No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RAUL ARCILA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court committed plain error by allowing the government to convert a sentencing factor, "resulting in death," under 21 USC §841(b)(1)(c) into a proximate cause element and then prove that sentencing factor to a jury through evidence about the evils of heroin that was irrelevant and unfairly prejudicial.

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The petitioner, Raul Arcila, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 19, 2018.

I. OPINIONS BELOW:

On March 19, 2018 petitioner Raul Arcila had his conviction affirmed in a memorandum opinion filed by the Ninth Circuit Court of Appeals. *See Appendix A.* On May 7, 2018 petitioner sought rehearing from the panel or rehearing en banc. On June 12, 2018 petitioner's motion for rehearing was denied. *See Appendix B.*

II. JURISIDICTIONAL STATEMENT:

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS:

21 USC § 841(a) criminalizes the distribution of a controlled substance:

> "(a) Unlawful acts
>
> 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; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

21 USC § 841(b) provides the penalties for a violation of subsection (a):

"(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both."

The Fifth Amendment to the United States Constitution states: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

IV. STATEMENT OF THE CASE:

"[W]e all agree it killed him." ER 1039 (government's opening statement).

Raul Arcila was convicted after a jury trial that was focused more on the evils of heroin than the elements of the crime. This jury trial was a government sponsored, court approved referendum on heroin that unsurprisingly ended with a 22 year old man receiving a 20 year mandatory minimum sentence. Relying on the Ninth Circuit's ruminations in a footnote, the District Court and government rewrote 21 USC § 841(a)(1) to require proximate cause for the "results in death" section found in § 841(b)(1)(C). Mr. Arcila appealed and the Ninth Circuit's response was to shrug and explain that it did not matter. *See Appendix A* at 3-4. It did not hurt Mr. Arcila according to the Ninth Circuit, because it meant the government had to prove more not less. That facile conclusion ignores a fundamental problem with what proof of proximate cause actually looks like in the real world of a trial. It was proof that rendered this trial unfair and violated Mr. Arcila's right to due process.

Beyond the fact that proximate cause is never required under Title 21 and the defendants stipulated that heroin caused death, the evidence the government adduced to prove proximate cause was so outrageously prejudicial it made defending the heroin distribution case impossible. Think for a moment about what the proof of proximate cause looks like in a heroin distribution case where death resulted. In Mr. Arcila's trial every fact witness called to prove but for causation as was then allowed to testify about the harrowingly awful impacts of heroin. They testified that many of their friends had died from it. They testified about the horrors of addiction. Beyond establishing that the heroin came from the defendants, nothing these witnesses testified to was relevant except to prove this made up element of proximate cause.

Given the defense, that they did not supply the drugs, there is no tactical reason for defense counsel to stipulate that heroin caused death except to avoid the unfairly prejudicial testimony that is necessarily required to prove that heroin caused someone's death. There is no tactical justification for defense counsel to stipulate that heroin caused death except to keep out a chief medical examiner who was going to testify about thousands of heroin overdose deaths that he had been

involved with and how it was now an epidemic. ER 868-870. There is no tactical advantage gained from stipulating that heroin caused death except to avoid the deputy medical examiner testifying about the blood Mr. Delong spat around the room as he slowly and painfully died, suffocating in his own fluids. ER 1088-1089. There was no reason to stipulate and then allow the government's drug expert to testify that they we are "seeing a lot of overdose deaths." ER 573. With that stipulation, none of this testimony should have come in. All of this irrelevant testimony was intended to support the government's proximate cause theory that would only be relevant in an impossible case where someone was so far removed from distribution of heroin it would not be reasonably foreseeable to them.

V. REASONS FOR GRANTING WRIT:

A. The Supreme Court should clarify that proximate cause is never required to be proved to a jury for sentencing factors under Title 21 like 21 USC § 841(b)(1)(C).

The Ninth Circuit initially acknowledges both the plain language of the statute and the holding in *United States v. Houston*: proximate cause regarding "resulting in death" 21 USC §841(b)(1)(c) is not required for a conviction. See *Appendix* at 1; *United States v. Houston,*

406 F.3d 1121, 1123 (9th Cir. 2005). "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.

Despite this clear statement of law, the Panel holds that the District Court did not commit plain error when it allowed the government to introduce an element of proximate cause because dicta *United States v. Houston* implies the rule might be different for conspiracies. See *Appendix* at 2-3.

The writ should be granted if for no other reason than to clarify that proximate cause is not a requirement for any offense under Title 21 absent specific language requiring proximate cause.

It is clear both from *Houston* and other Ninth Circuit cases that proximate cause is never required in regards to drug offenses under Title 21, including conspiracy under §§ 841(a) or 846. "Sentencing factors applicable to drug crimes seem to be the exception to the rule that the Government prove proximate cause when the charging statute

calls for a certain result, as well as the related rule that the Government prove that the defendant intended the conduct that the statute prohibits." *United States v. Pineda-Doval*, 614 F.3d 1019, 1028 (9th Cir. 2010).

In such cases, "[i]t is by no means unusual to peg the sentence to factors that were not known—or even foreseeable—to the defendant at the time the crime was committed." *United States v. Velasquez*, 28 F.3d 2, 5 (2d Cir.1994). The rule regarding drug cases could not be plainer: proof of sentencing factors like "resulting in death" never requires proximate cause irrespective of how exactly it is charged.

That is why a defendant who sells drugs within 1000 feet of a school is subject to twice the maximum penalties for drug distribution, even if he did not know or could not have foreseen that he was within the proscribed distance. *United States v. Pitts*, 908 F.2d 458, 461 (9th Cir.1990) (discussing 21 U.S.C. § 860(a)). The same is true for defendants who employ a minor in drug trafficking; the maximum authorized sentence is doubled regardless of whether the defendant knew or could have foreseen that the person under his employ was a minor. *United States v. Valencia–Roldan*, 893 F.2d 1080, 1083 (9th

Cir.1990) (discussing 21 U.S.C. § 859b, now codified at 21 U.S.C. § 861). A 10–year minimum sentence applies if a firearm is discharged during the commission of a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A)(iii). The defendant need not have intended or have been able to foresee that the gun would go off. *Dean v. United States*, 556 U.S. 568, 574 (2009).

It makes no difference to the analysis that conspiracy was charged here because it was charged under Title 21. Section 846 provides that "[a]ny 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 (emphasis added). Defendants conspired to violate § 841(a), i.e., distribution of a controlled substance. Therefore, they are subject to the same penalty as if they had actually violated § 841(a). See *Appendix* at 4.

Nevertheless, the Ninth Circuit in this case and *Houston* speculate about the possibility that there might be a hypothetical heroin trafficking conspiracy that would require to proximate cause. They are plainly wrong.

The cases do not support that conclusion. The case that *Houston* cites in reference to conspiracy and proximate cause is *United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir.1986). That case dealt with conspiracy to commit simple assault resulting in death, a misdemeanor. *Id.* at 1411. There is critical difference between conspiracy to commit simple assault resulting in death and conspiracy to distribute large quantities of heroin resulting in death. There are many ways a person could engage in a conspiracy to commit a simple assault and death would be completely unforeseeable to them, an absolute unintended accident. The law generally recognizes that it is inconsistent with due process to criminally sanction conduct unless it a specific outcome was reasonably foreseeable in those situations.

That logic has no application at all in a heroin trafficking conspiracy. First it is absolutely clear that drug prosecutions under Title 21 are different. Congress obviously intended strict liability for the results in death component under § 841(b)(1)(C) because it omitted any language about foreseeability.

> "A realistic consideration, however, supports the conclusion: strict liability creates an incentive for a drug dealer to warn his customer about the strength of the particular batch of

> drugs being sold and to refuse to supply drugs to particularly vulnerable people."
>
> *United States v. Hatfield*, 591 F.3d 945, 951 (7th Cir. 2010); see also *United States v. Pineda-Doval*, 614 F.3d 1019, 1028 (9th Cir. 2010).

Houston's footnote may have suggested the possibility of a proximate cause requirement in a drug conspiracy but the core of the holding is that "results in death" is strict liability for the purposes of 21 USC §§841 and 846, just as Congress intended. That footnote should not matter for the purposes of plain error because common sense dictates that it cannot ever apply.

Second, it is a simple fact that death is necessarily reasonably foreseeable to anyone in that conspiracy. Even to a heroin dealer a thousand steps removed from the transaction, the possibility of someone dying is reasonably foreseeable. The person that buys a cell phone for a heroin dealer for his drug business, perhaps the lowest level member of the conspiracy possible, knows that the death of a heroin user is a reasonably foreseeable outcome of the conspiracy. If the chain is too attenuated, direct causation is not proved, and the defendant is acquitted. This trial did not involve a statue about the provision of health care services or a simple assault statute where death would be

extraordinary or unusual, these charges involved the illegal distribution of heroin and everyone knows heroin kills.

It is impossible to conceive of a hypothetical where anyone knowingly participating in a heroin trafficking conspiracy actionable under Title 21 would not reasonably foresee death if death actually resulted from the use of heroin.. Therefore, even assuming the ridiculous, that proximate cause was ever actually an element, any competent defense attorney would stipulate to proximate cause every time just to avoid what the government did here.

This Court should grant the writ to rule conspiracy to commit Title 21 offenses does not require proximate cause because such a requirement is inconsistent with the plain language of 21 USC §§841 and 846 and, as discussed further below, it serves as the vehicle for the admission of so much irrelevant testimony about heroin deaths, the horrors of heroin, and the pain of heroin addiction, that it serves to deny a fair trial to any defendant charged with a violation of 21 USC §841(b)(1)(C).

B. Defendants were prejudiced by the evidence the government introduced in support of a non-existent evidentiary requirement.

Since it had found a way to hold that giving an instruction Ninth

Circuit has already repeatedly said is not necessary is not plain error, it makes perfect sense that to this Panel it could not have been plain error to introduce unfairly prejudicial evidence which supported government's made up element of the crime. *See Appendix* at 4. Mr. Arcila respectfully disagrees.

The government turned much of its case-in-chief, at least the little not about anticipatory bolstering of addict informants, into an invitation to convict because heroin is bad. Congress has already decided heroin is bad. It is a listed controlled substance. This is an extremely serious crime, which is why Congress required actual causation. While the government concedes that proximate cause is not an element, it then has the audacity to suggest it "inured to defendants' benefit." Gov't Answer 22. The suggestion is absurd. Having the medical examiner testify to thousands of heroin deaths was good for the defense?

The specious notion asserted by the Ninth Circuit that this increased the government's burden is laughable if considered in practice. *Id.* 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. Assuming that proximate cause was ever actually an element, any competent defense attorney would stipulate to proximate cause just to avoid what the government did here.

No court, including the Ninth Circuit in *Houston*, gave any consideration to the evidentiary issues that emanate from this fake addition to the burden of proof. *United States v. Houston*, 406 F.3d 1121, 1122 (9th Cir. 2005). Adding proof that heroin is bad does not increase the government's burden in reality, it distracted the jurors from the crucial elements of the crime with highly inflammatory and unfair prejudicial evidence. Nor did the Ninth Circuit consider a situation where the defendants had stipulated before trial that heroin caused the death.

Petitioner does not dispute that the Ninth Circuit in *Houston* pointlessly ruminated in dicta about the possibility that the causal chain could be so attenuated in a drug conspiracy that due process might require the government prove proximate cause. There might also be unicorns and stories of them are traditionally not given much

precedential weight. An instruction based on unicorns would obviously be plain error.

The defense did not make proximate cause an issue. Their argument was that they did not distribute the heroin killed Mr. Delong. That was a legitimate tactical choice because it would take a wizard to conjure a tenable defense in a heroin distribution case based on reasonable foreseeability. There is no one so far attenuated in the heroin distribution chain such that death would not be foreseeable when the government has already proved direct causation and intentional participation in a drug trafficking conspiracy. Nevertheless, hundreds of lines of trial transcript in this case are devoted entirely to proof that heroin is bad and kills people.

All of the government's forced extrapolations and skewed interpretations of inapposite cases and statutes are an attempt to obscure the simple fact that it created a tactical advantage by unconstitutionally writing an element into a federal criminal statute. This court has already held this was error. *United States v. Houston,* 406 F.3d 1121, 1122 (9th Cir. 2005). A fictional element was what allowed the government to ignore the stipulation that heroin caused

death and put on hours of irrelevant and prejudicial testimony about exactly how awful heroin is and how many people it kills. It is also why this is plain error.

While the concept of foreseeability may not be foreign to drug prosecutions, it is entirely foreign to the federal criminal jurisprudence relevant to 21 USC § 841.

There is no case that supports the idea that the government can make up an element of the crime in order to inject pointless and prejudicial testimony about heroin being bad and killing people. The government cannot point to a case where this instruction was given and held to be appropriate. The one case on point, Houston, says it was error to do this. Why trial counsel did not object may not be answered until the habeas stage. But it does not matter here. This was plain error.

There was no discussion at any point during the trial as to how the government intended to prove this element it conjured from the ether. Clearly it confused defense counsel and caused their acquiescence to all of the irrelevant evidence because there is no tactical reason why after that stipulation was reached a medical examiner or forensic pathologist was even relevant. There is no tactical reason for not

objecting to that testimony.

It also should have been apparent to the government that this proximate cause requirement was going to lead to dozens of situations where the government invited witness after witness to provide commentary on how bad heroin is and how many people it is killing.

The government rightly observes that a few the courts of appeals have ruminated in dicta about the possibility that the causal chain would be so attenuated due process might require the government prove proximate cause. What is also evident is that none of these courts, including this Court in *Houston*, gave any consideration to the real world evidentiary issues that emanate from this fake addition to the burden of proof. Houston, *406 F.3d at 1122*. Nor did any of them consider a situation where the defendants had stipulated before trial that heroin caused the death.

As the government acknowledges, the defense did not make proximate cause an issue. Their only argument was that an alternate source of heroin killed Mr. Delong. ER 953-957. For good reason: there is no tenable defense in a heroin distribution case based on reasonable foreseeability. There is no one so far attenuated in the heroin

distribution chain such that death would not be foreseeable when the government has proved direct causation.

A defense that a high-level heroin trafficker could not foresee someone down the line dying is moronic. First, it is nowhere in the statute. You would have to get a federal judge to make up a defense to the crime that does not exist in the statute. There is no reason for a federal court to even consider it given that *Houston* already says it is error. Second, there is no credible argument that death is "unforeseeable" when you are involved in the distribution of heroin. All of the government witnesses clearly knew many people were dying. There were allowed to testify to it extensively even though it was irrelevant. Finally, raising proximate cause is self-defeating because it would allow the government to respond with exactly the kind of irrelevant, unfairly prejudicial evidence it adduced here to completely poison the jury.

The evidence erroneously admitted did not have the slightest tendency to make any fact of consequence more or less probable because it only related to an element, proximate cause, which the government made up. FRE 401(a), (b). What the testimony undoubtedly did was

galvanize every juror in that room to convict the men the government kept pointing to irrespective of the strength of the case against them. 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 was plain error and an abuse of discretion.

VI. CONCLUSION:

The Petitioner did not receive a fair trial. The Ninth Circuit excused the fact that the government rewrote the statute at issue to include an element of the crime that involved incredibly unfair and

prejudicial evidence about the evils of heroin. It found this excusable despite clear caselaw that held proximate cause is never required for a violation of 21 USC § 841(a). This Court should reverse the judgment of the Ninth Circuit, reverse the District Court's judgment and remand for a new trial consistent with due process and explicit terms of the statute.

VII. STATEMENT OF RELATED CASES:

United States v. Raul Arcila, Ninth Circuit Court Case No. 16-30109, and *United States v. Sandoval-Ramos*, Ninth Circuit Court Case No. 16-30110, arise from the same Oregon District Court case, 3:14-CR-267-BR and these defendants were tried together. These cases were consolidated for purposes of this appeal. Docket Entry No. 15 in 16-30109, Docket Entry No. 6 in 16-30110.

Mr. Arcila joins in the sentencing arguments made by co-defendant and co-appellant Fabian Sandoval Ramos in his separately filed Petition for Writ of Certorari under Case No. 16-30110.

Respectfully submitted August 28, 2018,

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