v. Stoddard*, 892 F.3d 1203, 1219 (D.C. Cir. 2018) (collecting cases). And, in fact, it is now the Department of Justice policy to *charge* drug amounts in conspiracy cases based only on defendant-specific evidence in light

of *Alleyne v. United States*, 570 U.S. 99 (2013). See *Id.* at 121; *United States v. Haines*, 803 F.3d 713, 741 (5th Cir. 2015); *United States v. Young*, 847 F.3d 328, 366 (6th Cir. 2017). Nevertheless, those cases that have applied defendant-specific limitations—like this Court’s decision in *Banuelos*—are not based on any language in Sections 841 or 846; nothing in the drug statutes indicates that a conspiracy is a single, unified offense for one conspirator, but a different offense for another conspirator.

Rather than relying on statutory language to support the defendant-specific approach to mandatory-minimum sentences in drug-conspiracy cases, the Courts of Appeals have instead relied either on (1) general principles of conspiratorial liability set forth in *Pinkerton* or (2) the definition of relevant conduct set forth in the Sentencing Guidelines. See, e.g. *United States v. Pizarro*, 772 F.3d 284, 287 (1st Cir. 2014); *United States v. Haines*, 803 F.3d 713, 741 (5th Cir. 2015); *United States v. Rangel*, 781 F.3d 736, 742 (4th Cir. 2015); *United States v. Stoddard*, 892 F.3d 1203, 1220 (D.C. Cir. 2018). It is far from clear, however, why either of these would provide the correct standard for § 841(b) liability.

First, *Pinkerton* does not cabin a co-conspirator’s liability for the inchoate offense of conspiracy, which “is a distinct offense from the completed object of the conspiracy.” *Garrett v. United States*,

471 U.S. 773, 778 (1985). A drug conspirator’s liability rests on his agreement, and once it is established that he knowingly and voluntarily joined a conspiratorial agreement, he is liable for the full scope of the conspiracy he joined. See *United States v. Jimenez Recio*, 537 U.S. 270, 274-75 (2003) (conspiracy may be proved based on the unlawful agreement, regardless of whether the substantive offense is committed); *United States v. Shabani*, 513 U.S. 10, 13-14 (1994) (holding that no overt act is necessary for conspiracy liability under Section 846). Instead of limiting a conspirator’s liability for an illegal agreement, *Pinkerton* expands a conspirator’s liability beyond that agreement—to include the substantive offenses committed by his co-conspirators that are reasonably foreseeable and in furtherance of the conspiracy. 328 U.S. at 647-48.

Thus, while the principle of reasonable foreseeability set forth in *Pinkerton* is “relevant when a conspirator is charged with a substantive offense arising from the actions of a coconspirator,” it is not relevant “when a conspirator is charged with conspiracy.” *United States v. Collins*, 415 F.3d 304, 313 (4th Cir. 2005). In other words, the concept of reasonable foreseeability in *Pinkerton* cannot reduce the scope of a conspirator’s liability for the conspiracy itself. To the contrary, the Supreme Court made clear that conviction for conspiracy does not preclude conviction for the underlying

substantive offense, and vice versa. *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). Accordingly, “[a]lthough a ‘small-time’ drug seller may not be responsible for all the transactions or actions of his associates, he is responsible for the conspiracy in which he participated.” *United States v. Robinson*, 547 F.3d 632, 639 (6th Cir. 2008).

Second, the Supreme Court has rejected the notion that the Sentencing Guidelines can limit clear statutory language. See, e.g., *Neal v. United States*, 516 U.S. 284 (1996) (rejecting argument that method for calculating drug weight for purposes of the Guidelines “should also control the mandatory minimum calculation”); *Kimbrough v. United States*, 552 U.S. 85, 104 (2007) (citing *Neal* and “emphasizing that the Commission had not purported to interpret the statute”); see also *Smith v. United States*, 508 U.S. 223, 231 (1993) (describing as “dubious” the assumption that the meaning of a statute’s text can be deduced from different language in the Guidelines). And, the argument that a Guidelines provision should limit the language of Section 841 has even less force here, since as the concurrence noted in *Torres*, “relevant conduct” is a “Guidelines term not found in § 841(b).” 869 F.3d at 1008.

In short, a plain reading of § 841(b) and § 846 sets penalties based on the total amount of narcotics “involved” in the conspiracy,

even if that amount is beyond the scope of the defendant's individual participation. Therefore, if this Court elects to revisit *Banuelos* en banc, the appropriate jury instruction for § 846 and § 841(b) requires only (1) that the defendant was guilty of participating in a conspiracy, and (2) that the conspiracy involved a type and quantity of drugs sufficient to trigger the statutory maximum and mandatory minimum sentence. No further individualized determination is required.

Respectfully submitted,

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AUGUST 12, 2019.

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Nos. 15-50509, 16-50048, 16-50117, 16-50195, 16-50345

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JULIO RODRIGUEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of California  
Honorable Roger T. Benitez, District Judge, Presiding

APPELLANTS' COURT-ORDERED BRIEF REGARDING  
INITIAL EN BANC CONSIDERATION

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 16-50117
	)	
Plaintiff-Appellee,	)	U.S.D.C. No. 13cr4514-BEN
	)	
v.	)	
	)	
JULIO RODRIGUEZ,	)	
	)	
Defendant-Appellant.	)	
_____	)	

**Introduction and Rule 35(b) Statement**

The appellants in this consolidated appeal were subjected to both mandatory-minimum sentences under 21 U.S.C. § 841(b) and enhancements under the sentencing guidelines, which were based on drugs that were distributed by their coconspirators. This Court has consistently held that the test for coconspirator liability in a drug case should be the same under § 841(b) as it is under the sentencing guidelines, which now require the conduct of coconspirators to be “within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.”<sup>1</sup>

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<sup>1</sup> USSG § 1B1.3(a)(1)(B) (2015).

The appellants accordingly argued to the district court that – consistent with the sentencing guidelines – it was required to instruct the jury that a drug quantity attributable to an individual defendant must be *both* jointly undertaken in furtherance of that defendant’s agreement *and* reasonably foreseeable to that defendant (i.e., the “conjunctive formulation”).<sup>2</sup> The district court refused. It instead instructed the jury in the “disjunctive” regarding coconspirator liability. That is, whether certain drug types and quantities were *either* “reasonably foreseeable” to an individual defendant *or* “fell within the scope of his particular agreement.”

In supplemental opening and reply briefs filed by Julio Rodriguez (and joined by the others), the appellants renewed their arguments on direct appeal. On June 20, 2019 (after oral argument), this Court ordered the parties to file “simultaneous briefs . . . setting forth their respective positions on whether the case should be heard initially en banc. Specifically, we ask the parties to address the proper jury instruction under 21 U.S.C. § 841(b) for determining the drug type and quantity involved in a conspiracy offense.”

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<sup>2</sup> The trial took place before the 2015 guidelines amendment. The appellants accordingly asked the district court to instruct the jury consistent with the 2014 version of the guidelines, which limited coconspirator liability to “all reasonably foreseeable acts . . . of others in furtherance of the jointly undertaken criminal activity.” USSG § 1B1.3(a)(1)(B) (2014).

The correct jury instruction for determining coconspirator liability for drug quantities is obviously a significant issue. Violations of sections 841 and 846 are among the most frequently prosecuted federal offenses and the potential consequences for defendants are extreme – mandatory decades and even life in prison. Indeed, at least three members of this Court have recognized as much and opined that this issue should be resolved by the Court sitting en banc.<sup>3</sup> The question presented is thus of “exceptional importance” and en banc consideration “is necessary to secure or maintain uniformity of the court’s decisions.” Fed. R. App. P. 35(a). Julio Rodriguez accordingly submits this supplemental brief on behalf of all the appellants in this consolidated appeal.

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<sup>3</sup> *United States v. Torres*, 869 F.3d 1089, 1106 (9th Cir. 2017) (maj. op.) (“en banc review will likely be necessary to sort the whole mess out”); *id.* at 1098 (Ikuta, J., concurring specially) (the situation “is far from satisfactory and we should consider revisiting this issue en banc”).

## Background

The two-count indictment charged the appellants with participating in a RICO conspiracy (with the primary object of distributing methamphetamine and heroin) and a drug-trafficking conspiracy involving methamphetamine and heroin. The gist of it was that the appellants – all of whom were inmates at different California state prisons during the relevant period – were associates of the Mexican Mafia who distributed drugs in prison in furtherance of a wide-ranging criminal enterprise.

Julio Rodriguez grew up in poverty in Oceanside, California. He joined a Hispanic street gang and was a heroin addict by the age of 15. Like the other appellants, his alleged involvement in the charged conspiracies occurred exclusively while he was an inmate in state prison.

Unlike the other appellants, however, Rodriguez was *not* recorded on an illegal cell phone doing drug deals while in prison. Instead, the government alleged that Rodriguez's wife smuggled drugs into prison for him, which he then allegedly distributed to others. And although Rodriguez's wife cooperated and testified against him at trial, the government never asked her how many times she actually smuggled drugs into prison for her husband.

That was significant because Rodriguez's principal defense at trial was that

he did not distribute 100 grams or more of heroin because the heroin his wife smuggled into prison for him was for his personal use.<sup>4</sup> Specifically, Rodriguez argued that, because of his addiction, he consumed copious amounts of heroin (at least four-to-five grams) every day. To that end, he presented the testimony of several witnesses who were familiar with his debilitating addiction, including his wife (a licensed vocational nurse who, before Rodriguez was incarcerated, used to inject him) and the expert testimony of a narcotics-dependency specialist.

Rodriguez's alleged role in the conspiracy is especially significant – vis-a-vis the scope of his particular agreement – because the government had alleged a far-flung and loosely organized plan to smuggle drugs into several state prisons and county jails. It involved at least 20 coconspirators (some charged in related indictments) and any number of unindicted coconspirators, some of whom were on the streets while others were housed in other prisons and jails.

In the event that the jury found a defendant guilty of the drug conspiracy charged in Count 2, it was required to make special findings regarding drug type

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<sup>4</sup> Rodriguez's defense to the methamphetamine allegations was that he had nothing to do with methamphetamine and the jury agreed – answering the methamphetamine questions on the special verdict form in the negative.

and quantity.<sup>5</sup> Over the defendants’ objections, the court instructed the jury that it should make those findings based on quantities that were *either* “reasonably foreseeable” to an individual defendant *or* that “fell within the scope of his particular agreement.”<sup>6</sup>

This ruling was significant because the jury could find – under the disjunctive instruction – that Rodriguez was liable for at least 100 grams of heroin based on the conduct of coconspirators that was reasonably foreseeable to him but *not* within the scope of his particular agreement. In other words, the jury could find him liable for 100 grams or more based on the conduct of alleged coconspirators other than those that were working with Rodriguez and his wife (i.e., coconspirators who distributed heroin in other prisons and jails).

Rodriguez was convicted of both counts but the jury answered the special

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<sup>5</sup> With respect to Count 1, the jury was required to make a special finding as to whether “the government has proven beyond a reasonable doubt that the defendant’s agreement included the knowledge that a co-conspirator . . . would commit the following racketeering act in furtherance of the RICO conspiracy: conspiracy to distribute more than 50 grams of pure methamphetamine or 500 grams of a mixture containing methamphetamine.”

<sup>6</sup> As set forth in the opening and reply briefs, the defendants specifically objected to the court’s jury instructions after receiving a jury note. Counsel for Rodriguez and Amador explicitly identified this issue, cited the relevant authorities, and requested that the court instruct the jury in the conjunctive. *See* Rodriguez Supp. AOB at 7-10.

interrogatories regarding methamphetamine (for both counts) in the negative. With respect to Count 2, however, the jury found that the amount of heroin attributable to Rodriguez was 100 grams or more.

As a result of the jury's findings then, Rodriguez was subject to a 20-year maximum sentence on Count 1 and a five-year mandatory minimum and 40-year maximum on Count 2. At sentencing, the district court relied on the jury's findings to establish a base-offense level 24 under the guidelines. After applying a two-level increase for distribution in prison and another two-level increase for aggravating role, the court imposed the high end of 175 months.

Rodriguez briefed this issue in his supplemental briefs for all the appellants in this consolidated appeal. This Court heard oral argument on February 6, 2019. On June 20, the panel ordered the parties to file concurrent supplemental briefs regarding an initial hearing en banc.

## Argument

- I. Although this Court has repeatedly stated that the tests for determining drug quantity under § 841(b) and the sentencing guidelines should be the same, some of the Court’s opinions are inconsistent and contain “undermined logic”; en banc review is accordingly necessary to “sort the whole mess out.”**

The majority and concurring opinions in *United States v. Torres* – both of which recommend en banc review – set forth the history of this Court’s precedent interpreting the requirements for finding drug type and quantity in conspiracy cases.<sup>7</sup> In brief, this Court held in *United States v. Becerra* that drug quantity determinations under § 841(b) should be the same as under the sentencing guidelines, which – at the time that the appellant in *Becerra* was sentenced – required the “disjunctive formulation.”<sup>8</sup> In arriving at that conclusion, the *Becerra* Court expressly rejected the government’s argument that the analysis should be different:

We reject the government’s argument that sentencing under the statutory mandatory minimums should differ from the Guidelines. . . . We see no reason why sentencing under the statutory mandatory minimums should differ. They are, in essence, part of the Guidelines scheme.<sup>9</sup>

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<sup>7</sup> See 869 F.3d at 1096-1100 (Ikuta, J. concurring specially); 1104-06 (maj. op.).

<sup>8</sup> 992 F.2d 960, 967 (1993).

<sup>9</sup> *Id.* at 967, n.2.

For the most part, this Court has applied *Becerra*'s logic throughout its subsequent holdings while at the same time overlooking the revision to the guidelines amendment that replaced the disjunctive formulation with the conjunctive. For example, in *United States v. Mesa-Farias*, the Court stated that *Becerra* "required . . . that sentencing for conspiracy be the same under § 841(b) as under the Sentencing Guidelines."<sup>10</sup> Similarly, in *United States v. Banuelos*, this Court again remarked that it was "well-settled" that the rule is the same under both the guidelines and Title 21.<sup>11</sup>

This is where things begin to get complicated however, because the *Banuelos* court also – erroneously – observed that "[i]t is well settled that . . . the district court is required to determine the quantity of drugs the conspirator reasonably foresaw or which fell within the scope of his particular agreement with the [co]conspirators."<sup>12</sup> In fact, as the *Torres* majority points out, by the time *Banuelos* was decided "the Guidelines had already been amended in 1992 to require that defendants be held accountable only for the conduct of others that was both '(i) in furtherance of the jointly undertaken criminal activity; and (ii)

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<sup>10</sup> 53 F.3d 258, 260 (9th Cir. 1995).

<sup>11</sup> 322 F.3d 700, 704 (9th Cir. 2003).

<sup>12</sup> *Id.* at 702 (quotations and citations omitted).

reasonably foreseeable in connection with that criminal activity.”<sup>13</sup>

This significant change in the guidelines was first recognized by this Court in *United States v. Ortiz*, where the Court wrote “to clarify the proper standard for determining relevant conduct” and concluded that it must be “*both* in furtherance of jointly undertaken activity *and* reasonably foreseeable.”<sup>14</sup> *Ortiz* was only a guidelines case, however, and did not address the appropriate standard under § 841(b).<sup>15</sup>

This Court has thus “clearly held, on at least three separate occasions, that the same approach should be applied when analyzing culpability under § 841(b) as is applied under the Guidelines,”<sup>16</sup> which now require the conjunctive formulation. The appellants’ “straightforward” argument here is accordingly the same as in

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<sup>13</sup> 869 F.3d at 1105. Since *Torres*, Judge Berzon has also written separately to “suggest that this court reconsider *Banuelos* en banc” but for a different reason: because *Banuelos* “imported the test for *Pinkerton* liability . . . into the determination of whether a defendant can be held liable for the crime of conspiracy itself, thereby conflating liability for the crime of conspiracy and for substantive crimes committed by the conspiracy.” *United States v. Jauregui*, 918 F.3d 1050, 1062 (9th Cir. 2019) (Berzon, J., concurring).

<sup>14</sup> 362 F.3d 1274, 1275 (9th Cir. 2004).

<sup>15</sup> *Torres*, 869 F.3d at 1105.

<sup>16</sup> *Id.*

*Torres*:<sup>17</sup>

If [this Court’s] holdings in *Becerra*, *Mesa-Farias*, and *Banuelos* require that the same standard be applied when sentencing for a conspiracy under § 841(b) as under the Guidelines . . . then when *Ortiz* changed the test to be applied under the Guidelines, it also changed the test to be applied under § 841(b). *That is a strong argument.*<sup>18</sup>

And although the *Torres* majority declined to reach the issue because the error was not preserved in that case, it concluded that this Court should decide this question en banc:

[E]n banc review will likely be necessary to sort the whole mess out. As the special concurrence points out, there are other reasons to revisit some of the issues raised in *Becerra* and *Banuelos*. Even if we decide to maintain the result of *Banuelos*, that the disjunctive formulation should be applied to sentencing under § 841(b), we would have an opportunity to give reasoning for that result that makes more sense than our current undermined logic.<sup>19</sup>

Similarly, although Judge Ikuta concurred specially in *Torres* to express her view that “there has been no intervening controlling authority overruling our interpretation of § 841(b) in *Banuelos*,” she too recommended hearing en banc:

[A]pplying *Becerra* in this context is far from satisfactory, and we should consider revisiting this issue en banc. Because *Banuelos* relied

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<sup>17</sup> Unlike in *Torres*, however, the appellants’ argument here is preserved and therefore subject to de novo review.

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Id.* at 1106.

on *Becerra*, and *Becerra* relied on the Guidelines, the rationale underlying the interpretation of § 841(b) in *Becerra* and *Banuelos* has been undermined. Moreover, *Becerra*'s reasoning is not persuasive. Among other things, we have not yet explained how our standard is consistent with the plain text of § 841(b) . . . [and] we have not provided a reasoned explanation of why our general principles for determining co-conspirator liability do not apply to drug quantity determinations.<sup>20</sup>

In the simplest terms, this Court in *Becerra* stated plainly that the test for coconspirator liability in this context should be the same under § 841(b) as it is under the guidelines. And this Court reiterated that view in *Banuelos*. But the *Banuelos* court (presumably) unwittingly<sup>21</sup> cited the disjunctive guidelines standard from *Becerra*, which had by then been changed to the conjunctive formulation. And there is divided opinion in this circuit as to which part of *Banuelos* (i.e., the statement that the two tests should be the same or the statement that the test for § 841(b) is disjunctive) is controlling.<sup>22</sup> En banc review is indeed “necessary to sort this whole mess out.”

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<sup>20</sup> *Id.* at 1098-99 (Ikuta, J., concurring specially).

<sup>21</sup> *See id.* at 1106.

<sup>22</sup> *See id.* at 1098 (Ikuta, J., concurring specially) (concluding that “there has been no intervening controlling authority overruling our interpretation of § 841(b) in *Banuelos*”); *id.* at 1106 (“the reasoning of *Banuelos* in favor of the disjunctive formulation has been completely undermined”).

**II. The conjunctive formulation is the proper instruction for coconspirator liability in drug cases because the guidelines and § 841(b) were promulgated together and applying a less demanding standard for constitutionally required findings under § 841(b) is inconsistent with federal sentencing objectives and unworkable in practice.**

A. *The Supreme Court held in Dorsey v. United States that § 841(b) and the guidelines should be interpreted consistently in order to promote uniformity in sentencing.*

In 1986, Congress enacted § 841(b), which provided for new, mandatory-minimum sentences.<sup>23</sup> The Sentencing Commission promptly incorporated the new “mandatory minimums into the first version of the Guidelines themselves.”<sup>24</sup> “It did so by setting a base offense level for a first-time drug offender that corresponded to the lowest Guidelines range above the applicable mandatory minimum.”<sup>25</sup>

In *Dorsey v. United States*, the Supreme Court addressed the interaction between the guidelines and § 841(b) and concluded that the two should be interpreted consistently, so as not to “undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing.”<sup>26</sup> And

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<sup>23</sup> *Dorsey v. United States*, 567 U.S. 260, 266 (2012).

<sup>24</sup> *Id.* at 266-67.

<sup>25</sup> *Id.* at 267.

<sup>26</sup> *Id.* at 264.

it rested that statutory construction “upon an analysis of the Guidelines-based sentencing system Congress has established [and] how the Guidelines interact with federal statutes setting forth specific terms of imprisonment.”<sup>27</sup>

The Supreme Court’s conclusion in *Dorsey* – that § 841(b) and the guidelines should be interpreted consistently in order to promote uniformity and proportionality – echoes this Court’s analysis in *Becerra*<sup>28</sup> and weighs heavily in favor of applying the same standard for coconspirator liability under both the guidelines and § 841(b).

*B. Both constitutional and practical considerations – particularly after Dorsey – militate toward applying the same standard under both § 841(b) and the guidelines.*

As a threshold matter, the mandatory minimums in § 841(b) are onerous and have been criticized by several commentators as unduly harsh.<sup>29</sup> Moreover, the type and quantity of a controlled substance (when it triggers a mandatory minimum

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<sup>27</sup> *Id.* at 264-65.

<sup>28</sup> *See* 992 F.2d at 967, n.2. (“We see no reason why sentencing under the statutory mandatory minimums should differ. They are . . . part of the Guidelines scheme.”).

<sup>29</sup> *See, e.g.*, Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003); *In re Ellis*, 356 F.3d 1198, 1220 (9th Cir. 2004) (en banc) (Kozinski, J., concurring) (“our most distinguished jurists and commentators have spoken out against the Procrustean regime of mandatory minimum sentences”).

or increased maximum) is an element of the offense, subject to the beyond-a-reasonable-doubt standard articulated in *Apprendi v. New Jersey*.<sup>30</sup> Particularly with the benefit of the Supreme Court's guidance in *Dorsey*, it makes no sense to apply a lesser standard when making constitutionally required findings – which trigger harsh mandatory-minimum sentences – than the one required for making guidelines calculations. Again, the aim is to *avoid* unwarranted disparities. Certainly, the rule of lenity supports the conjunctive formulation.<sup>31</sup>

Second, applying a lesser standard is simply unworkable in practice. Rodriguez's case is a good example. Here, the jury was required to apply the less rigorous, disjunctive test under the most demanding standard of proof (beyond a reasonable doubt) in order to arrive at a quantity to establish the statutory maximum and any mandatory minimum. The jury concluded that Rodriguez was responsible for more than 100 grams of heroin, which tripped a five-year mandatory minimum and a 40-year maximum.

Then, notwithstanding the jury's findings, the district court was – ostensibly – required to apply the more exacting, conjunctive test under the least demanding standard of proof (preponderance) in order to arrive at the base-offense level under

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<sup>30</sup> 530 U.S. 466 (2000).

<sup>31</sup> See *Burrage v. United States*, 134 S. Ct. 881, 891 (2014).

the guidelines. It was hardly coincidental, then, that the court arrived at the base-offense level corresponding to the 100 grams of heroin found by the jury and that the only argument at sentencing was whether the court should *increase* that base-offense level under the guidelines.

Put another way, a jury's beyond-a-reasonable-doubt finding does not just establish the mandatory minimum and statutory maximum. It will also always establish the "floor" under the guidelines. Accordingly, absent comity between § 841(b) and the guidelines, the guidelines' conjunctive standard will apply only to findings that increase the offense level beyond the floor arrived at by the jury under the disjunctive (or any other lesser) standard.

*C. Applying any other less demanding standard for coconspirator liability in drug cases is incompatible with both Dorsey and proportionality in sentencing.*

In *Torres*, Judge Ikuta expresses misgivings about applying a guidelines standard for liability when "the plain text of § 841(b) . . . requires a court to first identify the violation of § 841(a) at issue and then determine whether that violation was 'involving' specified quantities of drugs."<sup>32</sup> She goes on to state that this Court has "not provided a reasoned explanation of why our general principles for

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<sup>32</sup> 869 F.3d at 1098-99 (Ikuta, J., concurring specially).

determining co-conspirator liability [e.g., *Pinkerton*<sup>33</sup>] do not apply to drug quantity determinations.”<sup>34</sup> This argument appears to be based on Judge Ikuta’s reading of *United States v. Liquori*, where this Court stated that “nothing in the guidelines requires us to apply guideline definitions in construing a federal sentencing statute.”<sup>35</sup>

*Liquori*, however, has been undermined – if not completely overruled – by *Dorsey*, which requires § 841(b) and the guidelines to be read consistently in order to promote uniformity and proportionality in sentencing. Additionally, in *Honeycutt v. United States*, the Supreme Court recently rejected the argument that Congress is presumed to have incorporated the *Pinkerton* standard when it enacted Title 21.<sup>36</sup>

Although *Honeycutt* was a forfeiture case addressing § 853, its analysis applies with even greater force to § 841(b) because *Pinkerton* was decided in 1946 – decades before the relatively recent phenomenon of mandatory minimums. The *Pinkerton* Court could not have considered the propriety of a toothless, reasonably-

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<sup>33</sup> *Pinkerton v. United States*, 328 U.S. 640 (1946).

<sup>34</sup> *Id.* at 1099.

<sup>35</sup> *Id.* at 1098 (quoting *Liquori*, 5 F.3d 435, 438 (9th Cir. 1993)).

<sup>36</sup> 137 S. Ct. 1626, 1634 (2017) (“The plain text and structure of § 853 leave no doubt that Congress did not incorporate [*Pinkerton*].”)

foreseeable standard in this context. Furthermore, *Pinkerton* relied on the overt-act requirement of the different conspiracy offense at issue in that case.<sup>37</sup> Section 846 does not have an overt-act requirement,<sup>38</sup> however, rendering *Pinkerton* liability inapplicable under § 841(b). Finally, even if there were doubt, the rule of lenity again supports the conjunctive formulation.<sup>39</sup>

Applying the same standard under both the guidelines and § 841(b) is, in practice, the only workable option. It is also required under *Dorsey* and consistent with the Sixth Amendment, as articulated in *Apprendi* and *Alleyne v. United States*.<sup>40</sup> The conjunctive formulation is the proper instruction.

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<sup>37</sup> 328 U.S. at 647.

<sup>38</sup> *See United States v. Shabani*, 513 U.S. 10 (1994).

<sup>39</sup> *See Burrage*, 134 S. Ct. at 891.

<sup>40</sup> 570 U.S. 99, 116 (2013) (“facts that increase mandatory minimum sentences must be submitted to the jury”).

## Conclusion

The *Torres* majority concluded by expressing its concern “about the state of our caselaw”:

As it stands, our precedent either is in conflict or calls for us to apply the disjunctive formulation to sentencing under § 841(b) and the conjunctive formulation under the Guidelines, even though we adopted the disjunctive formulation under § 841(b) in the first place to make the two approaches identical. That inconsistency cannot stand. In a case where it matters, it should be addressed en banc.<sup>41</sup>

Julio Rodriguez was subjected to a mandatory minimum and an enhanced base-offense level, both of which were likely based on the conduct of his coconspirators. And although that conduct may – arguably – have been reasonably foreseeable, it was not within the scope of his particular agreement. The issue is preserved, this is a case where it matters, and this Court should address it en banc.

Respectfully submitted,

Dated: August 12, 2019

/s John C. Lemon  
1350 Columbia Street, Suite 600  
San Diego, California 92101

Attorney for Mr. Rodriguez

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<sup>41</sup> 869 F.3d at 1108.

### **Certificate of Related Cases**

Undersigned counsel is aware of the following related cases (in addition to co-appellants joining this brief):

- United States v. Garibay, 16-50098
- United States v. Ruvalcaba-Morales, 15-50563

Respectfully submitted,

Dated: August 12, 2019

/s John C. Lemon  
JOHN C. LEMON

### **Certificate of Compliance**

Consistent with this Court's order, the body of this supplemental brief is less than 20 pages.

Date: August 12, 2019

s/ John C. Lemon  
JOHN C. LEMON