No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY L. SHELTON,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the "death results" enhanced penalty provisions of 21 U.S.C. §841(b)(1)(C) apply to a prosecution for the *inchoate* crime of conspiracy to commit a controlled substance offense under 21 U.S.C. §846?

LIST OF PARTIES

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

RELATED CASES

United States v. Terrill J. Hill, No. 2:17-cr-00010-1, U.S. District Court for the Eastern District of Kentucky. Judgment entered October 5, 2017.

United States v. Chad H. Prodoehl, No. 2:17-cr-00010-3, U.S. District Court for the Eastern District of Kentucky. Judgment entered May 29, 2018.

United States v. Gordon J. Wanser, No. 2:17-cr-00010-4, U.S. District Court for the Eastern District of Kentucky. Judgment entered July 31, 2018.

United States v. Chad H. Prodoehl, No. 18-5614, U.S. Court of Appeals for the Sixth Circuit. Judgment entered October 16, 2019.

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Petitioner Johnny L. Shelton ("Petitioner" or "Shelton") respectfully prays that a writ of certiorari will issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 18-6183 on October 16, 2019.

OPINION BELOW

On October 16, 2019, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed an opinion and order affirming Petitioner's conviction and life prison term for conspiracy to distribute carfentanil resulting in death. (App. 1a). The opinion is unpublished. The United States District Court entered its criminal judgment on February 28, 2017. (App. 14a).

JURISDICTION

Petitioner seeks review of the opinion and order of the United States Court of Appeals for the Sixth Circuit entered on October 16, 2019. Jurisdiction is invoked under 28 U.S.C. §1254(1), which permits a party to petition the Supreme Court of the United States to review any civil or criminal case before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

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

21 U.S.C. §841 (version in effect August 3, 2010 to December 20, 2018):

> (a) Unlawful acts
>
> . . . . [I]t 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[.]
>
> . . . .
>
> (b) Penalties
>
> . . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)
>
> . . . .
>
> (C) In the case of a controlled substance in schedule I or II, . . . such person shall be sentenced to a term of imprisonment of not more than 20 years and

> if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life[.] . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment[.] . . .
>
> **21 U.S.C. §846:**
>
> 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.

STATEMENT OF THE CASE

On the morning of October 16, 2016, corrections officers at the Boone County, Kentucky Jail Work Camp found Inmate Timothy Marcum lying dead in his bunk. The county medical examiner performed an autopsy, ordered toxicology testing on his bodily fluids, and determined the cause of death to be "acute carfentanil intoxication."

A task force of local and federal narcotics officers opened an investigation into Marcum's death. During the investigation, inmates implicated Shelton and others in the smuggling of drugs into the facility. The United States Attorney presented the results of the investigation to a federal grand jury.

The grand jurors returned an indictment charging Shelton and three other individuals with conspiracy to distribute a controlled substance. The sole count of the indictment reads in its entirety as follows:

> On or about October 15, 2016, in Boone County, in the Eastern District of Kentucky, and elsewhere,
>
> TERRILL J. HILL,
> Aka CUZO,
> JOHNNY L. SHELTON,
> CHAD H. PRODOEHL, and
> GORDON J. WANSER,
>
> did conspire together and with others to knowingly and intentionally distribute and possess with intent to distribute carfentanil, a Schedule II controlled substance, violations of 21 U.S.C. §841(a)(1), all in violation of 21 U.S.C. §846.
>
> As to TERRILL J. HILL, aka CUZO, JOHNNY L. SHELTON, and CHAD H. PRODOEHL, these violations resulted in death.

Shelton pled not guilty and exercised his right to a jury trial. The district judge instructed the jury that "the government must prove, beyond a reasonable doubt, [] that the death would not have occurred had the controlled substance distributed by the conspiracy not been ingested by T.M. Those are the initials for Marcum."

The jury returned a general verdict of guilty. The district court determined that Shelton had an earlier conviction for a felony drug offense, and sentenced him to a life prison term pursuant to the "death results" penalty enhancement provisions of 21 U.S.C. §841(b)(1)(C).

On appeal, Shelton challenged the indictment for plain error on the basis that a "death results" conspiracy is not a legally cognizable offense under 21 U.S.C. §846. He argued that the penalty enhancement language of §841(b)(1)(C) requires the commission of a substantive act (i.e. distribution of a controlled substance). Since conspiracy under

§846 is an inchoate crime, the "death results" language should have been stricken from the indictment.

The Sixth Circuit Court of Appeals rejected his argument, and affirmed his conviction and sentence.

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

May a defendant be subjected to an enhanced penalty (in some instances a life prison term) for the death of a drug user following the return of an indictment charging him with conspiracy unaccompanied by a separate count for a substantive controlled substance offense? Until recently, this question could be answered confidently with a resounding no!

After all, this Court has declared that a drug conspiracy is an *inchoate* crime. *See United States v. Shabani*, 513 U.S. 10, 16 (1994). It has pointed out that "the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act." *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

Under traditional concepts of coconspirator liability, a participant may not be held liable for the commission of a criminal act in furtherance of the conspiracy unless he is charged with a substantive offense in a separate count, and the prosecution proves his guilt as a principal offender or aider and abettor, or vicariously under the *Pinkerton* doctrine. *See e.g. United States v. Feldman,* 936 F.3d 1288, 1318-19 & n.4 (11th Cir. 2019).

However, two federal circuits, the Sixth (Shelton's case) and the Ninth [*United States v. Arcila*, 727 Fed.Appx. 279, 281 (9th Cir. 2018)], have upheld the application of the "death

results" enhancement in prosecutions involving indictments for conspiracy only. This is an unexpected, radical, and frankly astonishing development in the law that warrants the intervention of this Court before other federal circuits follow this slippery slope.

THE "DEATH RESULTS" PENALTY PROVISIONS OF 21 U.S.C. §841(b)(1)(C) DO NOT APPLY TO A PROSECUTION FOR THE *INCHOATE* CRIME OF CONSPIRACY TO COMMIT A CONTROLLED SUBSTANCE OFFENSE UNDER 21 U.S.C. §846.

21 U.S.C. §841(a)(1) makes it a crime "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." The Anti-Drug Abuse Act of 1986 established a sliding scale of penalties for distribution of Schedule I and II controlled substances depending on drug type and weight. *Burrage v. United States*, 571 U.S. 204, 209 (2014). These default penalties "do not apply, however, when 'death or serious bodily injury results from the use of [the distributed] substance.' §841(b)(1)(A)-(C)." *Id.*

Under 21 U.S.C. §841(b)(1)(C), an enhanced penalty of not less than 20 years, and not more than life, applies to a conviction for distribution of a Schedule I or II controlled substance resulting in death, without regard to the quantity of the substance. If the defendant has a prior conviction for a qualifying drug offense,[1] the penalty increases to a mandatory life prison term. *Id.*

[1]At the time of the offense conduct, a qualifying drug offense was labeled as a "felony drug offense." The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, effective December 21, 2018, substituted "serious drug felony" for "felony drug offense." The purpose of the amendment was to narrow the type of felony drug crimes and the age of convictions that may be used for enhancing the penalties under 21 U.S.C. §841(b). This legislative change does not affect the relevancy and importance of the question presented for review in this certiorari petition.

But Shelton was not charged with a distribution offense under §841(a)1). He was indicted solely for conspiring to distribute a controlled substance.

The federal drug conspiracy statute, 21 U.S.C. §846, incorporates by reference the penalty provisions of §841(b) "for the offense, the commission of which was the *object* of the . . . conspiracy." (Emphasis supplied) Notably absent from the statute is any language linking the penalty to the *result* of an offense that was the *object* of the conspiracy.

In rejecting Petitioner's challenge to the inclusion of the "death results" penalty enhancement language in the indictment, the court of appeals stated:

> [T]he indictment clearly alleged that it was the distribution of carfentanil - the stated *objective* of the agreement - that resulted in the death. Thus, Shelton was subject to the "death results" enhancement of 21 U.S.C. §841(b) not because he entered into an agreement with other individuals to distribute carfentanil, but because Marcum's death *resulted* from use of the carfentanil that Shelton distributed in furtherance of the conspiracy.

(App. 12a, emphasis supplied)

Petitioner asserts that the Sixth Circuit panel's analysis is flawed in two significant respects. First, the panel's result-driven approach conflicts with the idea that conspiracy under §846 is an *inchoate* crime. Second, the hearing panel improperly conflated the concepts of "object" and "result"when it upheld his enhanced sentence.

A. Correlating the Maximum Penalty for a Drug Conspiracy to the Result of an Overt Act or Substantive Offense Is Inconsistent with Congress' Intent That 21 U.S.C. §846 Defines an *Inchoate* Offense.

This Court has held that 21 U.S.C. §846 defines "an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Shabani*, 513 U.S. at 16, quoting

Iannelli, 420 U.S. at 777. Thus, [i]In order to establish a violation of 21 U.S.C. § 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy." *Shabani,* 513 U.S. at 15.

The Court in *Shabani* found support for this interpretation by comparing the text of §846 with 18 U.S.C. §371, the general conspiracy statute. It pointed out that "§371 contains an explicit requirement that a conspirator 'do any act to effect the object of the conspiracy.' In light of this additional element in the general conspiracy statute, Congress' silence in §846 speaks volumes." *Id.* 513 U.S. at 14.

Comparing §846 with a different conspiracy statute, one found in the Military Commission Act ("MCA"), is an even more useful exercise in ascertaining legislative intent. 10 U.S.C. §950t(29) directs that "[a]ny person . . . who conspires to commit one or more substantive offenses triable by military commission . . . and *who knowingly does any overt act to effect the object of the conspiracy*, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct[.]" (emphasis supplied).

In *Al Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc), the petitioner, an al Qaeda combatant who assisted Osama Bin Laden in planning the September 11, 2001 attacks on the United States, challenged the government's jurisdiction to try him for an inchoate conspiracy. He argued that "conspiracy is not an offense under the international law of war." *Id.* at 758.

Two members of the en banc panel of the District of Columbia Circuit Court of Appeals (Judges Millett and Wilkins) rejected his argument based on their belief that a conspiracy under the MCA -which requires an overt act and a resulting death - is not an inchoate offense. It is more akin to a substantive crime.

Judge Millett stated that "Bahlul's asserted error--Congress's power to criminalize traditional inchoate conspiracy in military commission proceedings--is not in fact implicated by his case." *Id.* at 789. He explained:

> [T]he statutory scheme seems to anticipate that a conviction will be linked to a completed offense. That is because the statute specifically ties the authorized sentences to the fate of the victims: the crime "shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."

Id.

Judge Wilkins expanded on these remarks:

> [T]here is a real question as to whether the conspiracy offense codified by the MCA amounts to *inchoate* conspiracy. [] Significantly, the statute specifically references victims, containing two sentencing variations depending on whether anybody dies as a result of the conspiracy. [] In other words, by conditioning punishment on either death or other harm befalling another person, the MCA's version of conspiracy contemplates the completion of a substantive offense. *That is a far cry from inchoate conspiracy*, which is achieved "even though the substantive offence is not successfully consummated." Inchoate, Black's Law Dictionary (10th ed. 2014) (quoting Andrew Ashworth, Principles Of Criminal Law 395 (1991))

Id. 840 F.3d at 801 (emphasis supplied).

In *Shabani*, this Court characterized §846 as an inchoate conspiracy precisely because the statute does not require the commission of an overt act, and does not correlate the penalty to the result of an overt act. The Sixth Circuit's interpretation of the statute conflicts with this Court's understanding of an inchoate conspiracy.

To paraphrase Judge Wilkins, "by conditioning punishment" on a death of a user of the controlled substance, the Sixth Circuit's interpretation of the penalty language of §846 "contemplates the completion of a substantive offense"; in this case, distribution of a Schedule II controlled substance resulting in death. This construction "is a far cry from [the] inchoate conspiracy" contemplated by this Court in *Shabani*.

As an aside, it does seem incongruous, and arguably absurd, that an enemy combatant should enjoy the protection of a far more demanding standard of proof - actual participation in the object crime - before he can be subjected to an enhanced penalty for a death resulting from that act. Yet, under the Sixth Circuit's approach, a domestic drug dealer can be put away for life for entering into an agreement to distribute a controlled substance, despite the absence of a jury finding that he had any involvement, direct or vicarious, in a subsequent act that results in death.

B. Congress Intended a Categorical Approach That Correlates the Maximum Penalty for a Narcotics Conspiracy to the Object of the Criminal Agreement, and not the Result of an Uncharged Overt Act or Substantive Offense.

Under general conspiracy law, the "object" of a criminal agreement is distinguished from a "result" arising from a substantive offense committed in furtherance of the

conspiracy. *Al Bahlul* , 840 F.3d at 789 (Millett, J. concurring). In *Pinkerton v. United States*, 328 U.S. 640, 643 (1946), this Court stated that unless the defendant is also prosecuted for a substantive offense, "no penalty greater than the maximum provided for [the] conspiracy may be imposed."

The Sixth Circuit acknowledged that the *object* of the agreement between Shelton and his co-defendants was the distribution of a controlled substance (carfentanil). This *objective* supported a default penalty under §841(b)(1)(C) of no more than 20 years imprisonment (or 30 years if the defendant has a prior conviction for a qualifying drug offense).

The Sixth Circuit justified the imposition of an enhanced penalty based on its *de novo* factual finding that Shelton committed a distribution offense resulting in the victim's death. In other words, the court applied a fact-driven approach correlating the penalty with the outcome of an uncharged cime, rather than the object of the conspiratorial agreement.

In *United States v. Devorkin*, 159 F.3d 465 (9th Cir. 1998), the Ninth Circuit declined the defendant's invitation to apply a similar approach in a case involving 18 U.S.C. §373, the solicitation of a violent crime statute. This statute fixes the penalty for solicitation at one-half of the maximum prison term for the object crime of the solicitation, or not more than 20 years if the object crime is punishable by death or life imprisonment.

Mr. Devorkin had pled guilty to soliciting a murder-for-hire. The murder-for-hire statute establishes a sliding scale of penalties correlated to the actual result of the intended

crime: a maximum of 10 years imprisonment if no injury results, a maximum of 20 years if injury results, and death or life imprisonment if death results.

Devorkin's solicitation of a third party to murder his ex-spouse was unsuccessful. The putative hit man turned out to be a federal agent. The district court sentenced Devorkin to 108 months imprisonment.

On appeal, the defendant argued that because his ex-spouse was unharmed, the maximum penalty for his offense should have been capped at one-half of the maximum 10-year prison term for a murder-for-hire that results in no injury; that is, five years. The Ninth Circuit was unpersuaded.

The hearing panel described Devorkin's position as "a case-by-case, fact-based approach, under which the court would consider the actual *result* of the defendant's crime, rather than the crime solicited, to determine the maximum sentence." *Id.* 159 F.3d at 466 (emphasis supplied). The panel sided with the government's position that a categorical approach, based on the object of the solicitation, and not its result, was more consistent with Congress' intent. *Id.* at 467.

The panel reasoned that a "categorical approach is preferable to a case-by-case analysis" for two reasons. First, "it increases uniformity in sentencing." Second, it "is easier to apply than a fact-based analysis." *Id.* at 469. The panel explained that a fact-specific analysis "would require collateral inquiries having little to do with the criminal intent that § 373 intended to punish." *Id.*

The same considerations weigh in favor of applying a categorical approach to penalty determinations under 21 U.S.C. §846. Under traditional *Pinkerton* principles of conspirator liability, a member may be subjected to punishment for a substantive offense committed in the furtherance of the conspiracy under one of three conditions: a) he personally committed the act, b) he aided and abetted a coconspirator in committing the act, or c) the act was committed by a fellow coconspirator and was "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* 328 U.S. at 648.

In adopting a result-driven approach, the Sixth Circuit failed to explain who should make this factual finding. The hearing panel assumed that "Marcum's death resulted from use of the carfentanil that Shelton distributed in furtherance of the conspiracy." (App. 12a)

But the jury made no such a finding. The district judge told the jury that the government's burden was simply to prove that the victim died as a result of using a controlled substance "distributed by the conspiracy." The jury was never asked to determine any particular coconspirator's responsibility for the distribution.

As cogently expressed by the dissenting judges in the *Al Bahlul* case, "[t]here is simply no basis for upholding a conviction for the crime of inchoate conspiracy on the ground that a defendant could have been charged with and convicted of some other crime. To do so would violate the most fundamental tenets of our criminal justice system--that a defendant is entitled to notice of the charges against him and that a conviction match the charge or be a lesser included offense." *Id.* 840 F.3d at 833 (Rogers, Tatel and Pillard, J.J, dissenting).

A categorical approach avoids these complexities. The object of a §846 conspiracy is specified in the indictment and is determined by the jury. The object fixes the penalty range. If the government believes the accused is deserving of more punishment for committing an act resulting in death, it may, consistent with *Pinkerton*, charge him in a separate substantive count and prove his culpability beyond a reasonable doubt.

The district judge told the jury that the government did not need to prove the commission of an overt act. Thus, the jurors' guilty verdict only supported a finding that Shelton had entered into a criminal agreement, the object of which was the distribution of carfentanil. The court of appeals erred in concluding differently.

CONCLUSION

"[T]he criminal agreement itself is the actus reus" of a §846 drug conspiracy. *Shabani*, 513 U.S. at 16. As a matter of logic, a death cannot *result* from a criminal agreement unaccompanied by an overt act. The government must separately charge and convict a coconspirator of a substantive offense before he can be subjected to a prison term for the *result* of that offense. *Pinkerton*, 328 U.S. at 643.

The government did not indict Petitioner for a substantive count of distributing a controlled substance resulting in death. This was probably deliberate.

After all, "[t]here are several features of inchoate conspiracy that make it the 'darling of the modern prosecutor's nursery.'" *Al Bahlul*, 840 F.3d at 800 (Wilkins, J. concurring), quoting *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). One such feature is that

"[i]t is not necessary that the parties to the conspiracy actually succeed in committing the crime." *Id.* citing *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

In this case, the government employed the prosecutors' "darling" - a loosely worded conspiracy count - to obtain an easy conviction of Petitioner under §846. It then asked the district court to impose an enhanced penalty based on facts that were not decided by the jury.

A sentence that exceeds the statutory maximum violates"the proscription of any deprivation of liberty without 'due process of law.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000). The inclusion of the "death results" penalty language in the conspiracy count of the indictment illegally exposed Petitioner to a life prison term, in contravention of his Fifth Amendment due process rights.

This was an obvious defect in the proceedings that affected his substantial rights, and seriously affected the fairness, integrity, and public reputation of the criminal proceedings. It therefore rose to the level of plain error. *See United States v. Olano*, 507 U.S. 725, 732 (1993).

For the foregoing reasons, Petitioner asks this Court to grant his petition for a writ of certiorari to settle the law on this important issue.

Respectfully submitted,

Dated: December 17, 2019

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ATTORNEY FOR PETITIONER