

No. 18-8584 ORIGINAL

FILED
MAR 26 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Antwan Jones — PETITIONER
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Seventh Circuit.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antwan Jones, Reg. No. 40833-424

(Your Name)

Federal Correctional Institution
P.O.Box 1000

(Address)

Milan Michigan 48160

(City, State, Zip Code)

Prisoner No Phone

(Phone Number)

QUESTION(S) PRESENTED

- I. Count 1 Conspiracy Indictment is insufficient on its face because it omitted essential element(s) that the Government had to prove.
 - (a). Is Title 21 U.S.C. §846 ATTEMPT AND CONSPIRACY UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO PROVIDE THE REQUIRED ESSENTIAL ELEMENT THAT THE DEFENDANT "KNOWINGLY" AGREED AND CONSPIRED ?
 - (b) IS TITLE 21 U.S.C. §846 UNCONSTITUTIONALLY VAGUE AS APPLIED IN THE INSTANT CASE ?

LIST OF PARTIES

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

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE.....	
REASONS FOR GRANTING THE WRIT.....	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A :	Seventh Circuit ORDER denying petition for rehearing and rehearing en banc.
APPENDIX B :	Motion For Rehearing And Rehearing En Banc to Seventh Circuit Court of Appeals.
APPENDIX C :	Seventh Circuit ORDER affirming district court judgment of conviction and sentence.
APPENDIX D :	Appeal Brief to Seventh Circuit. Relevant part, Issue No. 1. Case No. 17-1543, Dkt. #18.
APPENDIX E	Government Response Brief. Relevant part, Issue No. 1. Case No. 17-1543. Dkt. #27.
APPENDIX F	

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

For cases from **federal courts**:

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

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

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

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 30, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 24, 2019, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V,

No person shall be deprived of life, liberty, or property, without due process of law.....

AMENDMENT IV,

In all criminal proceedings, the accused shall enjoy the right to a..... (fair trial).....

Title 21 U.S.C. §846 Attempt and Conspiracy,

Any person who attempts or conspiracy to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission which was the object of the attempt or conspiracy.

Title 21 U.S.C. §841(a)(1), Prohibited Acts

(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 manfuacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a conterfit substance.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Morisette v. United States, 342 U.S. 246, 250, 96 L.Ed. 288, 72 S.Ct. 240 (1952).....	7
Russell v. United States, 369 U.S. 749, 8 L. Ed 2d 240, 82 S.Ct. 1038 (1962).....	9
United States v. Behrman, 471 U.S. 419, 85 L.Ed 2d 105 (1985).....	11
United States v. Brown, 726 F.3d 993 (7th Cir. 1994)....	9
United States v. Cox, 536 F.3d 723,727-28 (7th Cir. 2008).	12
United States v. Debrow, 346 U.S.374, 376 (1953).....	11
United States v. Felts, 602 F.2d 146 (7th Cir. 1997).....	9
United States v. Green, 779 F.2d 1313 (7th Cir. 1979)....	9
United States v. Gypsum, 438 U.S. 422, 57 L.Ed. 2d 854, 98 S.Ct. 2864 (1878).....	7
United States v. Harris, 536 F.3d 798 (7th Cir. 2008)....	9
United States v. Johnson, 538 Fed. Appx. 64 (5th Cir. 2014)	9
United States v. Mastrapa, 509 F.3d 652 (4th Cir. 2007)....	7
United States v. Kellum, 42 F.3d 108 (7th Cir. 1994).....	9
United States v. Northe, 86 Fed. Appx. 427 (1st Cir. 2004)...	9
United States v. Paulk, 66 Fed. Appx. 309 (3d Cir. 2003)....	9
United States v. Small, 1993 U.S. App. Lexis 881 (7th Cir. 1993).....	9
United States v. Staples, 511 U.S. 600, 128 L.Ed 2d 608 114 S.Ct. 1793 (1994).....	7
United States v. Wheeler, 535 F.3d 446 (6th Cir. 2008)....	9
STATUTES AND RULES	
Title 21 U.S.C. §846	passim
Title 21 U.S.C. §841(a)(1).....	passim

STATEMENT OF THE CASE

The Superseding Indictment Count One charge that Petitioner Antwan Jones and two co-defendants conspired with each other to "knowingly and intentionally" possess with intent to distribute and distribute a controlled substance, namely 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21 United States Code, Section 841(a)(1), all in violation of Title 21 United States Code, Section 846.

The §846 conspiracy allegations charged in Count One did not charge that Jones and others "knowingly" agreed and conspired with each others and others. At trial Jones did not challenge the Government's inferences that he knowingly agreed with others to conspire because the conspiracy charged in Count One did not charge that he "knowingly" agreed and conspired with others. At trial Jones was not prepared to defend against the Government's allegations that he "knowingly" agreed and conspired with others.

After all evidence was presented and the parties rested their cases the trial Judge gave the instructions to the Jury concerning what the government had to prove in order for the jury to find Jones guilty of the conspiracy charged in Count One. The Court instructed the jury that the government had to prove the existance of the conspiracy, but also that defendant knowingly became a member of the conspiracy with intent to advance the conspiracy. At that point it was to late for Jones to defend himself against allegations that he "knowingly" agreed and conspired with others to commit a drug trafficking crime because the trial was over.

REASONS FOR GRANTING THE PETITION

I. The issue presented in this petition is an issue of National interest because it affects the constitutional fifth amendment due process rights of all persons presumably innocent who are charged under federal law Title 21 U.S.C. §846, Attempt and Conspiracy nation wide. Title 21 U.S.C. §846 as applied is violative of the Constitutional Fifth Amendment due process right to notice and opportunity to respond. Notice and opportunity to respond is the foundation of constitutional due process rights. The Fifth Amendment provides: No person shall be deprived of life, liberty, or property, without due process of law. The Due Process Clause prohibits the government from depriving a person of life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standerless that it invites arbitrary enforcement without opportunity to respond. In the instant case petitioner Antwan Jones was deprived of (1) his protected liberty interest, and (2) such deprivation occurred without the requisite due process of law.

(a). IS TITLE 21 U.S.C. §846 ATTEMPT AND CONSPIRACY SUBJECT TO A "VAGUENESS" CHALLENGE BECAUSE IT FAILS TO PROVIDE THE ESSENTIAL ELEMENT OF CONSPIRACY THAT THE DEFENDANT "KNOWINGLY" AGREED AND CONSPIRED?

Criminal offenses requiring no mens rea have a generally disfavored status. The failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our

criminal law. Moreover, to interpret the statute to dispense with mens re would be to criminalize a broad range of apparently innocent conduct. See United States v. Behrman, 471 U.S. 419, 85 L.Ed. 2d 105 S.Ct. (1985). See Morissette v. United States, 342 U.S. 246, 250, 96 L Ed 288, 72 S.Ct. 240 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is universal and persistant in mature systems of law as belief in freedom of human will and a consequent ability and duty of the normal individual to choose between good and evil"). There can be no doubt that this established concept has influenced our interpretation of criminal statutes. Indeed, we have noted that the common-law rule requiring mens rea has been "followed in regards to statutory crimes even where the statutory definition did not in terms include it". "Far more than the simple omission of the appropriate phrase from the statutory definition of a crime is necessary to justify dispensing with an intent requirement". United States v. Gypsum, 438 U.S. 422, 57 L Ed 2d 854, 98 S.Ct. 2864 (1978). "Some indication of congressional intent, express or implied, is required to dispense with mens re as an element of a crime". United States v. Staples, 511 U.S. 600, 128 L Ed 2d 608, 114 S.Ct. 1793 (1994) (citing Gypsum, *supra*, at 438, and Morissette, *supra*, at 263).

Title 21 U.S.C. §846 Attempt and Conspiracy fails to include the essential element of "mens re" of "knowingly" agreed and conspired. In the case at bar Count One charges

Jones with a drug trafficking conspiracy under Title 21 U.S.C. §846 , and fails to provide the "mens re" that Jones "knowingly" agreed and conspired with others". Jones submits that pursuant to the "vagueness doctrine" 21 U.S.C. §846 is unconstitutionally vague as applied to him and his case because §846 invites the exercise of "arbitrary power" by leaving him in the dark about what §846 demands and allows prosecutors and the courts unbridled authority to determine what he must meet at trial through the charging function and jury instructions.

In the instant case government prosecutors exercised "arbitrary charging powers" and abused the charging function by choosing not to charge that Jones "knowingly" agreed and conspired when they knew that §846 conspiracy was a specific intent crime that required the government to prove Jones knowingly agreed and conspired to commit a drug trafficking crime. In the Seventh Circuit and other circuits federal prosecutors "arbitrarily" charge that the defendant "knowingly" agreed and conspired and in other case they omit the element that the defendant "knowingly" agreed and conspired. In the following cases prosecutors charged that the defendant's "knowingly" agreed and conspired with others. Specifically see United States v. Mastrapa, 509 F.3d 652 (4th Cir. 2007) where the Court stated:

"In this case Mastrapa plead guilty to Count I in the indictment charging him with "knowingly...conspir[ing]" with others "to knowingly and

intentionally distribute, and possess with intent to distribute 500 grams or more of a mixture or substsnce containing a detectable amount of methamphetamine" in violation of §§841(a)(1) and 846 (b)(1)(A). See 21 U.S.C. §846..... Mastrap's knowledge, accordingly was an essential element of his guilt for violation of §846". Id. Mastrapa, 509 F.3d at 657.

See: United States v. Small, 1993 U.S. App. Lexis 881 (7th Cir. 1993); United States v. Green, 779 F.2d 1313 (7th Cir. 1979); United States v. Felts, 602 F.2d 146 (7th Cir. 1997); United States v. North, 86 Fed. Appx. 427 (1st, Cir. 2004); United States v. Paulk, 66 Fed. Appx. 309 (3rd Cir. 2003); United States v. Johnason 583 Fed. Appx. 64 (5th Cir. 2014); United States v. Wheeler, 535 F.3d 446 (6th Cir. 2008). Specifically

A check of the legislative history and case law addressing Title 21 U.S.C. §846 Attempt and Conspiracy reveals that Congress and the Courts agree that conspiracy is a specific intent crime. See: United States v. Harris, 536 F.3d 798 (7th Cir. 2008) "Conspiracy is a specific intent crime". Id. Headnote; United States v. Kellum, 42 F.3d 108 (7th Cir. 1994) "Conspiracy is a specific intent crime". See: United States v. Brown, 726 F.3d 993 (7th Cir. 1994) "In order to obtain a drug conspiracy conviction the Government must show defendant knowingly and intentionally joined the agreement". Id. Headnote.

When the trial court gives it's jury instructions concerning 21 U.S.C. §846 the court exercises "arbitrary powers" by instructing the petit jury that in order to convict defendant on the §846 conspiracy count the government must prove beyond a reasonable doubt that the defendant "knowingly" agreed and conspired with others to commit a drug trafficking crime. At this point in the proceedings the submission of evidence is over, the parties have rested thier cases and its to late for the defendant - such as jones - to defend himself against the "jury instructions inference that he "knowingly" agreed and conspired with others to commit a drug trafficking crime". The Government's arbitrary charging of §846 and the court's arbitrary jury instructions effectively deprive defendants - such as Jones - of "notice" that he must meet and be prepared to defend himself against government evidence that he "knowingly" agreed and conspired with others to commit a drug trafficking crime. "The most basic of due process protections is the demand of fair notice." See Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). The question to be answered is how can a defendant - such as Jones - be convicted of an act he was never indicted for, never charged with and never given notice or opportunity to defend himself against because the statute 21 U.S.C. §846 conspiracy, does not charge or give notice that a person must "knowingly" agree and conspire in order to be guilty of the prohibited act ?

(a). IS TITLE 21 U.S.C. §846 UNCONSTITUTIONALLY VAGUE
AS APPLIED IN THE INSTANT CASE ?

"The sufficiency of an indictment is measured by two criteria: (1) whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and (2) in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction". See *Russell v. United States*, 369 U.S. 749, 8 L Ed 2d 240, 82 S.Ct. 1038 (1962). The drug conspiracy under 21 U.S.C. §846 charged in Count One of Jones indictment fails the number (1) criteria for determining the sufficiency of an indictment under *Russell*, because the conspiracy allegations under §846 fail to charge the essential "mens rea" element that Jones "knowingly" agreed and conspired with others. See *Mastrapa*, *supra*, 509 F.3d at 657, "Mastrapa's knowledge, accordingly was an essential element of his guilt for violation of §846". "It is settled law that in order for an indictment to be valid it must allege all of the elements which are necessary to constitute a violation of the statute". *United States v. Debrow*, 346 U.S. 374, 376, 98 L. Ed. 92, 74 S.Ct. 113 (1953).

Jones firmly submits that pursuant to the "vagueness doctrine" found under the Fifth Amendment's due process clause Title 21 U.S.C. §846 is unconstitutionally vague as applied in Count One of his case. As applied in this case §846 fails to provide Jones

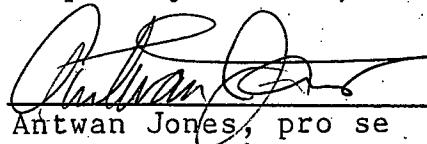
with "notice" of what he is actually being charged with and fails to provide an opportunity to meet those charges and defend against them at trial as guaranteed under the Sixth Amendment right to a fair trial. In this case the Count One's failure to charge under 21 U.S.C. §846 that Jones "knowingly" agreed and conspired with others produces more unpredictability and arbitrariness than the Due Process Clause of the Fifth Amendment tolerates. Jones conviction on Count One under §846 should be vacated as violative of the vagueness doctrine and the fifth and Sixth Amendments of the United States Constitution.

The Seventh Circuit panel admits that, "the indictment did not explicitly accuse Jones of "knowingly" and "intentionally" conspiring. (See Seventh Circuit Order, Appendix-D, page 3, ¶ 2). No further argument is required as to whether or not the indictment fails to charge that Jones "knowingly" and intentionally" conspired. Citing United States v. Cox, 536 F.3d 723, 727-28 (7th Cir. 2008) The Seventh Circuit holds that "The verb 'conspire', however necessarily entails an intent to act"....."And it is not necessary to spell out each element of an offense in the indictment so long as "each element of the offense [is] present in context". citing United States v. Smith, 223 F.3d 554, 571 (7th Cir. 2000). In the instant case the drug conspiracy charged in Count One under 21 U.S.C. §846 fails to allege the "mens rea" of "knowingly" in any context or form whatsoever. Count One fails to charge an offense against the United States because it fails to charge the essential element that Jones "knowingly" agreed and conspired.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Antwan Jones, pro se

Date: 3/16/2019