No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT CARL SHARP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
EIGHTH CIRCUIT APPELLATE COURT

PETITION FOR A WRIT OF CERTIORARI

ROBERT C. SHARP
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Oxford, WI 53952
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Pro Se Petitioner

QUESTIONS PRESENTED

(1) Can recklessness or negligence amount to willful blindness?

(2) Can a defendant be found to be willfully blind because he failed to test a drug when testing wasn't available?

(3) Should knowledge of the effects of lesser known controlled substances alone be sufficient to prove knowledge that the substance is controlled or an analogue drug?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 879 F.3d 327 ;

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2016 U.S. Dist. LEXIS 59024 ;

The report and recommendation of the U.S. District Court magistrate appears at Appendix C to the petition and is

[X] reported at 2016 U.S. Dist. LEXIS 60099.

The denial of the 8th Circuit Appellate Court hearing en banc appears at Appendix D to the petition and is

[X] reported at 2018 U.S. App. LEXIS 3343.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 5, 2018 .

[ ] No petition for rehearing was timely filed in my case

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 13, 2018 , and a copy of the order denying rehearing appears at Appendix D .

[X] An extension of time to file the petition for a writ of certiorari was granted to and including July 13, 2018 (date) on May 17, 2018 (date) in Application No. 17 a 1276 .

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) Title 21 U.S.C.S.
§841. Prohibited Acts A
(a)Unlawful acts. Except as authorized by this title, 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.

2) Title 21 U.S.C.S.
§ 813. Treatment of Controlled substance analogues.

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any federal law in Schedule I.

3) Title 21 U.S.C.S.
§ 802. Definitions.

(32)(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance--

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effects on the central nervous system of a controlled substance in schedule I or II.

XII STATEMENT OF THE CASE

Legal Background

Robert Sharp sold "herbal incense," a product made up of dried leaves and synthetic cannibinoids. It's widely available in gas stations, convenience stores and online. When smoked these products have varied effects depending on which one of the hundreds of different synthetic cannibinoids are used and how much of them are applied to the leaf. Some types of herbal incense are legal, others illegal, depending on the chemical used and only laboratory testing can determine legality, (see Latour v. McCullar, 3rd Cir. 2016). Even with laboratory testing the results can be unclear. If a substance isn't on the schedules the government can disagree with a private lab on legal status, claiming the substance to be an analogue drug. In some instances even DEA chemists disagree among each other about the analogue status of different synthetic cannibinoids.

Sharp purchased his products he's charged with from a company called Mega Mulch LLC. Mega Mulch distributed their products nationally and represented them as legal. Specifically they claimed their products contained a substance called THJ-011. THJ-011 is not a controlled substance or a known analogue.

On May 5, 2014 the Mega Mulch owners, Patrick and Sarah Van Aken were arrested for making herbal incense with the controlled substance AB-FUBANACA. On May 7, 2014 Sharp was the target of raids because of the products he purchased from Mega Mulch and the searches recovered their products. The search against Sharp also recovered electronic devices that showed Sharp's emails and text messages with Mega Mulch informing Sharp his products contained THJ-011. Sharp was charged with conspiracy to sell AB-FUBINACA, possession with intent to deliver AB-FUBINACA and Aiding and Abetting the sale of AB-FUBINACA.

Sharp had Attorney Joel Schwartz on retainer at the time of his raid, consulting him on his business, and hired him to represent him in this criminal matter. Between the time Sharp initially retained Schwartz in December 2013 and when he was arrested for the current offense in March of 2015, the government was beginning to prosecute attorneys for advising clients on how to sell synthetic cannibinoids. See: USA v. Daniel J. Stanford, 5th Cir. and USA v. Barry L. Domingue. 5th Cir. On the eve of Sharp's trial Schwartz informed Sharp he'd failed to call his defense witnesses, his exculpatory evidence wasn't admissible, mens rea wasn't a viable defense and because Sharp failed to obtain independent testing of his products that he would be convicted under a willful blindness instruction. Sharp pled guilty based on Schwartz advice that failure to test constituted willful blindness and pled to that element of the offense.

At the plea hearing Sharp informed the magistrate he believed his products contained THJ-011 and that THJ-011 wasn't a

controlled substance. When the magistrate asked if Sharp believed the substance was subject to federal drug laws, Sharp replied "Under some federal drug law, yes, yes." Not specifically to the CONROLLED SUBSTANCE ACT or ANALOGUE ENFORCEMENT ACT. The magistrate then asked Sharp if he had been deliberate in not learning the substances true identity, Sharp responded with the advice given by Schwartz by stating, "By not getting it tested, yes, yes, I did." The plea was accepted.

After the plea Sharp retained a new lawyer and fired Schwartz. Sharp moved to withdraw his plea because he believed Schwartz conflicts-of-interest motivated Schwartz to intentionally mislead him to plead guilty to an element of an offense which did not apply which was willful blindness. Additionally Schwartz was aware of information from being Sharp's attorney who consulted him on his business prior to the raids executed against Sharp which rebutted the willful blindness instruction and should have required Schwartz to become a fact witness in this case.

At the plea withdrawal hearing Sharp informed the court Schwartz had clients with adverse interests to his, Schwartz approved the products he sold and had sent products to Schwartz to have tested. Schwartz testified he'd told Sharp not to sell synthetic cannibinoids after receiving thousands of dollars in fees, in which Sharp had no pending criminal charges. Many facts were not in dispute. Schwartz testified that Sharp discussed THJ-001 with him, that he researched THJ-001 for Sharp, never specifically told Sharp it was illegal to sell and it was possible Sharp sent him samples for testing.

Evidence presented by the government included letters Sharp sent Schwartz describing Schwartz consulting him, Sharp sending Schwartz products to test and Sharp describing how other attempts to procure independent testing were unavailable because the DEA ordered the companies he contacted to cease testing synthetic cannibinoid products. The defense introduced evidence which included Schwartz time records that showed Schwartz researching synthetic cannibinoids for Sharp, specifically THJ-011. The defense also introduced attorney-client recorded phone calls between Sharp and Schwartz from jail that showed evidence of Schwartz misleading Sharp in areas of the law, then encouraging him to plead guilty.

The magistrate issuing his report and recommendation determined Sharp to be willfully blind, saying Schwartz stated he'd never received any products for testing from Sharp. This was false, Schwartz actually stated he didn't recall getting the package but it was possible Sharp sent them. When the distict court ruled on the R&R, she didn't repeat the magistrate's erroneous claim but cited a new reason. That because Sharp knew his products caused a "disorientation," that "such disorientation is emblematic of a controlled substance analogue" and Sharp must have "subjectively believed that there was a high probability that the substance in his possession was a controlled substance

analogue." The appellate court took another position, that "defendants failure to have the substance tested made it almost impossible to rebut the governments case." They didn't address that Sharp sought out testing and it was not available. Instead the court equated this failure to "burying his head in the sand." At oral arguments the government conceeded that no independent laboratory could even legally test these substances.

XIII REASONS FOR GRANTING THE PETITION

The court should grant certiorari in this case because the 8th Circuit is in conflict with decisions made by the U.S. Supreme Court, it's sister circuits, and have departed from the accepted and usual course of judicial proceedings. Should the questions in this petition go unanswered it will allow the government to continue setting arbitrary benchmarks to criminalize the conduct of consumers, who through fraud, unknowingly purchase adulterated substances.

The first two questions are presented here, 1) can recklessness or negligence amount to willful blindness, and 2) can a defendant be found to be willfully blind because he failed to test a drug when testing wasn't available; because the 8th Circuit determined that Sharp was "willfully blind" because he neglected to obtain laboratory testing for products he sold that contained a controlled substance. The 8th Circuit stated "defendant's failure to have the substance tested made it almost impossible to rebut the governments case." It's undisputed that Sharp sought testing, but testing was unavailable. The government even conceeded testing would not have been lawful. Also undisputed, that Sharp believed his products contained a substance not listed on the schedules or subject to the analogue act. Neither 21 U.S.C. § 841 or § 813 require independent laboratory testing to determine identity of substances. So the 8th Circuit has equated recklessness / negligence to willful blindness. Clearly this is forbidden by Supreme Court precedent.

In Global Tech Appliances, INC v. SEB S.A. the court defined willful blindness this way. "First, the defendant must subjectively believe that there is a high probability that a fact exists. Second, the defendant must take deliberate actions to avoid learning of that fact." Then, "willful blindness has a limited scope that surpasses recklessness and negligence." The court is clear, and the 8th Circuit clearly allowed recklessness/ negligence to extend to willful blindness in Sharp.

Since the Global Tech decision, other courts have noted the importance of not allowing recklessness or negligent conduct to infect willful blindness instructions. In U.S. v. Clay (11th Cir. 2016)the 11th Circuit forcefully states, "But I must emphasize that negligence, recklessness, carelessness or foolishness is not enough to prove that a defendant knew about the possession of the controlled substance (under a willful blindness instruction)."

Other circuits narrow willful blindness even more in drug cases. In U.S. v. Burgos (1st Cir. 2012) the court states "It is not enough for the government to prove that the defendant knew, or was willfully blind to, the fact something illegal was occuring. Rather the government must prove beyond a reasonable doubt that the defendant knew or was willfully blind to, the fact the illegal activity involved a controlled substance." In Sharp, the district court concluded that since Sharp told the magistrate

that he believed THJ-011 (the substance he believed his products contained) could be subject to some federal drug laws, he must have believed it was subject to the controlled subtance act or analogue act.

The 2nd Circuit, realizing the potential for abuse in willfull blindness instructions, doesn't even allow for them to be used in conspiracy cases. In U.S. v. Scotti (2nd Cir. 1994) the court states "It is logically impossible for a defendant to intend and agree to join a conspiracy if he does not know it exists." Then in U.S. v. Ciambrone (2nd Cir. 1985) "Conscious avoidance of participating in a conspiracy and agreeing to be a member of a conspiracy are mutally exclusive concepts." These decisions came after U.S. v. Mankani (2nd Cir. 1984) that sensibally stated, "Concluding an agreement to conspire cannot be proved through deliberate ignorance."

Inside the 8th Circuit, even other justices have voiced concern for the overuse and abuse of willfull blindness instructions. In U.S. v. Novak (8th Cir. 2017), Novak complained the willful blindness instruction given to her jury allowed her to be convicted because she'd been perceived as reckless or negligent. Justice Kelly, in her dissent, agreed, stating "A willful blindness instruction should not be given when the evidence points soley to either actual knowledge or no knowledge to the facts in question." The same follows in Sharp, as he had no actual knowledge.

The 4th Circuit agrees with Judge Kelly in recognizing the dangers in overusing willful blindness. In U.S. v. Lightly (4th Cir. 2016) they state "A willful blindness instruction should be given only in rare circumstances because the instruction presents a danger of allowing the jury to convict based on ex post facto theory (he should have been more careful) or to convict on a negligence theory (he should've known his conduct was illegal)." This was the danger realized in Sharp, except it was the appellate court and not a jury deciding negligence was tantamount to willful blindness. In U.S. v. Suado Mohamed Ali (4th Cir. 2013) the court warns that willful blindness is "appropriate only in rare circumstances."

Now, because of Sharp, willfull blindness elements are sought in every single synthetic drug case prosecuted in the Northern District of Iowa. In all these following cases, defendants maintain they believed their products were legal. But there is no viable defense for any of these defendants because arbitrary benchmarks can be set to impute knowledge. This will not go unnoticed by the government.

Willfull blindness is most simply summed up in U.S. v. Newell (5th Cir. 2002). "the essence of deliberate ignorance is don't tell me, I don't want to know." Not, you should have known. If Congress wishes to expand 21 U.S.C. § 841(a)(1) to include recklessness or negligent conduct, they can do so. It's not the job of the 8th Circuit to redefine or expand the definition of willfull blindness to include reckless / negligent behavior or

impose arbitrary benchmarks not required by statute.

The third question posed, should knowledge of the effects of lesser known controlled substances alone be sufficient to prove knowledge that the substance is controlled? The 8th Circuit says yes. The 10th Circuit says no. The question has been posed by Chief Justice Roberts in his concurrence in 2015's McFadden. Sharp sold a product containing AB-FUBINACA. Sharp believed his product only contained THJ-011, which isn't controlled and not even the government maintains is an analogue. The effects of AB-FUBINACA differ slightly if at all from THJ-011. At Sharp's sentencing the government read emails to the court showing chemical suppliers advising Sharp THJ-011 was not an analogue. The district court in Sharp decided that since Sharp was aware his product caused a "disorientation" that "such disorientation is emblematic of a controlled substance analogue" and Sharp must have "subjectively believed that there was a high probability that the substance in his possession was a controlled substance or controlled substance analogue." The appellate court agreed and stated that "defendants failure to have the substance tested made it impossible to rebut the governments case." The statute 21 U.S.C. § 802(32)(A) states the first prong determining what is an analogue is that it must have a "substantially similar" chemical structure to a substance on the schedule 1 or 2. This first prong must be met before the second prong is considered, which is the effect on the central nervous system. The district and appellate court never consider the first prong here and rely solely on the second prong (which isn't proven either).

Chief Justice Roberts addresses the difficulty in being able to differentiate between substances controlled and not in his concurrence in McFadden V. United States from 2015. He states "In cases involving well known drugs such as heroin, a defendant's knowledge of the identity of the substance can be compelling if he knows the substance is controlled. But that is not necessarily true for lesser known drugs. A pop quiz for any reader who doubts the point: Two drugs - dextromethorphan and hydrocodone - are both used as cough suppressants. They are also both used as recreational drugs. Which one is the controlled substance? " The 8th Circuit does not share this concern.

The 10th Circuit does share this concern. In U.S. v. Makkar, 2015, then Chief Justice of the 10th Circuit Gorsuch stated, "As a matter of common experience and logic, the fact one drug produces a similar effect to a second drug just doesn't give rise to a rational inference -- let alone rationally suggest beyond a reasonable doubt -- that the first drug shares a similar chemical structure to a second drug." Makkar requires knowledge beyond effect to knowledge of chemical structure, the element of the first prong in 21 U.S.C. § 802(32)(A). In Sharp, there was no scientific consensus as to whether THJ-011 had a chemical structure substantially similar to any thing on the schedule 1 or 2.

The 9th Circuit recognized a need for heightened scrutiny and nuanced applications for proving knowledge in controlled

substance and analogue cases. In U.S. v. Aquino, 2015, a defendant's probation violation was reversed because she wasn't aware that the synthetic marijuana she smoked contained any controlled substance or analogue. In U.S. v. Jefferson a concurrence addressed the unfairness of sentencing a man for methamphetimin when he believed he was transporting marijuana.

In the 3rd Circuit district court, a civil case, Latour v. McCullar, highlights the issue in this case determining difficulty in discovering legality of these new, lesser known substances. The Latour court said, "In general, the chemical makeup of synthetic marijuana varies; certain chemicals used to make it are illegal while others are legal." In Latour, the police were the target of civil litigation for seizing legal herbal incense. The court stated the only way to tell the difference between the legal and illegal products was laboratory testing.

When laboratory testing isn't available and the effects of the legal and illegal substances are very similar, how can anyone know that what they have is legal? It's reasonable for a customer to believe the representation of the seller. In complicated cases the suggestion of Chief Roberts in McFadden and decision by Judge Gorsuch in Makkar seem most reasonable.

When this court considers reviewing this case, I ask them to envision the following scenario. The government stages large national raids targeting conduct they disapprove of but isn't necessarily illegal. The people targeted defend themselves and produce laboratory results, proving their innocence. The government's cases and forfeitures fail in court. So the government forces the laboratories to stop independent testing. After that, the government allows foreign drug manufactures to import the substances they've outlawed, using their informants to entice this action. From there, knowing testing isn't available, and the market is flooded with substances the government outlawed and had imported, they take another shot at their national sting. After that, the government fishes their cases into friendly judicial districts that have lower standards for the burden of proof, in some cases arbitrary standards impossible to overcome.

This is what occured in Sharp. In 2013 the DEA executed Project Synergy, targeting hundreds of people nationally who sold herbal incense. Those people were protected by their lab reports, mostly, from AI Biotech, the industy's largest and most reliable laboratory. After Project synergy the DEA ordered AI Biotech to stop testing synthetic cannibinoids for anyone not DEA certified. On February 10, 2014 the DEA emergency schedules AB-FUBINACA. On February 11, 2014 the DEA used an informant to induce a Chinese synthetic drug producer named Haijun Tian to start shipping AB-FUBINACA into the U.S. at discounted prices (see: United States v Haijun Tian, 7th Cir. Dist. 2015). Then in May 2014 the DEA executes Project Synergy Phase 2, executing hundreds of raids, seizing millions in cash and property, of which Sharp was targeted. Sharp could have been charged in 6 different jurisdictions, 3 state and 3 federal. Competitors of Sharp,

charged in state jurisdictions received probation. Sharp, prosecuted in the Northern District of Iowa, received 30 years. His case was fished to a district where the district court found because the substance he sold was controlled, unknown to him, caused a vague disorienting effect, so he must have known it should have been subject to the analogue act. Then the appellate court found because he didn't perform an action that was unavailable to him, which the government claims is illegal to boot, he can't defend himself. This is the basis for denying his plea withdrawal. If this case doesn't merit review from the Supreme Court, it's hard to picture one that does.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Robert Carl Sharp ."

Date: August 3rd, 2018

8/3/18