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In the Supreme Court of the United States

18-1064

In re OCTAVIOUS DEMONT WILLIAMS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent,*

On Petition for an Extraordinary  
Writ of Habeas Corpus to the United States Court of  
Appeals For The Ninth Circuit

PETITION FOR AN ORIGINAL WRIT OF HABEAS  
CORPUS ("EXTRAORDINARY WRIT")

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## QUESTIONS PRESENTED

Whether petitioner's constitutional due process was violated when he was deprived of the fundamental right that a jury find him guilty of all elements of the crime; and

Whether a controlled substance (amount is not the contention) is a distinct element of petitioner's substantive offense; and

Whether necessary element of a "controlled substance" not being proven to jury beyond a reasonable doubt violates this Court's precedent, the plain language of 21 U.S.C. § 841 (a) (1), and Constitutional Due Process.

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## OPINION BELOW

The Decision of the Ninth Circuit (No. 18-15910) was filed on September 25, 2018.

## JURISDICTION

The order of the court of appeals was entered September 25, 2018. Williams timely filed a notice of appeal. U.S. Const. art. § 2 vest appellate jurisdiction in this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1651(a).

## PROVISIONS INVOLVED

Section 841(a)(1) of Title 21 of the United States Code provides, in pertinent part:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) To manufacture, distribute, or dispense, or  
 possess with intent to manufacture,  
 distribute, or dispense, a controlled  
 substance.

Section 846 of Title 21 of the United States Code,

Provides, in pertinent part:

Any Person who attempts or conspires to commit  
 any offense defined in this title 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.

#### STATEMENT

Williams was indicted on one count of Attempted  
 Drug Possession With Intent to Distribute, in  
 violation of Title 21, United States Code, Sections 846  
 and 841(a)(1). (*Indictment at Appendix C*) At trial



only three law enforcement officials testified. See, e.g., *Transcript Of Trial, Volume I of II, Witness Index at p. 2 of 139*. The evidence of their testimony shows that neither testified to a substance being involved to trigger violation of an essential element prescribed by 841(a).

(A. The District Court Proceedings)

At trial, it was uncontested that the petitioner was deprived of his fundamental right that the jury find him guilty of all elements of the crime.

Furthermore, Williams reported District Judge Xavier Rodriguez and Magistrate Judge Nancy Stein Nowak to the judicial committee in Louisiana, and they were sanctioned as a result of their actions involving petitioner's case at the district level. Fifth,

Circuit Chief Judge Edith H. Jones held the disciplinary and sanction proceedings. Williams did not report the judges to the disciplinary committee out of arrogance, he did so because he feared being rail-roaded in their courtroom.

This Court's review is needed because the lower Court's contradict one another and are divided. And because, "It is axiomatic that a criminal cannot conspire with an undercover law enforcement official." *United States v Mergerson*, 4 F.3d 337, n.9 (5<sup>th</sup> Cir. 1993).

Furthermore, the Court should consider that 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 "[T]ogether, these statutes provide that a person may violate § 846 by conspiring to violate § 841(a)(1); *United States v Carson*, 520 Fed. Appx. 874, 897 (11<sup>th</sup> Cir. 2013), but the facts of petitioner's case do not support

such a conclusion because he has not been found to be a coconspirator/codefendant.

The underlying constitutional error identified in the petitioner's case is § 841(a), and the deprivation of the fundamental right that a jury find him guilty of all essential elements of his substantive offense beyond a reasonable doubt.

Where there is no "substance" involved in the petitioner's case, in reality he actually stands convicted and sentenced to twenty (20) years for conspiring with an undercover law enforcement official, and this qualifies as an extraordinary circumstance.

#### **B. The Court Of Appeals Decision**

The Government introduced "Conspiracy-based" Attempted Drug Possession With Intent to Distribute

cases that lacked relevance to Williams' case. Williams' attorney refused to argue the 841(a) elements issue, and waived his right to respond to the Government's misuse of conspiracy based cases, which was an involuntary waiver. Williams filed a 28 U.S.C. § 2241 Writ Of Habeas Corpus in the Ninth Circuit. The Ninth Circuit did not address his, Violation of Due Process of the Constitution of the United States of America, argument, instead deciding that Williams' actual innocence petition was a disguised § 2255. On November 13, 2018 Williams received legal correspondence from the Ninth Circuit, (No. 18-15910, D.C. No. 4:17-cv-00577-RCC-JR, District of Arizona, Tucson, ORDER).

## REASON FOR GRANTING THE PETITION.

### I. Williams Contends That His Due Process

Was Violated Because, "[T]he Constitution

Gives A Criminal Defendant The Right To

Demand That A Jury Find Him Guilty Of

All Elements Of The Crime With Which He

Was Charged." *United States v. Gaudin*, 515

*U.S.* 506, 511 (1995).

The jury found Williams guilty of violating two

sections of, United States Code, of Title 21. Those

sections being § 846, and § 841(a)(1). The substantive

offense in Williams is § 841(a)(1), and § 846 is the

lesser included offense. According to the plain

language of § 841(a)(1), a "controlled substance" is an

distinct element of that drug offense." *United States v.*

*Maldonado Sanchez*, 269 F.3.d 1250, 1264 (11<sup>th</sup> Cir.

2001). (See Also Judgment In A Criminal Case)

"Noting that the express language of § 841(a) puts no quantity requirement on the amount of controlled substance possessed." *Maldonado-Sanchez at fn.28.*

Williams' argument is not possession. His argument is the necessary element of an "actual substance" being involved to trigger violation of all essential elements proscribed by his substantive offense.

"Attempted drug possession in violation of 21 § 846 is simply a lesser included offense of the drug possession proscribed by 21 U.S.C.S. § 841(a) (1)."

*United States v Mitchell, 484 F.3d 762 (5th Cir. 2007).*

"The crime of attempt is a lesser included

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<sup>1</sup> Lesser included offense: One which is composed of some, but not all elements of a greater offense and which does not have any element not included in the greater offense so that it is impossible to commit a greater offense without necessarily committing the lesser offense. *State v Garcia, App., 100 N.M.*

offense of the substantive crime." *United States v. Remigio*, 767 F.2d 730, 733 (10th Cir. 1985). Court's instructions provide undeniable evidence that a "Substance" is a distinct element of Williams' substantive offense. (Court's Instructions at Appendix B; Transcript of Trial, Volume II of II at pp.151, 152); also see *State v. ...*

120, 666 p.2d 1267, 1272. One that does not require proof of any additional element beyond those required by the greater offense. *Government of Virgin Islands v Bedford, C.A. Virgin Islands*, 671 F.2d 758, 765.

One which must necessarily be included in the greater offense.

*State v Etzweiler*, 125 N.H. 57, 480 A.2d 870, 876. One which includes some of the essential elements of the crime charged in the information without the addition of any element irrelevant to the original charge. *State v Johnsen*, 197 Neb. 216, 247 N.W.2d 638, 640. When it is impossible to commit a particular crime without concomitantly committing, by the same conduct,

In Williams' situation, his attempt to possess cannot be necessarily committed until the carrying out of the greater crime, meaning all necessary elements of his substantive offense must be proven beyond a reasonable doubt. In other words, "where one offense is included in another, it cannot support a separate conviction and sentence." *United States v Scott*, 987 F.2d 261 (5th Cir. 1993).

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another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense". In any case in which it is legally possible to attempt to commit a crime, such attempt constitutes a lesser included offense with respect thereto. The defendant may be found guilty of an offense necessarily included in the offense charged. *Fed.R.Crim.P. 31*. Substantive offense. One which is complete of itself and not dependent upon another. *U.S. v Martinez-Gonzales*, D.C. Cal., 89 F.Supp. 62,64.



### Example I: Reverse Sting Operation

"A" is contacted by a police officer working undercover as a narcotics supplier as part of a "reverse sting" operation. An informant put him in touch with "A", and the two arranged to meet at a local restaurant. At the meeting, Undercover Agent and "A" discuss the possibility of a narcotics sale; the next day, the two negotiate a deal in which "A" agrees to pay \$65,000 for three kilograms. Undercover Agent and "A" meet in a parking lot – under the watchful eye of a group of DEA agents – to complete the deal. Undercover Agent walks over to "A's" car and asked to see the money for the purchase.

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Substantive. An essential part or constituent or relation to what is essential. *Stewart-Warner Corporation v Le Vally*, D.C.Ill., 15 F.Supp. 571, 576.

"A" responds by flashing a bundle of cash. "A" then follows Undercover Agent back to his vehicle, where inside Undercover shows "A" one-half gram of an "actual substance" that's wrapped in a tiny sandwich bag. After inspecting contraband, "A" says "I want all of them if they're like this." Undercover gets out of the vehicle and, gives a prearranged arrest signal to surrounding DEA agents to arrest "A".

"A" is up Stink Creek without a paddle because an "actual substance" was involved, a distinct element of his substantive offense. "A's" objective acts were conversing with a law enforcement official about a possible narcotics sale, which without an "actual substance" only amounts to conspiring with a law enforcement official, and, (2) Meeting the undercover agent at the appointed time and place with \$65,000 dollars, which is also a noncriminal objective act

because money alone is not enough. But §846 attempt was necessarily committed in the carrying out of the substantive offense because: (1) all of the necessary elements proscribed by §841(a)(1); his substantive offense, have been triggered and; (2) "A's" §846 attempt is "one that does not require proof of any additional element beyond those required by the greater offense." *Virgin Islands v Bedford*, 671 F.2d 758, 765 (3d Cir 1982).

The missing link in Williams' case is a "controlled substance" which is a distinct element of his substantive offense. The underlying Constitutional error identified in Williams' case is in regard to §841(a)(1), the deprivation of his fundamental right "to demand that a jury find him guilty of all elements of the crime" with which he was charged. *Gaudin at 511*.

Example II. Reverse Sting Operation: *United States v Jonathan S. Edwards*, 166 F.3d 1362 (11<sup>th</sup> Cir. 1999).

"Patrick Flannery, a West Palm Beach police officer, was working undercover as a narcotics supplier as part of a "reverse sting" operation. An informant put him in touch with Edwards, and the two arranged to meet at a local restaurant. At the meeting, Flannery and Edwards discussed the possibility of a narcotics sale; the next day, the two negotiated a deal in

<sup>2</sup> Element. Material; substance; ingredient; factor. Elements of crime. Those constituent parts of a crime which must be proved by the prosecution to sustain a conviction. *Com v Burke*, 390

*Mass. 480, 457 N.E.2d 622, 624*. A term used by the common law to refer to each component of the actus reus, causation, and the mens rea that must be proved in order to establish that a given offense has occurred. The term is more broadly defined

which Edwards agreed to pay \$8000 for one-half kilogram of crack cocaine.

Flannery and Edwards met in a parking lot under the watchful eye of a group of DEA agents to complete the deal. Flannery walked over to Edwards' car and asked to see the money for the purchase. Edwards responded by flashing a bundle of cash. Edwards then followed Flannery back to his car, where Flannery opened the trunk and pointed to a manila envelope containing one-half kilogram of crack cocaine. Edwards reached into the trunk, picked up the envelope, and pulled out the inner

by the Model Penal Code in § 1.13(9) to refer to each component of the actus reus, causation, the mens rea, any grading factors, and the negative of any defense.

All definitions provided within this petition can be found in Black' Law Dictionary, Sixth Addition.

plastic bag containing the cocaine. After inspecting the contraband, Edwards slid the plastic bag back into the envelope, returned the envelope to Flannery's trunk, and said, "Let's go for a ride."

Flannery closed the trunk, and, as he and Edwards were getting into Flannery's car, Flannery contacted the DEA agents (via cellular telephone) who proceeded to arrest Edwards." *Edwards at 1363.*

Williams uses Edwards for an example, not because of the possession argument it contends, for Williams' argument is not the element of possession. Williams refers to Edwards for an example because:

(1) Edwards is a "reverse sting" operation practically identical to his, (2) Edwards' substantive offense is identical to Williams, §841(a)(1) and, (3) There was an actual substance (amount is not a factor) involved to trigger a necessary element proscribed by his

substantive offense, which is Williams' contention in the case at bar. A specific type of substance is not relevant either.

In Williams' Mark Rodriguez, a San Antonio police officer, was working undercover as a narcotics supplier as part of a "reverse sting" operation. An informant put him in touch with Williams, and the two arranged to meet at a restaurant in Schertz, Texas. At the meeting, Rodriguez and Williams discussed the possibility of a narcotics sale. On May 16, 2011 they met again in the parking lot of the restaurant where they had met back on April 5<sup>th</sup>. Rodriguez and Williams had a conversation in Rodriguez' undercover vehicle. And the vehicle was equipped with both video and audio. During the conversation Williams indicated that he could not come up with as much as they had talked about.

before, but had come up with \$50,000. Which Williams had agreed to pay toward seven kilograms. Once Rodriguez saw the money that Williams had brought, he gave an arrest signal, and other DEA agents descended upon Williams and arrested him. *(Trial Transcript, Volume I of II at p. 62 of 139).*

Williams contest that under the facts of this case, he is actually innocent of any criminal offense, because the jury found that intent formed the sole basis for a criminal attempt where a necessary element of his substantive offense was not proven. A controlled substance (*amount is not the argument, nor is a specific type of controlled substance*) is a distinct element of Williams' drug offense; and it is absent.

Receiving the verdict of the jury on every element of the offense is a "substantial right" required by the



Sixth Amendment. To hold otherwise "would be to dispense with trial by jury." *California v. Roy*, 519 U.S. 2 (1996). If this Court is to approve prosecution in situations such as Williams, where necessary element of the substantive offense was not proven to the jury beyond a reasonable doubt, then our Constitutional Rights mean absolutely nothing. Once again in closing, Williams wants to be absolutely clear with this Court, his argument is not possession, nor is his argument in regard to an amount, or a specific type of substance, for it is neither. His sole contention is, it is inherent that a "substance" be involved in his drug offense because it is an essential element of his substantive offense. (Court's statement in Instructions at Appendix B, Transcript of Trial, and in Volume II of II at pp. 151, 152).

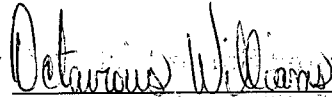
**RELIEF SOUGHT**

That Williams be release immediately if Court  
rules in his favor. Conviction and sentence be vacated  
with instruction that indictment be dismissed.

**CONCLUSION**

The petition for an extraordinary writ should be  
granted.

Respectfully submitted,



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**DECEMBER 2018**