Nos. 16-30109 and 16-30110

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

FABIAN SANDOVAL-RAMOS and RAUL ARCILA,

Defendants/Appellants.

Appeal from the United States District Court for
the District of Oregon
Case No. 3:14-cr-00267-BR

The Honorable Anna J. Brown
United States District Judge

APPELLANTS' OPENING BRIEF

Matthew A. Schindler, #964190
Attorney at Law
501 Fourth Street #324
Lake Oswego, OR 97034
Telephone: (503) 699-7333
Fax: (503) 345-9372
Email: mattschindler@comcast.net

Attorney for Defendant/Appellant
RAUL ARCILA

Benjamin T. Andersen, #06256
Attorney at Law
101 SW Madison St. #9068
Portland, OR 97207-9068
Telephone: (503) 860-2531
Email: btandersen@btandersen.com

Attorney for Defendant/Appellant
FABIAN SANDOVAL-RAMOS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

Constitutional and Statutory Provisions

Nos. 16-30109 and 16-30110

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

FABIAN SANDOVAL-RAMOS and RAUL ARCILA,

Defendants/Appellants.

APPELLANT'S OPENING BRIEF

I. JURISDICTION

A. District Court Jurisdiction

Defendants Fabian Sandoval-Ramos ("Sandoval") and Raul Arcila ("Arcila") went to trial on various federal drugs offenses and were convicted by a jury. ER 1, 7. The United States District Court had jurisdiction over this criminal matter pursuant to 18 U.S.C. § 3231.

B. Appellate Jurisdiction

The Ninth Circuit has jurisdiction over this appeal of final judgments pursuant to 28 U.S.C. § 1291.

////

C. Timeliness

On April 20, 2016, pursuant to FRAP 4(b)(1)(A)(i), Mr. Arcila timely filed a Notice of Appeal from the Judgment of Conviction and Statement of Reasons, entered on April 18, 2016. ER 69. Mr. Sandoval timely filed a Notice of Appeal on April 22, 2016. ER 70.

D. Appeal from a Final Judgment

This is an appeal from the final Judgment of the United States District Court for the District of Oregon in a criminal case. ER 1, 7.

II. CUSTODY STATUS

On April 14, 2016, the District Court imposed a sentence of 20 years in prison on each defendant. Mr. Sandoval is presently serving the sentence imposed in this case in the custody of the Bureau of Prisons at La Tuna Federal Corrections Institution in Anthony, Texas. His projected release date is September 3, 2031.

Mr. Arcila is presently serving his sentence at Herlong Federal Corrections Institution in Herlong, California. His projected release date is June 13, 2032.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court err by instructing the jury that it had to find whether or not it was reasonably foreseeable that "overdoses [sic] deaths could occur as a result of users ingesting the distributed heroin?

////

Did the District Court err by allowing the government to invent a proximate cause requirement and then offer hours of irrelevant and unfairly prejudicial evidence to support it?

Did the District Court abuse its discretion allowing the government to repeatedly rely on hearsay testimony from law enforcement officers intended to bolster the testimony of informants whose credibility was unchallenged?

Did the District Court err in imposing a mandatory minimum sentence for a conviction of conspiracy to distribute heroin when the sole object of the conspiracy was not a factor that would trigger a mandatory minimum sentence?

Did the District Court err in calculating the applicable sentencing guideline range when it applied a US Sentencing Guideline that did not specifically enumerate the offense of conviction?

IV. STATEMENT OF THE CASE AND THE FACTS

A. Procedural History:

On June 24, 2014, a federal grand jury indicted defendants Sandoval and Arcila and five others with two counts of Conspiracy to Distribute Heroin in violation of 21 U.S.C. §§ 846 and 841(a)(1). ER 1313-14. Count 1 of the indictment further charged that "[the] conspiracy distributed heroin, the use of which resulted in the death of another person . . ." in violation of 21 U.S.C. § 846 and §§ 841(a)(1) and (b)(1)(C). *Id.* Count 2 further charged that "[the] violation

involved 1,000 grams or more of . . . heroin," in violation 21 U.S.C. § 846 and §§ 841(a)(1) and (b)(1)(A)(i). ER 1314.

Counts 9 and 10 charged defendant Arcila with Possession with Intent to Distribute Heroin on two separate dates, further alleging that each possession "involved 100 grams or more . . . of heroin." ER 1316.

Defendant Arcila entered a plea of not guilty at his arraignment on July 1, 2014, and the magistrate judge ordered him detained pretrial as a danger to the community and a flight risk. ER 1327, ECF 16. On July 2, 2014, he was released on conditions. ER 1328, ECF 22. He came back into custody after a violation and has been detained since January 27, 2015. ER 1334, ECF 91.

Defendant Sandoval entered a plea of not guilty at his arraignment on July 2, 2014, and was detained pre-trial as a danger to the community and as a flight risk. ER 1327-28, ECF 21.

Only defendants Sandoval and Arcila proceeded to trial. Trial commenced on Tuesday November 3, 2015, and concluded on Friday November 6, 2015. The jury returned guilty verdicts against both defendants on all applicable counts. ER 1, 7. Additionally, the jury unanimously found beyond a reasonable doubt that (1) "[J.D.] used heroin distributed in the course of this conspiracy which resulted in his death," Jury Instruction at ER 58; (2) "death resulting from use of the distributed heroin was a reasonably foreseeable result of the Count 1 conspiracy,"

Jury Instruction at ER 59; (3) "1,000 grams or more of heroin was involved in [the conspiracy alleged in Count 2]," Jury Instruction at ER 60; and, (4) "the amount of heroin possessed with intent to distribute by [Defendant Arcila], or someone he aided and abetted, was more [] than 100 grams," ER 257. See Verdict Forms at ER 48-53.

B. Statement of Facts:

The facts adduced at trial are summarized in the Government's Sentencing Memorandum. ER 141. On Saturday March 29, 2014, a man named Justin Delong used heroin for the last time and died. ER 142. The parties stipulated that his use of heroin killed him. ER 1133. A search of Mr. Delong's phone led to a woman named Morgan Godvin, a co-defendant. ER 142. That same day agents executed a controlled buy from Ms. Godvin. *Id*. A search warrant was executed at the apartment she shared with co-defendant Michael Rosa. ER 142. At that time, Ms. Godvin admitted selling the heroin to Mr. Delong. *Id.* She, in turn, disclosed that she received her heroin from Mr. Rosa. ER 142-143. Agents searched Mr. Rosa's car and found heroin and cash. Mr. Rosa admitted being a heroin dealer and reported buying his heroin from a man named Shane Baker. ER 143. Mr. Rosa believed that Mr. Baker's source of supply was an English speaking Mexican male. ER 143.

On March 30, 2014, agents orchestrated a controlled buy from Mr. Baker. ER 143. The next day, agents executed a search warrant at Mr. Baker's apartment where they found heroin and cash. ER 143. Mr. Baker admitted selling heroin to Mr. Rosa. ER 143. Mr. Baker agreed to set up two controlled buys from his supplier, who he knew as "Mexican Bobby." ER 144-45. Fugitive co-defendant Placido Ramirez-Coronel and appellant Arcila delivered the heroin in those controlled buys to Mr. Baker. *Id*. Through surveillance and additional investigation, agents identified appellant Sandoval as being involved in the conspiracy as well, as he was the leaseholder of the house used by Ramirez-Coronel and Arcila, and had material used to "cut" heroin at his own house. ER 144-149. Mr. Baker also identified Sandoval as being "Mexican Bobby," although he later retracted that identification. *Id*.

V. SUMMARY OF ARGUMENT

A. The District Court erred by instructing the jury to decide whether death was the reasonably foreseeable consequence of the appellants' activities.

B. Based erroneously on *United States v. Houston*, 406 F.3d 1121, 1124 n.5 (9th Cir. 2005), the District Court allowed the government to introduce irrelevant and unfairly prejudicial evidence to purportedly demonstrate that death was the reasonably foreseeable consequence of the appellants' conspiracy.

C. The District Court erred when it admitted extensive hearsay testimony from law enforcement officers intended to bolster informant testimony that was never challenged.

D. The District Court erred by applying USSG § 2D1.1(a)(1), because that sentencing guideline specifically applies to a conviction for a substantive drug distribution offense pursuant to 21 U.S.C. § 841, not to a conspiracy conviction pursuant to 21 U.S.C. § 846. The Court should have applied USSG § 2D1.1(a)(5).

E. The District Court erred in applying a mandatory minimum sentence of 20 years. A conviction for conspiracy pursuant to 21 U.S.C. § 846 cannot support the application of a 20 year mandatory minimum sentence unless a specific object of the conspiracy was an element that would trigger a mandatory minimum sentence for a substantive offense pursuant to 21 U.S.C. § 841.

VI. ARGUMENT

A. The Supplemental Jury Instruction and Special Verdict requiring proximate cause misstated the elements of the crime and were confusing.

1. Standard of Review

Whether supplemental jury instructions correctly state the elements of an offense is a question of law reviewed de novo. *See, United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004); *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003).

2. Relevant Facts

The supplemental instruction and special verdict on proximate cause requested by the government were first raised during a colloquy between the District Court and the government concerning jury instructions:

> "MS. BOLSTAD: Sorry, your Honor, I forgot one thing.
>
> THE COURT: Yes.
>
> MS. BOLSTAD: You're going to think I'm crazy. It's probably not the first time in this trial.
> …..
>
> MS. BOLSTAD: The Government is going to request a special verdict question on foreseeability. I believe, right now, under the state of the law, it's not required. What concerns me is *Burrage* left the issue open.
>
> THE COURT: All right.
>
> MS. BOLSTAD: And, two, in the Ninth Circuit, the *Houston* case mentions that there might be instances in which someone is so far removed from the death that due process requires some showing of foreseeability."

ER 709.

The District Court directed the government to draft a verdict form and supplemental jury instruction. ER 709, 991.

The government filed its proposed supplemental jury instruction on November 5, 2015. ER 62-63. The government requested that the jury be required

to find that death was the reasonably foreseeable consequence of the appellants' activities. *Id.*

The government requested the instruction state:

> "Although the government must prove that death resulted from the use of the heroin, the government need not prove that the death was a foreseeable result of a heroin distribution conspiracy."

ER 62.

It then further requested that the jury be instructed that:

> "If you find the defendant Guilty of the conspiracy charged in Count 1 of the indictment, you are then to determine whether the government proved beyond a reasonable doubt that death resulting from the use of heroin distributed by the Conspiracy in Count 1 was a reasonably foreseeable result of the conspiracy to distribute heroin. The government does not have to prove that the defendant knew or intended the exact overdose death would occur, nor the identity of the person who died. Rather, it must have been reasonably foreseeable to the defendant that overdose deaths could occur as a result of users ingesting the product distributed by the conspiracy."

ER 63.

The District Court later discussed the special verdict and supplemental instruction with the government. It expressed concern about the internal inconsistency in the government's proposed instruction.

> "THE COURT: I think what you're asking me to tell the jury is the Government doesn't have to prove foreseeability in order to get a conviction on Count 1.
>
> MS. BOLSTAD: Correct.

> THE COURT: But you're asking me to ask the jury to find whether the Government, nevertheless, proved foreseeability in a verdict form.
>
> MS. BOLSTAD: In a special verdict question.
>
> THE COURT: Okay. This is very confusing, the way you've laid it out because it's -- the way you've laid it out makes it sound like it doesn't have to be proved and yet it does have to be proved. So I'm going to try to rephrase that."

ER 602.

Nothing was rephrased. Despite the government acknowledging that it was not necessary, the District Court ruled that proximate cause would be a part of the verdict and instructions. The defendants took exception to that instruction:

> "THE COURT: Let me be clear for the record . . . . Because there is also a question in the case law with respect to this potential issue of foreseeability and a due process-type challenge for certain defendants who may be too remote to the actual end-user who died, I agree with the Government that a special verdict question needs to be. You have an exception to that format -- to that formulation and to the fact I'm asking it. You don't need to continue to state that. I think that's very clear."

ER 61.

The final jury instruction adopted the government's "confusing" formulation of the instruction and the verdict. ER 48, 50, 58-59.

The Court instructed the jury as follows regarding Count 1:

> "Thus, in order to satisfy this third element, the government must prove beyond a reasonable doubt that Justin DeLong's use of the

> distributed heroin was the cause in fact of his death, but the government need not prove that his death was a foreseeable result of the heroin distribution conspiracy or that the Defendants knew or should have known that the distributed heroin would cause his death . . ."

The District Court then went on to instruct the jury specifically about a special verdict regarding foreseeability:

> "But if you find the Defendant is Guilty of the Conspiracy charged in Count 1, you must then determine whether the government also proved beyond a reasonable doubt that death resulting from use of the distributed heroin was a reasonably foreseeable result of the Count 1 conspiracy (even though this factor is not necessary to prove a Defendant guilty of Count 1 in the first instance).
>
> For this **Special Verdict Question**, please note the government does not have to prove that the Defendant knew or intended the exact overdose death would occur or knew the identity of the person who dies. In order for you to answer "yes" to this Special Verdict Question, the government must prove beyond a reasonable doubt that it was reasonably foreseeable to the Defendant that overdoes (sic.) deaths could occur as a result of users ingesting the distributed heroin."

ER 59.

3. Legal Argument

To prove violations of § 841(a)(1) and § 841(b)(1)(C) the government was not required to prove proximate cause. *United States v. Houston*, 406 F.3d 1121, 1122 (9th Cir. 2005). To instruct the jury that it was required to find death a

reasonably foreseeable consequence of the drug trafficking conspiracy was error. *Houston*, 406 F.3d at 1122–23.

A defendant convicted of the substantive offense of distribution of heroin faces an enhanced penalty "if death or serious bodily injury results from the use of such substance." 21 U.S.C. § 841(b)(1)(C). Nothing in the language of the statute suggests that a death must be foreseeable before the enhanced penalty provision applies. The plain language of § 841(b)(1)(C) demonstrates that proximate cause is not a required element. *Id.*

"The addition of proximate cause as an element necessary for invoking the twenty-year minimum sentence described in § 841(b)(1)(C) is inconsistent with the statutory language, our circuit's related precedent, and the conclusions of every other federal court of appeals to consider the issue." *Houston*, 406 F.3d at1123. The District Court here committed the same error identified in *Houston*: adding an element of proximate cause where none is required.

The Ninth Circuit found in *Houston*, however, that an effectively higher burden of proof was harmless to the defendant under the circumstances. The situation here is very different. Unlike *Houston,* the error here impacted the integrity of the entire trial.

The instruction in *Houston* made the jury's finding regarding foreseeability an *element* of the crime. *United States v. Houston*, 406 F.3d 1121, 1125 (9th Cir.

2005). The jury in *Houston* knew what it had to find in order to convict the defendant, because the instruction was not internally inconsistent. The *Houston* instruction did not ask the jury to ignore proximate cause in making the determination of guilt and then assess it in the context of finding guilt.

In this case, different from *Houston*, the issue is that the first part of the instruction provides the jury a correct statement of the law, that the government does not have to prove reasonable foreseeability, and the next part of the instruction paradoxically imposes a non-existent requirement that the jury find proximate cause in a "special verdict." Unlike *Houston*, there is no way this did not serve to confuse the jury about the elements it was required to find. It confused the District Court. ER 602. And yet it is this very formulation that District Court described as "confusing" which became the core instruction used to convict the appellants this case. ER 602. Different from *Houston*, the crucial jury instruction here was nonsensically contradictory and that had to have impacted how the jury viewed all the elements it was required to find.

Unlike *Houston*, the error here cannot be harmless because of the proof the government was allowed to introduce to prove proximate cause. The mountain of irrelevant and unfairly prejudicial evidence the District Court allowed the government to pile onto the appellants in order prove something completely immaterial to the case renders this error anything but harmless. The jury

instruction cannot be viewed in isolation. That instructional error led to erroneous evidentiary rulings that infected the trial with error and allowed the government to make this trial into a referendum on heroin. This is addressed below.

B. The government's extensive evidence regarding proximate cause was irrelevant and unfairly prejudicial.

1. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See, United States v. Santini*, 656 F.3d 1075, 1077 (9th Cir. 2011) (per curiam); *United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir. 2007). The District Court's construction or interpretation of the Federal Rules of Evidence is a question of law subject to de novo review. *See, United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758-59 (9th Cir. 2007); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003). Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. *See United States v. Garrido*, 596 F.3d 613, 616 (9th Cir. 2010).

2. Relevant Facts

On October 29, 2015 the government and the appellants reached a stipulation concerning causation. ER 1133. The parties agreed that heroin killed Mr. Delong. ER 1133. This reduced the government's burden and eliminated the need to prove that heroin was the cause of death. *See, Burrage v. United States,*

134 S. Ct. 881, 892, 187 L. Ed. 2d 715 (2014). No more proof on that issue was necessary. The government stated in opening: "[W]e all agree it killed him." ER 1039.

Despite a stipulation that heroin caused Mr. Delong's death, the government nevertheless went about proving in irrelevant and highly prejudicial detail that heroin killed Mr. Delong. It made sure the jury knew he suffered an awful death and this same drug was killing many, many other people. Proof of this kind began with the government's first witness, Dustin Kilty. ER 1074. Mr. Kilty shared an apartment with Mr. Delong and discovered his body. ER 1074, 1077.

Mr. Kilty describes in narrative detail finding his dead friend and house mate. ER 1077-1079. He described the blood. ER 1077. He described the bubbling white foam around his mouth. *Id*. He described the onset of rigor mortis which he understood from his hunting background. ER 1079. Then the government asked him to describe what the body felt like. *Id*. He was asked how he felt emotionally and what he did to try and save his friend. ER 1079-1080. It then adduced more irrelevant evidence concerning Mr. Kilty's impressions of Mr. Delong's addiction issues and current use. ER 1082.

The government's next irrelevant and unfairly prejudicial witness was the Deputy Medical Examiner, Charles Lovato. ER 1085. The medical examiner testified extensively to the state of Mr. Delong's dead body. ER 1088-1092. The

medical examiner described in great detail the blood Mr. Delong sprayed around the room as he suffered a horrible death from a heroin overdose. ER 1088. The government did not forget to note for the jury that Mr. Delong was expectorating white foam from his dead, blue lips. ER 1089. The government made sure to elicit what the corpse felt like to the witness. ER 1089. In response, the witness described in great detail rigor and lividity. ER 1089-90. He talked further about the abscesses that form from intravenous heroin use. ER 1091-1092.

The government next ran the medical examiner through the flotsam and jetsam of a dead heroin addict's room. ER 1092-1093. The government finished with this witness by asking if the medical examiner is responding to more or less heroin deaths in the last five years. ER 1097. The defense objected. *Id*.

The government's next irrelevant witness was a forensic toxicologist, Sara Short. ER 1099. In a trial where the parties stipulated that heroin was the cause of death, Ms. Short provides nearly 10 transcribed pages of irrelevant testimony about the testing she did to conclude that heroin was used recently by Mr. Delong. ER 1099-1109.

The government's next irrelevant and unfairly prejudicial witness was Timothy Goshorn who lived with Mr. Rosa. ER 1113. Mr. Goshorn was present when the police searched their apartment. ER 1113. Nearly all of his testimony

was irrelevant. The government made sure to ask about his personal knowledge regarding heroin deaths:

Q: [AUSA] "Do you know anyone who was died from heroin?"

A: "Many people."

It then transitioned right into the witness' irrelevant experiences with heroin and his brother's death from an overdose. ER 1114. It then asked him about his own overdose experiences. ER 1115. He was then asked to transition right into the equally irrelevant horrors that someone experiences withdrawing from heroin. ER 1115. He discussed how the drug makes one into a slave. *Id*. The government managed to elicit a small piece of relevant evidence concerning the witnesses' involvement trafficking drugs for Mr. Rosa before veering right back into completely irrelevant and unfairly prejudicial testimony:

"Q. When you found out that Mr. Delong had died, how did you feel?

A. It was so many emotions. Figuring out what day it was, three years and a day after my brother died from the drugs Justin had given him. And then my roommate gave him -- I don't know. It was very emotional.

And I feel for anyone, you know, that -- he has a family. And I know what my family went through, and it's just sad."

ER 1119.

////

Before finishing up, the government made sure to adduce more irrelevant testimony through a non-responsive redirect asking the witness to compare the quality of white heroin from Ohio with the tar heroin from Oregon. ER 1124. Far more of Day 1 of this jury trial was dedicated to irrelevant and unfairly prejudicial evidence than anything relevant to a material issue of fact.

The cavalcade of irrelevant witnesses providing unfairly prejudicial testimony continued the morning of Day 2 when the government called the Chief Medical Examiner Forensic Pathologist, Larry Lewman, in a case where the parties stipulated that Mr. Delong's death was caused by heroin. ER 863. Dr. Lewman apparently was intended to meet the government's non-existent burden to prove proximate cause:

> Q. And so have you been involved in the investigation of deaths? Have you performed autopsies of deaths related to drug overdoses?
>
> A. Many times.
>
> Q. Do you have an idea of the number of times that you've done –
>
> A. Oh, hundreds. I mean, if we go back 40-some-odd years. And, oh, yeah. I mean, heroin is the most common overdose thing. We used to see -- maybe in the '70s, maybe a handful of those a year. It was at that time what we called China white. It was processed in Asia. Came through Canada.

ER 868.

A defense objection to this obviously irrelevant and unfairly prejudicial line of testimony was overruled. *Id*. Hearing the District Court's approval for this "background," Dr. Lewman piled on:

> THE WITNESS: So, to summarize, it was fairly rare when we were dealing with heroin in the '70s. Then in the '80s, '90s, hundreds, it became just epidemic.
>
> We've had over 100 heroin overdoses a year. We had 122 last year. Over a hundred for the last ten years, then -- in the '90s. And it's a totally different kind of heroin. It comes in from Mexico now. We rarely see the China white stuff. This is the gooey-brown stuff that comes in through Mexico.
>
> BY MS. BOLSTAD:
>
> Q. You mentioned over 100 in 2014.
>
> Do you know the exact number of heroin overdose deaths in the state of Oregon?
>
> A. Well, that's it.
>
> Q. Over 100?
>
> A. It was 122 last year. 111, 2013. 140-some, 2011. Over 100 ever since -- I have it back to 2004. We've had slightly less than 100 -- more than a hundred every year, and it's not going down. This year, I haven't counted them yet. But we see them all the time.

ER 869-870.

The government's segue out of this irrelevant, unfairly prejudicial line of inquiry was too perfect: "Okay. I would like to talk about this case now."

ER 896. Because up to that point, nothing in the doctor's testimony was relevant to a material issue in the case.

The irony is that as the government pivoted and redirected the witness to "the case" it still could not manage to adduce relevant testimony. Instead it had him discuss the particulars of disassembling this man's body in the course of an autopsy. ER 869. From there, Dr. Lewman went about describing in unfairly prejudicial detail, why he concluded that Mr. Delong died from a heroin overdose, something already resolved by stipulation. ER 870, 1132.

Even though not an issue in the case, he explained in depth the toxicological underpinnings of his conclusions. ER 872. From there his testimony drifted back into the horrible death that Mr. Delong undoubtedly suffered in the purgatory between the needle piercing his vein and the respite death provided hours later. ER 873. The defense made no attempt to impeach this witness. ER 875-876.

From there the government called the lead detective responsible for responding to the scene of the overdose, Sommer Andersen. ER 876. Hopes for relevant evidence were dashed when the government immediately used the detective to explain that she responds to so many overdose deaths they had developed a handy shorthand: calling them *Len Bias* investigations. ER 879. Even the drug dealers knew about them. *Id*. Fortunately, the government did not

spare the jury the irrelevant, unfairly prejudicial story about how cocaine killing the basketball star led to the law. *Id*.

Almost for the first time in the trial there was short detour into some relevant evidence, the government then had the detective repeat the deputy medical examiner's irrelevant, unfairly prejudicial testimony about blood and foam from the mouth. ER 883.

As the coda to the first portion of the trial, which focused almost entirely on irrelevant issues like the horrible death Mr. Delong suffered, how awful heroin is, and the fact that thousands of people have been killed by it, the government finally asks the court to read the stipulation that heroin caused the man's death:

> Jurors, I told you at the beginning of the case that evidence comes to you in three forms: One through the witness stand, one in the form of exhibits that are received into evidence, and the third form is any agreed fact or stipulation. A stipulation is an agreement. It simply means it's before you. *It doesn't require any other proof or evidence.*
>
> I told you during jury selection yesterday -- and now the parties confirm it as evidence -- that there's not any disagreement that Mr. Delong died of a heroin overdose. The question, of course, is whether the Government proves that heroin from which he overdosed was distributed in the course of the conspiracy alleged in Count 1; and that is very much an issue in the case.

ER 908-909 (emphasis added).

To this point in the trial, with more than a day gone, nearly of all the testimony adduced was focused on a matter stipulated to by the parties or was

some backhanded attempt by the government to meet the burden of proximate cause it had invented for itself.

To further assure that the trial remained a referendum on heroin rather than relevant evidence, the government made sure to discuss at length with its addict witnesses how much they had suffered for their addiction. ER 975-976. Morgan Godvin, who actually sold the fatal dose of heroin to Mr. Delong and will spend five years in prison, was allowed to testify about how her mother had died of a morphine overdose and was facing homelessness. ER 976. She was then allowed to relate her life story of drug addiction to the jury presumably because it had some small connection to Mr. Delong. ER 978. This narrative began six years before Mr. Delong's death or any of the relevant acts alleged in the indictment. ER 978.

The witness was allowed to testify at length about her journeys through drug treatment and the criminal justice system. ER 979-980. All of this incredibly prejudicial and irrelevant evidence was presumably more background. ER 868. And while the government eventually stumbled onto relevant testimony from Ms. Godvin, it nevertheless injected additional irrelevant, unfairly prejudicial testimony about heroin:

> Q. Can you tell the jury what it's like to go through heroin withdrawal, from your own perspective?
>
> A. So it's like the worst flu that you've ever had. But instead of that mental fogginess, you're just hyper-acute. You're very aware.

> Your skin hurts. The wind hurts your skin. Your clothes hurt your skin. Nausea. Sometimes accompanied with diarrhea, intense stomach cramps. And absolutely crushing insomnia. You do not sleep, not for one second. And all you want is a break from the agony. And you can't. You're awake, and you're just hyper-acute. You're acutely aware of everything that's going on.

Q. How long does that last?

A. Five days to a week.

Q. Is there something that cures that feeling?

A. Heroin.

Q. Is there anything else that can cure that feeling?

A. Outside of another opiate drug, no.

ER 988-989.

If there was a relevant purpose for this testimony, the appellants struggle to identify it.

The government could not resist tacking on more irrelevant evidence about *Len Bias* investigations and the witness' familiarity with that term. ER 990. Besides being unfairly prejudicial, the testimony was all hearsay.

The next addict informant, convicted felon Michael Rosa, would provide the government with similar irrelevant evidence. ER 715. First he tells his sad, sympathetic, and irrelevant history of being a junkie. ER 715-718. Nothing about this testimony has any connection to the elements of the crime.

The government made sure to have him again describe just how bad it is to withdraw from heroin and his own preparations to deal with the all too frequent overdoses:

> "Q. Prior to your arrest in July of 2014, had you tried to get off heroin before?
>
> A. I have, yes.
>
> Q. What is that -- how did that go for you?
>
> A. Not well. I --
>
> Q. Why?
>
> A. I always seem to go back. Heroin is a very strong drug, especially when you have lots of friends who do it.
>
> Q. Is it harder when it's all around you?
>
> A. Definitely.
>
> Q. What's it like to go through heroin withdrawal?
>
> A. It's like having the flu, but a hundred times worse.
>
> Q. And did you go through that when you were arrested in July 2014?
>
> A. I certainly did.
>
> Q. Is there any medicine you can take to feel better?
>
> A. Yes. They have suboxones and subutex that take away the withdrawals.
>
> Q. And do you recall that suboxone -- did you have any with you when you were arrested in this case, in March of 2014?
>
> A. Yes, I did.

Q. Why did you have suboxone?

A. I always kept some on hand just in case I wasn't able to get heroin, just so I would be able to function. It's a fail-safe.

ER 731-732.

How any of this connects to issues relevant to this litigation is unclear. Perhaps it is more "background" about heroin needed to assure that these men would be denied a fair trial on the only issue that mattered according to the District Court: whether the heroin came from their conspiracy.

The government then again injects the unfairly prejudicial *Len Bias* shorthand to improperly convey again the breadth of heroin problem this jury must address. ER 752. From there the government probed Mr. Rosa's completely irrelevant knowledge of addicts who had died. ER 752-753. Unsurprisingly, Mr. Rosa's reply was irrelevant and unfairly prejudicial:

Q. When you sold heroin to people, Mr. Rosa, did you know you were selling a product that endangered people's lives?

A. Yes, I did.

Q. Do you know people who have died from heroin overdoses?

A. Yes, I do.

Q. How many?

A. 15.

Q. What kind of people? Are these your friends or your customers, or what?

A. These are people that I went to high school with, for the most part.

Q. So knowing all of these risks, knowing 15 people who have died, why did you keep selling it?

A. Because I needed to keep using it.

ER 753.

That is patently improper testimony that has no relevance to any question of material fact. It can only be explained by the government's desire to prove the proximate cause requirement that did not actually exist. It could not be a more obvious appeal to juror sympathy.

Having seen that nothing would restrain its presentation of irrelevant and unfairly prejudicial evidence, the government continued with its next informant addict witness, Shane Baker, to elicit information about how bad heroin is for at least the third time:

Q. Did you ever try to stop using heroin before you were arrested?

A. Once.

Q. How did that go?

A. Not too good.

Q. What's it like to try to get off of heroin?

A. You are very, very sick.

Q. What kind of sickness?

A. Throwing up, diarrhea, hallucinations, stuff like that.

Q. How long does that last?

A. About two weeks, maybe three, depending.

Q. How do you get better when you're going through heroin withdrawal?

A. Use more heroin or some other type of alternative drug.

ER 769-780.

It did not stop there, however. The government and court erroneously decided the crime required proximate cause, so the government probes Mr. Baker to see if he can help meet that burden and he does. ER 780-781.

Q. Have you ever had any close calls with overdosing on heroin?

A. No, I have not.

Q. What about others? Do you know anyone in your life who has died from a heroin overdose?

A. No.

Q. Do you know that people do die from heroin over --

A. Yes.

ER 781.

The government made sure to elicit this piece of irrelevant, unfairly prejudicial testimony from Mr. Baker:

Q. Do you have prior experience with such a thing?

A. To an extent, yes.

> Q. And by such a thing, I mean do you have prior experience with the police talking to you about somebody who's died from heroin?
>
> A. Yes.

ER 793.

Along this same theme, the jury was provided more unfairly prejudicial and completely irrelevant evidence by the government's drug expert, Sergeant Jan Kubic. ER 573. After first acknowledging that he knew nothing in particular about the case, he provided his own irrelevant, unfairly prejudicial narrative about how much worse it is now and how many more people are dying:

> Q. Okay. So tell us about heroin. Have some of your thousands of investigations involved heroin?
>
> A. Yes, they have. Heroin has exploded in the Portland area. It's probably exploded nationwide.
>
> My first tour in dope was from '97 to 2003, 2004. And we had heroin users and we had heroin out here, but it wasn't the same as it has become now, since 2010. It's changed. There is a just a lot more heroin. There are a lot more users. It's readily available, and we're seeing a lot of overdose deaths.

ER 573.

3. Legal Argument

Citing Federal Rules of Evidence 401 and 403 to a United States Court of Appeals seems trite. There is simply no law, no case, nothing, that supports what the District Court allowed the government to do here. By the time the government got done with its case-in-chief, the jury had heard so much irrelevant, unfairly

prejudicial testimony about heroin's evils and the deaths it causes, they must have been surprised not to stumble over dead junkies on their way into the courthouse. Despite a stipulation, this jury had been exposed needlessly and repeatedly to the horrible details of Mr. Delong's death.

The evidence erroneously admitted did not have the slightest tendency to make any fact of consequence more or less probable. FRE 401(a), (b). What it undoubtedly did was galvanize every juror in that room to convict the men the government kept pointing to. All of this irrelevant evidence was directed at proving the irrelevant and undisputed fact that heroin is a terrible drug. It was a clear invitation to convict based on the emotional weight of this evidence.

Even assuming that any of this testimony had the slightest relevance, which the appellants do not concede, it was all unfairly prejudicial or unnecessarily cumulative and should have been excluded on that basis. FRE 403. The government cannot invent a new requirement of proof never called for by any statute or court and then use irrelevant, unfairly prejudicial testimony to satisfy it. The government's proof supporting a fictional element extrapolated from a cinder of dicta hanging off the end of *Houston* rendered this trial completely unfair. The admission of this evidence is plain error and an abuse of discretion. Accordingly, this case should be reversed and remanded for a new trial.

C. The District Court erred in allowing the government to call law enforcement witnesses to provide hearsay testimony to corroborate informant testimony that was never challenged.

1. Standard of Review

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *See, United States v. Santini*, 656 F.3d 1075, 1077 (9th Cir. 2011) (per curiam); *United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir. 2007). The District Court's construction or interpretation of the Federal Rules of Evidence is a question of law subject to de novo review. *See, United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758-59 (9th Cir. 2007); *United States v. Garrido*, 596 F.3d 613, 616 (9th Cir. 2010); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003). Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. *See, United States v. Garrido,* 596 F.3d 613, 616 (9th Cir. 2010)*; United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006)*; United States v. Lillard,* 354 F.3d 850, 853 (9th Cir. 2003).

2. Relevant Facts

A trial already unfair because of the repeated admission of prejudicial and irrelevant evidence was made worse by the government's reliance on inadmissible hearsay. The government used lead detective Sommer Andersen to provide extensive inadmissible hearsay. ER 885-894. There are ten pages of transcript where nearly all of her testimony is hearsay. *Id*. Much of this inadmissible

hearsay would be directed at improperly establishing the dead man's communications. *Id*. The rest was an attempt to prospectively bolster the testimony of addict informants whose credibility would never be challenged. *Id*.

Detective Andersen discusses what the medical examiner told her. ER 885. Then she goes on at length summarizing hearsay messages from a cell phone that presumably belonged to Mr. Delong. ER 886. She then relates numerous hearsay text messages between the dead man Delong and a woman named Cat who never testified. ER 886-891. Then she testifies about a number of hearsay statements between Ms. Godvin and Mr. Delong. ER 891-894. The government runs through an entire colloquy with her intended to bolster an informant, in this case Mr. Rosa, with more hearsay about *Len Bias* cases:

> Q. And did he speak with the police?
>
> A. He did.
>
> Q. Was it made clear to Mr. Rosa the nature of your investigation?
>
> A. Yes.
>
> Q. And tell us about -- how is it that you inform suspects in a **Len Bias** case about the seriousness of the investigation?
>
> A. We typically, in these cases, don't waste a lot of time starting from scratch and letting the suspect or the person we're talking to really control the interview.
>
> Part of it is because we have this time-sensitive nature. You know, if it were just a regular investigation, we might spend more time kind of letting them tell their story before we started asking

more specific questions and, you know, providing them with more details about what we maybe knew or what we had been doing.

In this case, and in cases like it, we'll typically be very upfront. And we were very upfront with Mr. Rosa about we're here because we're investigating a heroin overdose death. We're here because we believe that as of right now you are involved in this chain of events leading to the death. And that what we're hoping for is to focus on who your supplier is and to obtain information from you that will help us identify where you're obtaining these heroin -- the heroin from.

Q. At any point in these preliminary discussions with suspects in a **Len Bias** case, do you tell them you're getting charged right now and here's what you're looking at?

A. We don't tell them that they're being charged right now, but we tell them that they could be facing potentially these **Len Bias** charges of substantial consequence.

Q. And do you let them know what the potential penalties are?

A. We do.

Q. Why do you do that?

A. Well, for one, to make sure that they understand the seriousness of what they're looking at so that they can make an informed decision about, you know, whether or not at that point they feel they want to talk with us or not.

You know, we feel that it's fair to let them know where things are at so, you know, they don't feel that it's just some random traffic stop where we're hoping to make a case on them. We're letting them know that there's a much bigger picture involved in that, and

> letting them know how serious it is. That we would like to get to that next level of supply.

ER 912-913.

The government then uses the detective to introduce more hearsay conversations between Mr. Baker and Mr. Rosa. ER 925. She goes on to testify to more hearsay instructions she provided the informant. ER 926. The government then deals with the fact that Mr. Rosa violated the terms of his informant agreement and participated in an uncontrolled drug purchase. ER 930-932. All of it is hearsay.

Later, when discussing Shane Baker, she goes through a lengthy summary of his various identifications of people, all hearsay. ER 942-950. After some limited cross examination that did not touch upon any of the prior consistent statements, the government had improperly offered, the redirect again called for hearsay about what the officer told Mr. Rosa. ER 967.

The first of the informants to testify, Morgan Godvin, is also asked to provide hearsay to confirm statements made to her by the police. ER 973. The government then elicits her consistent statements to the police:

> Q. So I'm almost done here, Ms. Godvin, and I want you to talk to the jury about what you told the police when they spoke with you that day. Do you remember?
>
> A. Yes.

ER 993.

In response, Ms. Godvin provides narrative composed entirely of her hearsay statements to the police. ER 993, 692. The government finished with this improper hearsay bolstering of an unimpeached witness:

> Q. And (pause), Ms. Godvin, is the information that you told the police back on the 29th, is that the same information you're providing today?
>
> A. Exactly the same.
>
> Q. Are you doing that because you think you'll get a better deal or -- or is that the truth?
>
> A. It's just the truth. It's kind of the hard, painful truth, but it's the truth.

ER 696.

The government continued to rely on inadmissible hearsay in its examination of informant addict felon Michael Rosa. He discusses a conversation with Shane Baker. ER 719. Then the government attempts to improperly bolster him with hearsay about *Len Bias* investigations:

> Q. Have you heard of **Len Bias** investigations?
>
> A. I definitely have now.
>
> Q. Had you heard about them before the police showed up that day?
>
> A. I heard a few things.
>
> Q. Did you know there are very high penalties if you sell heroin that causes someone's death?
>
> A. Yes, I did.

Q. And so did the police let you know that's what was going on in this case?

A. Yes, they did.

ER 752.

From there, the government used the same improper bolstering technique that it had employed with Ms. Godvin:

Q. What did you tell the police on March 29th?

A. I told the police where I got my heroin.

Q. Did you admit to selling to Ms. Godvin?

A. Yes, I did.

Q. And you -- you already testified to it, but what did you tell them about where you got your heroin?

A. What did I tell them?

Q. Yep.

A. I told them where I got it.

Q. Did you give a name?

A. I did.

Q. What was the name?

A. Shane Baker.

Q. And did you tell the police what you've told us here today?

A. Yes.

Q. Okay. About how long you purchased from Mr. Baker?

A. Yes, I did.

Q. Did you tell the police how much you purchased from Mr. Baker?

A. Yes, I did.

ER 752.

Throughout the examination the government continued to elicit hearsay to bolster Mr. Rosa, including information about snitches and the consequences they might suffer. ER 755-756. The government offered more hearsay about law enforcement's safety protocols as "told" to Mr. Rosa. ER 757. The government concluded with more improper testimony focused on bolstering Mr. Rosa based on his current health and future plans. ER 764.

The government's next informant felon addict was Shane Baker. ER 777. Just like the others, Mr. Baker was asked to improperly provide an accounting of his prior consistent statements to law enforcement. ER 794-795.

The government calls Detective McNair who provides testimony cumulative to Detective Andersen. ER 606, 609-611. He, too, is asked to provide hearsay statements of informants. ER 613.

3. Legal Argument

Federal Rule of Evidence 801(d)(1) addresses the admissibility of a witness' prior consistent statement:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

> **(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement
>
> **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> **(B)** is consistent with the declarant's testimony and is offered:
>
> **(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> **(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
>
> **(C)** identifies a person as someone the declarant perceived earlier.

FRE 801.

It is improper for the government to call law enforcement witnesses to repeat what they were told by cooperating government witnesses to bolster that testimony.

> "The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told. This limitation is instructive, not only to establish the preconditions of admissibility but also to reinforce the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate, arose."

Tome v. United States, 513 U.S. 150, 157–58, 115 S. Ct. 696, 701, 130 L. Ed. 2d 574 (1995).

A proponent must establish four elements under Rule 801(d)(1)(B): (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996), *as amended* (Oct. 21, 1996).

The government's evidence in this case fails to meet both the second and fourth requirements for admission under the rule. In *Tome* the Supreme Court affirmed the temporal precondition for admission of statements under this rule. *Tome v. United States*, 513 U.S. 150, 160, 115 S. Ct. 696, 702, 130 L. Ed. 2d 574 (1995). The statements must have come before the motive to fabricate arose. Nearly all of the hearsay statements offered by law enforcement witnesses fail this precondition. Officers repeatedly testified that witnesses were informed about their "Len Bias" liability and thus when those statements were made to officers the motive to lie had already ripened. *Id.*

The evidence also fails because there was no suggestion during the trial that the witnesses lied about their statements. There was next to no impeachment of anyone in this trial and what was done was insufficient to justify the government

admitting this volume of hearsay statements. *United States v. Collicott*, 92 F.3d 973, 982 (9th Cir. 1996), as amended (Oct. 21, 1996); *United States v. Gonzalez*, 533 F.3d 1057, 1061 (9th Cir. 2008).

Questions about what the informants told the police and questions to the police about what the informants told them are improper and they permeate the government's case. ER 613, 752, 794, 993. Instead of simply asking witnesses the appropriate questions about what happened, the government repeatedly inquired about what was said. That led to the admission of prior consistent statements and other hearsay in a way that unfairly allowed the government to give the informant, addict, felon witnesses the imprimatur of legitimacy. The collective weight of that inadmissible evidence rendered this trial unfair and likely affected the outcome.

D. The District Court erred by imposing a mandatory minimum sentence.

1. Standard of Review

The imposition by the District Court of a mandatory minimum sentence in this case was based on that court's interpretation of 21 U.S.C. §§ 846 and 841. Tr. of Sentencing Hearing at ER 37 and 44. Questions of statutory interpretation are reviewed de novo. *United States v. Youssef*, 547 F.3d 1090 (9th Cir. 2008).

2. Relevant Facts

The sole object of both conspiracy counts as charged was "to distribute heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846." Indictment at ER 1313. See also, Tr. Pretrial

Conference at ER 1192 ("[AUSA Bolstad]: It's a conspiracy to distribute heroin. That's the object.")

Count 1 went on to further charge:

> "that this conspiracy distributed heroin, the use of which resulted in the death of another person, to wit: defendants conspired to distribute heroin which was ultimately used by victim 'J.D.' in Washington County, Oregon, whose use of said heroin caused his death, all in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

ER 1313-14.

Count 2 (which was dismissed at sentencing) went on to further charge:

> "pursuant to Title 21, United States Code, Section 841(b)(1)(A)(i), that this violation involved 1,000 grams or more of a mixture or substance containing a detectable amount of heroin.

ER 1314.

The jury convicted both defendants of both counts of the inchoate crime of conspiracy to distribute heroin. (Verdict form at ER 048-053.) The jury further found the following sentencing factors: (1) "[J.D.] used heroin distributed in the course of this conspiracy which resulted in his death," Jury Instruction at ER 58; (2) "death resulting from use of the distributed heroin was a reasonably foreseeable result of the Count 1 conspiracy," Jury Instruction at ER 59; and, (3) "1,000 grams or more of heroin was involved in [the conspiracy alleged in Count 2]," Jury Instruction at ER 60. Of essential import for purposes of this appeal, none of those

further findings by the jury were charged as or found to be *objects* of the conspiracy.

At sentencing, the court dismissed the second conspiracy count upon the government's motion. (Judgments at ER 1, ER 7). The court then imposed what it termed the "Congressional mandatory minimum of 20 years" on each defendant. Tr. of Sentencing Hearing at ER 37. The court noted, in sentencing Mr. Arcila, "there's [] not any authority for me to sentence you below [the mandatory minimum]." ER 44.

3. Legal Argument

As held by this court in *United States v. Navarrette-Aguilar*, 813 F.3d 785 (9th Cir. 2015), in a drug distribution conspiracy, "in order for the defendant to be subject to a mandatory minimum under § 841(b)(1)(A)(i), the government []must prove, beyond a reasonable doubt, that an agreement to distribute one kilogram existed[.]" 813 F.3d at 794. *Navarette-Aguilar* unambiguously invalidates the imposition of a mandatory minimum on Count 2 in the instant case, as the government never proved and the jury never found that an agreement "to distribute one kilogram existed." *See Id.* *Navarette-Aguilar*'s clear holding also extends to invalidate the imposition of a mandatory minimum on Count 1, as the government never proved and the jury never found that an agreement to distribute heroin resulting in the death of J.D. existed. Because the objects of both charged

conspiracies did not include any element beyond the simple distribution of heroin, both defendants are not "subject to a mandatory minimum." *Id*.

a. Conspiracy is an inchoate offense, distinct from a substantive offense

The actual commission of a substantive offense and a conspiracy to commit it are "separate and distinct offenses." *Pinkerton v. United States*, 328 US 640, 643 (1946). The agreement to do the act is different from doing the act, *Id*. 328 US at 644, and is itself a "distinct evil." *Salinas v. United States*, 522 US 52, 65 (1997). Defendants could be convicted of a conspiracy to commit a substantive crime and also of the substantive crime itself, *see, e.g., United States v. Medina-Verdugo*, 637 F.2d 649, 950-51 (9th Cir. 1981); that was not the case here.

Unlike a general conspiracy (defined at 18 U.S.C § 371), a controlled substance conspiracy does not require proof of an overt act. *United States v. Shabani*, 513 US 10, 14-17 (1994). To establish a drug conspiracy, the government must prove: 1) an agreement to accomplish an illegal objective, and 2) the intent to commit the underlying offense. *Navarrette-Aguilar*, 813 F.3d at 794.

Moreover, a drug conspiracy conviction does not require "the delivery, presence, or even existence of actual contraband." *United States v. Macias-Valencia*, 510 F.3d 1012, 1016 (9th Cir. 2007).

b. Defendants were convicted of conspiracy pursuant to 21 U.S.C. § 846

Mr. Sandoval and Mr. Arcila were convicted of a conspiracy to distribute heroin in violation of 21 U.S.C. § 846. § 846 is the "drug conspiracy statute." *Shabani,* 513 US at 11-12 (noting that Mr. Shabani was convicted "in violation of 21 USC § 846"), *see also, United States v. Acuna*, 9 F.3d 1442, 1446 (1993) ("The [drug] conspiracy offense was a violation of 21 U.S.C. § 846"). The government appears to agree that § 846 is the conspiracy statute:

> [AUSA] Bolstad: Your Honor, I think that we should return to the statute itself. If you read 846, it is very clear 846 is our conspiracy statute.

ER-031.

c. 21 U.S.C. § 846 determines the sentence exposure based on the "object of the conspiracy"

"[I]n interpreting a statute, a court . . . must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 US 249, 253-254 (1992).

What 21 U.S.C. § 846 says is that the specific objective alleged as the object of a conspiracy to distribute controlled substances controls the sentencing exposure:

> "Any person who attempts or conspires to commit any offense defined in this subchapter 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. By its text, § 846 limits the maximum and any mandatory minimum sentence for a conviction of a conspiracy to distribute a controlled substance to the sentence that could be imposed if a defendant were to be convicted of the offense that is "the object of the . . . conspiracy." *Id.*, *see also, Navarrette-Aguilar*, 813 F.3d at 794.

When the words of a statute are unambiguous, then judicial inquiry is complete. *Germain*, 503 US at 254.

The government argued below, and the District Court erroneously found, in direct contravention of § 846, that it was the *result* of the actions of the conspirators increased the sentencing exposure. While this would be true in the context of a substantive offense, it is not true in the context of a conspiracy offense under § 846.

d. The offense that was the "object of the conspiracy" was the "distribution of heroin"

There appears to be no question that the object of the conspiracy as charged was to distribute heroin:

> [AUSA Bolstad:] Mr. Anders[e]n concedes that the object of the conspiracy in Count 1 was distribution of heroin.

Sentencing hearing at ER-032.

"[A] fact is by definition an element of the offense . . . if it increases the punishment above what is otherwise legally prescribed." *Alleyne v. United States*,

133 S.Ct. 2151, 2158 (2013) (citing to *Apprendi v. New Jersey*, 530 US 466, 483, n.10). A substantive offense is both "the core crime and the fact triggering the mandatory minimum sentence together," which together "constitute a new, aggravated crime[.]" *Alleyne*, 133 S.Ct. at 2161.

As the Supreme Court, citing to *Apprendi* and *Alleyne*, noted:

> "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences [to which a defendant convicted of the substantive offense of distribution of heroin was exposed], it is an element that must be submitted to the jury and found beyond a reasonable doubt.

Burrage v. United States, 134 S.Ct. 881, 887 (2014) (citations omitted). *Burrage* further went clarified that the substantive drug offense of delivery of heroin with resulting death:

> "has two principal elements: (i) knowing or intentional distribution of heroin, § 841(a)(1), and (ii) death caused by ("resulting from") the use of that drug, § 841(b)(1)(C).

Id. A violation of § 841(a)(1) without the "['death results' enhancement]" is a lesser included, i.e. separate, offense. *Id.* at n.4.

e. The further findings of the jury are sentencing factors, not sentence enhancements

As charged in the indictment, the additional jury findings are not elements of the conspiracy charge or sentencing enhancements, but rather sentencing factors. *See, Apprendi v. New Jersey*, 530 US 466, 494 n.19 (2000). A "sentencing factor:"

> "appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Id. (italics in original).

f. Because defendants were convicted of conspiracy to distribute heroin, 21 U.S.C. § 841 limits the maximum sentence to 20 years

As discussed above, the specific object of the conspiracy of which defendants were convicted was simply to distribute heroin.

> [AUSA Bolstad:] Because the object of the conspiracy is distribution of heroin, we look at the penalty provisions under 841[(a)(1)].

Sentencing hearing at ER-032. At the sentencing hearing, however, the government did not look at the penalty provisions for the charged and proven *object* of the conspiracy: the substantive offense of distribution of heroin. Instead the government looked at the penalty provisions for a separate substantive offense with an additional element that was not charged or proven as being an *object* of the conspiracy, namely that death resulted from the use of distributed heroin. The government went on to argue that, because defendants were convicted of conspiracy to distribute heroin, "all of the penalty provisions that are included in [21 USC § 841(b)(1)] for distributing heroin apply equally to people who are

charged and convicted of conspiring to violate that law." ER-032. This is simply incorrect and ignores the clear text of § 846.

Prior to trial, defendants requested that the court instruct the jury with regard to Counts One and Two as follows:

> For Count One:
>
> First, beginning on or about March 20, 2014, and ending on or about April 4, 2014, there was an agreement between two or more persons to distribute heroin resulting in death;
>
> Second, Mr. Sandoval joined in the agreement knowing that its purposes were to:
>
> a. distribute heroin, and
>
> b. that death result from the delivery of that heroin,
>
> Third, Mr. Sandoval intended to help accomplish both those specific purposes.
>
> For Count Two:
>
> First, beginning in February of 2014 and ending in April of 2014, there was an agreement between two or more persons to distribute heroin;
>
> Second, Mr. Sandoval joined in the agreement knowing that its purpose was to distribute more than a kilogram of heroin
>
> Third, Mr. Sandoval intended to help accomplish that specific purpose.

Defendant' Requested Jury Instructions at ER-064. The District Court rejected those requests when formulating its instructions to the jury. See Final Jury Instructions at ER 57-60. The rejection of those particular instructions was not error on the part of the court, as those requested instructions added elements that were not charged in the indictment as objects or purposes of the conspiracy. Curiously, this is exactly what the government argued for and what the District

Court did at sentencing, adding elements that were not charged in the indictment or proven to the jury as being objects or purposes of the conspiracy.

The court's rejection of those requested jury instructions serves to highlight the following facts:

1. The defendants were never charged with conspiring to distribute more than a kilogram of heroin conspiring or distribute heroin that would result in the somebody's death;
2. The jury was never instructed that they must find that an object of the conspiracy was the distribution of more than a kilogram of distribution of heroin or distribution of heroin that would result in the somebody's death; and therefore
3. The defendants were never convicted of conspiring to distribute more than a kilogram of heroin or to distribute heroin that would result in somebody's death.

The court's logic in rejecting those requested instructions was sound, because what defendants were charged with was simply conspiring to distribute heroin. It was error on the part of the District Court to not continue that logic through to the sentencing phase, where consistency would dictate the rejection of the

Governments exact same attempt to insert elements into the offense of conviction that were not present in the indictment or presented to the jury.

This principle—that, because the government failed to allege or prove and the jury did not find any object of the conspiracy beyond the simple distribution of heroin, the sentencing exposure should be that of the simple distribution of heroin—is consistent with prior rulings of this court. The defendant in *Macias-Valencia, supra,* pleaded guilty to one count of intentionally conspiring to "distribute … 50 grams or more of methamphetamine" and one count of intentionally attempting to "possess with intent to distribute . . . 50 grams or more of methamphetamine." *Id.* 510 F.3d at 1013. The *object* of the conspiracy and attempt in *Macias-Valencia* was the distribution of 50 grams or more of methamphetamine. It did not matter that in reality, the *result* of Mr. Macias' actions did not involve the actual distribution of any methamphetamine whatsoever.

Mr. Macias had been caught in a "reverse sting," in which the government set up the purported sale of two pounds of methamphetamine to Mr. Macias and his brother. When Mr. Macias and his brother contacted the DEA agent at the prearranged meeting place with more than $4,600, the government arrested them. There was never any actual methamphetamine present during the investigation or arrest. Mr. Macias argued at sentencing that, since no actual contraband was

involved, the mandatory minimum should not apply. The court disagreed, noting "[t]he statutory text is clear. The same penalty that Congress has prescribed for a substantive controlled substance offense applies to any attempt or conspiracy to accomplish that offense." *Id*. 510 F.3d at 1015. Since the object of the charged conspiracy in Mr. Macias' case was to possess with intent to distribute 50 grams or more of methamphetamine, and the penalty for the substantive crime of possession with intent to distribute 50 grams or more of methamphetamine was a mandatory minimum sentence of ten years, a mandatory minimum sentence of ten years applied. *Id*. at 1016. Whether or not the object of the conspiracy was completed was of no consequence for purposes of Mr. Macias' sentencing exposure.

The instant case is the other side of the *Macias-Valencia* coin. In this case, there was an actual result, but no intent, in *Macias-Valencia*, there was intent, but no actual result. However, as *Macias-Valencia* instructs, it is the intent—the object—of the conspiracy that triggers the application of a mandatory minimum sentence.

E. The court imposed an improper sentencing guideline.

The court applied USSG § 2D1.1(a)(2). Because § 2D1.1(a)(2) applies only to substantive drug offenses, and not drug conspiracies, the court should have applied § 2D1.1(a)(5).

////

1. Standard of Review

Review of a District Court's interpretation and application of the United States Sentencing Guidelines is de novo. *United States v. Roybal*, 737 F. 3d 621, 624 (9th Cir. 2013).

2. Relevant Facts

Many of the relevant facts are set out in the mandatory minimum argument, *supra*. The District Court heard extensive argument related to the application of the USSGs at the sentencing hearing. Tr. Sentencing Hearing at ER 13-25, 32. The District Court ultimately overruled Defendants' objections and concluded that the base offense level was 38 pursuant to USSG §2D1.1(a)(2). ER 33.

3. Legal Argument

As discussed above, Defendants were convicted of a conspiracy to distribute drugs pursuant to 21 U.S.C. § 846. *See*, *e.g.*, *Acuna*, *supra*, ("The [drug] conspiracy offense was a violation of 21 U.S.C. § 846").

USSG § 2D1.1(a)(2) applies to specifically enumerated offenses:

(a) Base Offense Level (Apply the greatest): …

> (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance

USSG § 2D1.1 (in relevant part). By specifically enumerating the statutes of conviction to which it applies, USSG § 2D1.1(a)(2) excludes the conspiracy

statute, 21 U.S.C. § 846. *See, e.g.*, *United States v. Vonn*, 535 US 55, 65 (2003) (discussing judicial "canon that expressing one item of a commonly associated group or series excludes another left unmentioned"). "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron USA Inc. v. Echazabal*, 536 US 73, 81 (2002).

§ 2D1.1(a)(2), by specifically identifying a series of five different statutes and sub-statutes related to drug distribution or importation, but excluding the neighboring conspiracy/attempt statutes (§ 846 and its sister statute, 21 U.S.C. § 963), easily meets that *Echazabal* test, and supports a sensible inference that the omitted conspiracy/attempt statutes must have been meant to be excluded. Further, this exclusion makes sense, because if the causing of another person's death were truly the object of a conspiracy, the conspirators would most likely be charged with conspiracy to commit murder or a similar offense. Indeed, USSG § 2D1.1(d)(1), specifically addresses situations in which "a victim was killed under circumstances that would constitute murder," and cross-references to the USSGs for Murder.

USSG § 2D1.1(a)(5) has no such specific enumerated offenses, and operates as a catchall:

> (a) Base Offense Level (Apply the greatest): …
>
> > (5) the offense level specified in the Drug Quantity Table set forth in subsection (c). . . .

USSG § 2D1.1 (in relevant part). This catchall provision refers to the "Drug Quantity Table" at § 2D1.1(c). Because the jury in the instant case found that "1,000 grams or more of heroin was involved in [the conspiracy charged in Count 2]," Jury Instruction at ER 60, § 2D1.1(c)(5) provides for a base offense level of 30.

VII. Conclusion-Prayer for Relief

Based on the forgoing, Defendants ask this court to reverse the convictions and remand these cases to the District Court for a new trial. In the alternative, Defendants ask this court to vacate the sentences imposed on Counts 1 and 2, and remand this case to the District Court with instructions to impose a sentence of not more than 20 years in compliance with 21 U.S.C. §§ 846 and 841(b)(1)(C), and to apply a base offense level in accordance with USSG § 2D1.1(a)(5).

VIII. Statement of Related Cases

United States v. Raul Arcila, Circuit Court Case no. 16-30109, and *United States v. Sandoval-Ramos*, Circuit Court Case no. 16-30110, arise from the same

////

////

Oregon District Court case, 3:14-CR-267-BR. These cases were consolidated for purposes of this appeal. Docket Entry No. 15 in 16-30109, Docket Entry No. 6 in 16-30110.

Respectfully submitted March 20, 2017

/s/ Matthew Schindler

Matthew Schindler #964190
Attorney for Raul Arcila

/s/ Benjamin T. Andersen

Benjamin T. Andersen #06256
Attorney for Fabian Sandoval-Ramos

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 13-30256

Matthew A. Schindler, counsel for Defendant-Appellant Raul Arcila, and Benjamin T. Andersen, counsel for Fabian Sandoval-Ramos, certify that pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 12,802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted March 20, 2017

/s/ Matthew Schindler

Matthew Schindler #964190
Attorney for Raul Arcila

/s/ Benjamin T. Andersen

Benjamin T. Andersen #06256
Attorney for Fabian Sandoval-Ramos

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2017, I electronically filed the foregoing APPELLANT'S OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted March 20, 2017,

/s/ Matthew Schindler

Matthew Schindler #964190
Attorney for Raul Arcila

/s/ Benjamin T. Andersen

Benjamin T. Andersen #06256
Attorney for Fabian Sandoval-Ramos