No. 18-6863 ORIGINAL

Supreme Court of the United States

ANTRELL LEWIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW PETITIONER ANTRELL LEWIS and respectfully moves this Honorable Court for leave to proceed in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 39 of the Rules of this Court.

The affidavit of Antrell Lewis in support of this motion is attached hereto.

Mr. Lewis sought leave to proceed in forma pauperis in the court below.

Mr. Lewis was granted leave to proceed in forma pauperis in the court below.

The statute under which Mr. Lewis was appointed counsel by the Northern District of Iowa and the Court of Appeals for the Eighth Circuit was the Criminal Justice Act of 1964, 18 U. S. C. § 3006A. Therefore, in reliance upon Supreme Court Rule 39.1 and 18 U.S.C. § 3006A(d)(7), petitioner has *not* attached the affidavit which would otherwise be required.**

Presented herewith is Mr. Lewis' Petition for Writ of Certiorari to the Court of Appeals for the Eighth Circuit.

Antrell Lewis

Antrell Lewis
Petitioner
16596-029
P.O. Box 5000
Pekin, IL 61555

Date: 10/9/18

** Supreme Court Rule 39.1 provides:

> A party seeking to proceed in forma pauperis shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U.S.C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed in forma pauperis was sought in any other court and, if so, whether leave was granted. *If the United States district court or the United States court of appeals has appointed counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, or under any other applicable federal statute, no affidavit or declaration is required, but the motion shall cite the statute under which counsel was appointed.*" *Id.* (As Amended Jan. 27, 2003, eff. May 1, 2003.) (emphasis added)

18 U.S.C. § 3006A(d)(7) provides:

> (7) Proceedings before appellate courts. If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and *without filing the affidavit required by section 1915(a) of title 28. Id* (emphasis added)

General Docket
Eighth Circuit Court of Appeals
Court of Appeals
Docket #: 17-3046
United States v. Antrell Lewis
* * * * * * * * * *

09/21/2017 CLERK ORDER: Appointing Mr. Stephen Arthur Swift for Mr. Antrell Desharron Lewis under the Criminal Justice Act. [4581247] [17-3046] (BNS) [Entered: 09/21/2017 10:21 AM]

ORIGINAL

No. 18-6863

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Antrell Lewis
Petitioner
16596-029
P.O. Box 5000
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QUESTIONS PRESENTED

On or about 11-15-16 Antrell Lewis was charged with violation of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846 ("knowingly and intentionally" conspiring to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 1); 21 U.S.C. § 841(a)(1) ("knowingly and intentionally" distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 2).

At the end of a bench trial, over specific objection that there was insufficient evidence of Mr. Lewis' knowledge of the actual charged substances, the district court held that it was not necessary to prove Mr. Lewis' knowledge of the specific charged substances; it was sufficient that he was aware that "some controlled substance" was involved (Appendix D3) and found Mr. Lewis guilty as charged. The Court of Appeals affirmed this holding.

1.) Where both drug type and willfulness are pleaded in indictment, does a court err in finding the evidence sufficient for conviction under 21 U.S.C. § 841(a)(1) without finding beyond a reasonable doubt that defendant had knowledge of drug type?

2.) Where a Court of appeals has reached a decision that conflicts with this Court's decisions reached in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) and *Molina-Martinez v. United States*, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016) and *Alleyne v. United States*, 133 S. Ct. 2151; 186 L. Ed. 2d 314 (2013) and progeny, can that conviction stand?

3.) Where multiple additional errors affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's supervisory power to vacate his conviction and sentence?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

More specifically, the Petitioner Antrell Lewis and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Antrell Lewis, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on 7-13-18.

OPINIONS BELOW

The 7-13-18 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is reported at 895 F.3d 1004 *; 2018 U.S. App. LEXIS 19168 **, and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 8-20-18. This opinion is an unpublished decision reported at 2018 U.S. App. LEXIS 23225, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Northern District of Iowa, was entered on 9-15-17, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States District Court for the Northern District of Iowa in the Bench Trial Verdict & Denial of Motion for Acquittal was entered on 4-19-17, is an unpublished decision, and is reprinted in the separate Appendix D to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 7-13-18. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 8-20-18. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

21 U.S.C. § 841 provides in relevant part:

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

(21 U.S.C. § 841 (As amended Aug. 3, 2010, P.L. 111-220, §§ 2(a), 4(a), 124 Stat. 2372.))

21 U.S.C. § 846 provides:

> 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. *Id.* 21 U.S.C. § 846

STATEMENT OF THE CASE

On or about 11-15-16 Antrell Lewis was charged with violation of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846 ("knowingly and intentionally" conspiring to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 1); 21 U.S.C. § 841(a)(1) ("knowingly and intentionally" distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 2). (CR 2)[1]

He was arraigned on or about 11-21-16 at which time he pleaded not guilty to the charged violations.

No motion to suppress was filed or litigated.

On or about 2-28-17 Mr. Lewis proceeded to a bench trial. (Appendix B)

At the conclusion of the bench trial, Mr. Lewis filed a motion for acquittal based on the premises that there was insufficient evidence that he was aware that the substances involved in his case were heroin and furanylfentanyl.

The district court, declined to rule on this motion and, instead decided it would be ruled upon as part of the court's verdict. (Txp Trial 3-2-17, page 614)

On 4-19-17, the district court handed down its combination verdict and denial of Mr. Lewis' motion for acquittal. In the court's opinion and order, the district court held that it was not necessary to prove Mr. Lewis' knowledge of the specific charged substances; it was sufficient that he was aware that "some controlled substance" was involved (Appendix D3) and found Mr.

[1] This refers to the district court "Clerk's Record", entry #2.

Lewis guilty as charged for violation of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846 ("knowingly and intentionally" conspiring to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 1); 21 U.S.C. § 841(a)(1) ("knowingly and intentionally" distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 2). (Appendix D)

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 38 and a Criminal History of III which resulted in a guideline sentencing range 292-365 months and a statutory mandatory minimum of 20 years and a statutory maximum of life incarceration. (Presentence Report, ¶¶34, 44, 75-76)

On 9-14-17, Mr. Lewis appeared for sentencing. In the district court's 18 U.S.C. § 3553(a) analysis, the court specifically found that Mr. Lewis most likely did NOT know the specific drugs he had distributed and conspired to distribute.[2]

On 9-14-17, Mr. Lewis was sentenced to 252 months incarceration for violations of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846 ("knowingly and intentionally" conspiring to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 1); 21 U.S.C. § 841(a)(1) ("knowingly and intentionally" distribute "a mixture or substance containing a detectable amount of heroin ... and

[2] See Transcript of Sentencing 9-14-17, page 18 ("...dealers don't know exactly what they're selling"). See also Transcript of Sentencing 9-14-17, page 19 ("I do acknowledge there's no indication that Mr. Lewis intended to cause death or serious injury ... It's more of a situation where it's extremely reckless to be peddling a substance that you don't know exactly what it is and what it might do to the people who use it.").

furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 2). This sentence represented a downward variance from the guideline sentencing range. (Appendix B)

The judgment was entered on 9-15-17.

On 9-19-17, a Notice of Appeal was filed. On direct appeal, counsel argued that the evidence was insufficient. This included argument that Mr. Lewis did not know the specific drugs he sold and that he sold and distributed "other controlled substances". (Lewis USCA brief, PDF page 11).[3]

On 7-13-18, the Court of Appeals denied Mr. Lewis' appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that a defendant does not need to know the exact nature of the substance in his possession, only that it was a controlled substance of some kind. 21 U.S.C. § 841(b)(1)(C) is a sentencing enhancement, not a separate offense. To sustain a conviction under 21 U.S.C. § 841(a)(1) with a serious bodily injury or death enhancement under 21 U.S.C. § 841(b)(1)(C) the government must prove: (i) knowing or intentional distribution of ***an illicit drug***, and (ii) serious bodily injury or death caused by resulting from the use of that drug. *United States v. Lewis*, 895 F.3d 1004 *; 2018 U.S. App. LEXIS 19168 ** (8th Cir. 7-13-18).

Mr. Lewis timely filed a petition for rehearing. In the petition, Mr. Lewis argued, *inter alia*, that the evidence was insufficient because it did not show he "knowingly and intentionally"

[3] Mr. Lewis also filed a pro se F.R.A.P. 28(j) citation in which he expanded upon the brief of his attorney by challenging, *inter alia*, the sufficiency of the evidence of his knowledge of the specific drugs involved in his case. While denominated "28(j)", the motion should probably be considered a petition for rehearing or supplement to his petition for rehearing filed by his attorney. (See 7-26-18 USCA filing).

distributed or conspired to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl".[4]

On 8-20-18, the Court of Appeals denied rehearing. *United States v. Lewis*, 2018 U.S. App. LEXIS 23225 (8th Cir. 8-20-18). (Appendix C)

Mr. Lewis demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

[4] See Lewis USCA petition for rehearing, PDF page 7: "there was no evidence offered that Mr. Lewis had any knowledge of the full contents of the drug distributed".

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. LEWIS' PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[5] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies

[5] See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

1A.) Where Both Drug Type And Willfulness Were Pleaded In Indictment, The Lower Courts Erred In Finding The Evidence Sufficient For Conviction Under 21 U.S.C. § 841(A)(1) Without Finding Beyond A Reasonable Doubt That Defendant Had Knowledge Of Drug Type

In *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), the Supreme Court held that the due process clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Beyond the rule that places the burden upon the prosecution of producing evidence to prove the accused guilty, Professor Wigmore states that "the presumption of innocence ... conveys for the jury a special and additional caution ... to consider, in the material for their belief, nothing but the evidence, i.e., no surmises based on the present situation of the accused." 9 Evidence § 2511 (emphasis in original). The essence of any truly civilized criminal justice system is fairness in the individual case. We are reminded that "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent [persons] are being condemned." *In re Winship*, 397 U.S. at 364.[6]

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[6] See *Jones v. United States*, 16 F.3d 487; 1994 U.S. App. LEXIS 2182 (2nd Cir. 1994) (where there is a "slight possibility" defendant is not guilty then proof beyond a reasonable doubt has not been demonstrated); *United States v. Peterson*, 236 F.3d 848; 2001 U.S. App. LEXIS 53 (7th Cir. 2001) (same -- "possibility" that defendant not guilty precluded finding of guilt beyond a reasonable doubt); *United States v. Pena*, 983 F.2d 71, 72-73 (6th Cir. 1993) (holding that even though a passenger in a car carrying seventeen kilograms of cocaine suspected that something illegal was going on, that suspicion did not prove that she actually knew or intended to aid the driver in the distribution of cocaine); *United States v. Craig*, 522 F.2d 29, 31-32 (6th Cir. 1975) (holding that "it would be highly conjectural and speculative indeed to conclude from these facts [where the defendant drove a friend who was carrying a closed box to an apartment for a drug sale, waited for him, fled from the scene when law enforcement agents arrived, abandoned his

Unlike 21 U.S.C.S. § 841(a), which makes it unlawful for any person knowingly or intentionally to distribute a controlled substance, § 841(b) which prescribes the penalties for violations of § 841(a), imposes no mens rea requirement. *United States v. Massena*, 719 Fed. Appx. 884, 886, 2017 U.S. App. LEXIS 25341 (11th Cir. 2017). *Cf. United States v. Nahmani*, 696 Fed. Appx. 457, 469, 2017 U.S. App. LEXIS 14924, *22 (11th Cir. 2017) ("[A]n indictment may charge 'a generic violation of §§ 841(a) and 846 in which [the defendant] conspired to knowingly and intentionally distribute 'a controlled substance'".).

However, where an indictment charges that the defendant "knowingly and intentionally" distributed or conspired to distribute a *specific* drug or drugs those facts must be proven beyond a reasonable doubt to support conviction. *Id.* . *Nahmani*, 696 Fed. Appx. at 470 (citing *United States v. Narog*, 372 F.3d 1243 (11th Cir. 2004)). *Cf. United States v. Sanders*, 668 F.3d 1298; 2012 U.S. App. LEXIS 1933 ** (11th Cir. 2012) (same); *United States v. Caseer*, 399 F.3d 828, 2005 U.S. App. LEXIS 3390, 2004 FED App. 0098P (6th Cir. 2005) (same); *United States v.*

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truck and shotgun, and eluded police officers for two years] that Craig had knowledge of the presence of drugs in the closed box..."); *United States v. Hayter Oil Co., Inc. of Greenville, Tennessee*, 51 F.3d 1265, 1271 n. 5 (6th Cir. 1995) (quoting *United States v. Van Hee*, 531 F.2d 352, 357 (6th Cir. 1976) (holding that "'evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal.'"); *United States v. Cartwright*, 359 F.3d 281; 2004 U.S. App. LEXIS 3904 (3rd Cir. 2004) ("we have consistently held in cases of this genre that, even in situations where the defendant knew that he was engaged in illicit activity, and knew that 'some form of contraband' was involved in the scheme in which he was participating, the government is obliged to prove beyond a reasonable doubt that the defendant had knowledge of the particular illegal objective contemplated by the conspiracy") (citing *United States v. Idowu*, 157 F.3d 265, 266-67 (3rd Cir. 1998) (citing *United States v. Thomas*, 114 F.3d 403, 405 (3rd Cir. 1997) and *United States v. Mastrangelo*, 172 F.3d 288, 293 (3rd Cir. 1999)). *Cf. United States v. Radomski*, 2007 U.S. App. LEXIS 364 (7th Cir. 1-9-07) (Although a conspiracy to sell a counterfeit drug is a federal crime, 21 U.S.C.S. §§ 841(a)(2), 846, a conspiracy to pretend to be offering to sell an illegal drug is not).

Cruz, 388 F.3d 150; 2004 U.S. App. LEXIS 20954 ** (5th Cir. 10-7-04) (same); *United States v. Demott*, __ F.3d __, 2018 U.S. App. LEXIS 28417 (2nd Cir. 2018) (same).[7]

In Mr. Lewis' case, as set forth above, on or about 11-15-16 Antrell Lewis was charged with violation of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846 ("knowingly and intentionally" conspiring to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 1); 21 U.S.C. § 841(a)(1) ("knowingly and intentionally" distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 2). (CR 2).

On or about 2-28-17 Mr. Lewis proceeded to a bench trial. (Appendix B)

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At the conclusion of the bench trial, Mr. Lewis filed a motion for acquittal based on the premises that there was insufficient evidence that he was aware that the substances involved in his case were heroin and furanylfentanyl.

The district court, declined to rule on this motion and, instead decided it would be ruled upon as part of the court's verdict. (Txp Trial 3-2-17, page 614)

On 4-19-17, the district court handed down its combination verdict and denial of Mr. Lewis' motion for acquittal. In the court's opinion and order, the district court held that it was not necessary to prove Mr. Lewis' knowledge of the specific charged substances; it was sufficient that he was aware that "some controlled substance" was involved (Appendix D3) and found Mr. Lewis guilty as charged for violation of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846 ("knowingly and intentionally" conspiring to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 1); 21 U.S.C. § 841(a)(1) ("knowingly and intentionally" distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 2). (Appendix D)

On 9-14-17, Mr. Lewis appeared for sentencing. In the district court's 18 U.S.C. § 3553(a) analysis, the court specifically found that Mr. Lewis most likely did NOT know the specific drugs he had distributed and conspired to distribute.[8]

[8] See Transcript of Sentencing 9-14-17, page 18 ("...dealers don't know exactly what they're selling"). See also Transcript of Sentencing 9-14-17, page 19 ("I do acknowledge there's no indication that Mr. Lewis intended to cause death or serious injury ... It's more of a situation where it's extremely reckless to be peddling a substance that you don't know exactly what it is and what it might do to the people who use it.").

On 9-14-17, Mr. Lewis was sentenced to 252 months incarceration for violations of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846 ("knowingly and intentionally" conspiring to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 1); 21 U.S.C. § 841(a)(1) ("knowingly and intentionally" distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl ... knowing that the mixture or substance was intended for human consumption" with death and serious injury resulting) (Count 2). This sentence represented a downward variance from the guideline sentencing range. (Appendix B)

On direct appeal, counsel argued that the evidence was insufficient. This included argument that Mr. Lewis did not know the specific drugs he sold and that he sold and distributed "other controlled substances". (Lewis USCA brief, PDF page 11).[9]

On 7-13-18, the Court of Appeals denied Mr. Lewis' appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that a defendant does not need to know the exact nature of the substance in his possession, only that it was a controlled substance of some kind. 21 U.S.C. § 841(b)(1)(C) is a sentencing enhancement, not a separate offense. To sustain a conviction under 21 U.S.C. § 841(a)(1) with a serious bodily injury or death enhancement under 21 U.S.C. § 841(b)(1)(C) the government must prove: (i) knowing or intentional distribution of ***an illicit drug***, and (ii) serious bodily injury or death caused by resulting from the use of that drug. *United States v. Lewis*, 895 F.3d 1004 *; 2018 U.S. App. LEXIS 19168 ** (8th Cir. 7-13-18).

[9] Mr. Lewis also filed a pro se F.R.A.P. 28(j) citation in which he expanded upon the brief of his attorney by challenging, *inter alia*, the sufficiency of the evidence of his knowledge of the specific drugs involved in his case. While denominated "28(j)", the motion should probably be considered a petition for rehearing or supplement to his petition for rehearing filed by his attorney. (See 7-26-18 USCA filing).

Mr. Lewis timely filed a petition for rehearing. In the petition, Mr. Lewis argued, *inter alia*, that the evidence was insufficient because it did not show he "knowingly and intentionally" distributed or conspired to distribute "a mixture or substance containing a detectable amount of heroin ... and furanylfentanyl".[10]

On 8-20-18, the Court of Appeals denied rehearing. *United States v. Lewis*, 2018 U.S. App. LEXIS 23225 (8th Cir. 8-20-18). (Appendix C)

Based on the foregoing, the decision by the Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

[10] See Lewis USCA petition for rehearing, PDF page 7: "there was no evidence offered that Mr. Lewis had any knowledge of the full contents of the drug distributed".

1B.) The Court Of Appeals Has Reached A Decision That Conflicts With This Court's Decisions Reached In Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) And Molina-Martinez v. United States, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016) And Alleyne v. United States, 133 S. Ct. 2151; 186 L. Ed. 2d 314 (2013) And Progeny.

FACTS

Mr. Lewis indictment charges 2 counts, both counts alleges in some fashion to distribute heroin and furanylfentanyl resulting in death and serious bodily injury. Furanylfentanyl, a schedule I controlled substance analogue, as defined in 21 U.S.C. § 802(32)(A), knowing that the mixture or substance was intended for human consumption as provided in 21 U.S.C. § 813 in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C).

Being found guilty of distributing heroin and furanylfentanyl, and finding that the "but for" cause of death resulted from the use of furanylfentanyl, the district court imposed a singular sentence on both counts, starting with an identified mandatory minimum of 240 months. See Sentencing Hearing pg 20 line 15 on.

On Appeal, during oral arguments, counsel raised that the government submitted no evidence that his client knew anything about any furanylfentanyl and that the heroin cannot trigger a violation of 841(b)(1)(c), resulting in death and seriously bodily injury enhancement. See Hearing Minutes at 5:00. (Hr. M Hereinafter).

The Court rejected this assertion asking counsel what importance is it that he didn't know furanylfentanyl was mixed in the heroin? One justice opinioned that he knew heroin was an illicit drug; a high percentage of the cases that came through his court with heroin had furanylfentanyl in it. Hr. M. at 7-9. The court however, acknowledged that the district court made no findings of fact to Mr. Lewis' knowledge of the furanylfentanyl. Hr. M. 11:30.

The court affirmed the conviction identifying a singular offense of heroin with an mixture of furanylfentanyl and affirmed the sentence of the 252 months even though it identified solely that furanylfentanyl was the "but for" cause.

Under *Blockburger*, the court is permitted to find a singular offense as long as the furanylfentanyl did not require a different fact/element from that of heroin. Under Alleyne and similar cases, if the heroin was the causation of the death, then the court can find 841(b)(1)(c) was violated. Under *Molina-Martinez*, if the heroin id not the causation for the death, then it is not harmless error to give 252 months for the heroin for one of the facts no findings was made towards the elements of the furanylfentanyl because the courts relied on the heroin. Thus, a violation of Jackson v. Virginia, that the government must prove every element of the charged offense.

Discussion

In *Blockburger*, 284 U.S. 299, 304, stated: "that, where the same act or transaction constitutes a violation of 2 distinct statutory provisions, the test to be applied to determine whether there are 2 offenses or 1 is whether each provision requires proof of a fact which the other does not." In that case, the petitioner was charged with violating the Harrison Narcotics Act. The indictment contained 5 counts. The jury returned a verdict against the petitioner upon the 2nd, 3rd, and 5th counts only.

It was challenged that the sale charged in the 3rd as having been made not from the original stamped package, and the same sale charged in the 5th count as having been made not in pursuance of a written order of the purchaser, constituted but one offense from which only a single penalty lawfully may be imposed. Id at 301. The court found that 2 statutes had been violated stating: "Section 1 of the Narcotic Act creates the offense of selling any of the forbidden

drugs except in or from the original stamped package; and section 2 creates the offense of selling any such drug not in pursuance of a written order" Thus the court held: Upon the face of the statute, 2 distinct offenses are created... applying the test, we must conclude that here, although both sections were violated by one sale, two offenses were committed; if each statute requires a proof of an additional fact which the other does not an acquittal or conviction under does not exempt the defendant from prosecution and punishment under the other." Id at 304.

Based on this, the courts position is untenable, because the analogue act requires a different fact from the controlled substance act.

The Controlled Substance Act prohibit the distribution of a "controlled Substance," 21 U.S.C.S. 841, and defines "controlled Substance" to mean any drugs included in schedules I thru V, established by the CSA. 21 U.S.C.S, 80296, 812(a).

The Analogue Act however, is to prevent the distribution of newly created drugs, not yet listed on the schedules but have similar effects on the body. The Analogue Act defines a "controlled substance analogue" as any substance the chemical structure of which is substantially similar to that of a controlled substance in schedule I or II, and which has an actual, claimed , or intended stimulant effect on the central nervous system... 21 U.S.C. § 802(32)(A). But the most obvious fact that is different, is that it explicitly excludes heroin from its definition. See *United States v. Carlson*, 2013 U.S. Dist. Lexis 130893 (Dist of Minn. July 2013) (§802(32(c)(i) specifically excludes controlled substances listed in the I through V schedules) of the person to whom the drug is sold. In addition, courts have distinguished in "void for vagueness" challenges to the analogue statute, that 21 U.S.C. § 813 establishes that analogues is to be treated "as" a controlled substance once it is shown it is for human consumption, not that it "is" a controlled substance. See *United States v. Lane*, 2013 U.S. Dist. Lexis, 88376 (9th Dist 2013). So it gives

reason to follow that on the face of the statute as well as congress intent the Analogue Act creates a different offense than that of the CSA. *Blockburger* 284 at 304. Thus the courts decision conflicts in determining only one offense was committed.

Because Heroin was not the "but for" cause and does not extend to the Analogue definition, the Court is in conflict with Molina-Martinez in starting with the guideline sentence.

In *Molina-Martinez* court, That Court stated: "The Court has made clear that the guidelines are to be the sentencing court's ' starting point and...initial benchmark'. Federal courts understand that they 'must begin their analysis with the guidelines and remain cognizant of them throughout the sentencing process.' The guidelines are 'the framework for sentencing and anchor...the district court's discretion.'" In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome. And, again in most cases, will suffice for relief if the other requirements of Fed. R. Crim. P. 52(b) are met. Id.

With that said, we know that the heroin is not the "but for" cause of the death and serious body injury. Therefore the court had to start with a guideline range determination. 5grams of heroin is a sentence no more than 40 months. But because the sentence is based on the furanylfentanyl, and the evidence in support of is based on the heroin, the court would have to go back and contend with counsels argument that the government produced no evidence of knowledge of the furanylfentanyl. Based on the trial record, this would lead to an acquittal for the furanylfentanyl charge, in which the sentence is now no more than 40 months.

1C.) Multiple Errors In The Courts Below Mandate That Mr. Lewis' Conviction And/Or Sentence Be Vacated.

Mr. Lewis' conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Lewis' conviction and sentence are violative of his right to freedom of speech and to petition and his right to be free of unreasonable search and seizure, his right to due process of law, his rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and his right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Mr. Lewis' sentence.

These claims in Argument 1C are submitted to preserve Mr. Lewis' right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

Based on the foregoing, the decision by the Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States,* 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Eighth Circuit in Mr. Lewis' case.

CONCLUSION

For all of the foregoing reasons, Petitioner Antrell Lewis respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[11] to the court of appeals for reconsideration in light of 21 U.S.C. § 841(a)(1) and the case law set forth herein including *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

Mr. Lewis asks that the Court of Appeals be directed to remand to the district court for entry of a judgment of acquittal based on insufficient evidence.

Antrell Lewis

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[11] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).