

No. \_\_\_\_\_

---

---

IN THE  
**Supreme Court of the United States**

**JEREMY ACHEY,**  
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**  
*Respondent.*

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

---

James T. Skuthan  
Acting Federal Defender

M. Allison Guagliardo, Counsel of Record  
Assistant Federal Defender  
Federal Defender's Office  
400 N. Tampa Street, Suite 2700  
Tampa, FL 33602  
Telephone: (813) 228-2715  
Facsimile: (813) 228-2562  
E-mail: [allison\\_guagliardo@fd.org](mailto:allison_guagliardo@fd.org)

---

## QUESTIONS PRESENTED

Federal law treats a controlled substance analogue intended for human consumption as a Schedule I controlled substance. *See* 21 U.S.C. § 813; *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015). A defendant who conspires to distribute a Schedule I substance is subject to a statutory maximum of 20 years in prison. *See* 21 U.S.C. § 841(b)(1)(C); 21 U.S.C. § 846. But if death results from the use of such substance, the defendant becomes subject to a mandatory-minimum term of 20 years in prison and a maximum term of life in prison. *See* 21 U.S.C. § 841(b)(1)(C); *Burrage v. United States*, 571 U.S. 204, 206 (2014).

Petitioner Jeremy Achey is serving life in prison based on his convictions in this case. The questions presented are:

1. Whether, in cases where a drug conspiracy allegedly involves multiple substances, the government must prove that the defendant conspired to distribute the specific controlled substance charged in the indictment to have resulted in death, in order to increase the defendant's statutory penalties to a mandatory-minimum of 20 years and maximum of life in prison under 21 U.S.C. § 841(b)(1)(C)?
2. Whether the government must prove that a defendant conspired to distribute the specific controlled substance analogues charged in the indictment (here, alleging "which violation involved" two specific analogues)—as opposed to conspired to distribute other substances—in order to convict a defendant of an offense under 21 U.S.C. §§ 813 and 846?

## TABLE OF CONTENTS

Questions Presented .....	i
Table of Contents .....	ii
Table of Authorities .....	iii
Petition for a Writ of Certiorari .....	1
Opinion Below .....	1
Jurisdiction .....	1
Relevant Constitutional and Statutory Provisions .....	1
Statement of the Case .....	3
Reasons for Granting the Writ .....	9
Conclusion .....	15
Appendix	
Decision Below .....	1a
Indictment .....	9a
District Court's Jury Instructions (excerpts) .....	15a
Government's Closing Argument (excerpts) .....	21a
Judgment .....	28a

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013).....	10
<i>Apprendi v. New Jersey</i> , 530 U.S. 466(2000).....	10
<i>Burrage v. United States</i> , 571 U.S. 204 (2014) .....	i, 11
<i>Jones v. United States</i> , 526 U.S. 227 (1999) .....	10
<i>McFadden v. United States</i> , 135 S. Ct. 2298 (2015) .....	i, 8
<i>Stirone v. United States</i> , 361 U.S. 212 (1960).....	11, 12, 14, 15
<i>United States v. Abdulle</i> , 564 F.3d 119 (2d Cir. 2009).....	8, 14
<i>United States v. Bishop</i> , 469 F.3d 896 (10th Cir. 2006) .....	13
<i>United States v. Miller</i> , 891 F.3d 1220 (10th Cir. 2018) .....	12
<i>United States v. Whitfield</i> , 695 F.3d 288 (4th Cir. 2012).....	10
<b>U.S. Constitution</b>	
U.S. Const. amend. V.....	1
U.S. Const. amend. VI .....	1
<b>Statutes</b>	
18 U.S.C. § 2119.....	10
21 U.S.C. § 802.....	2
21 U.S.C. § 813.....	i, 2, 4, 13
21 U.S.C. § 841.....	<i>passim</i>
21 U.S.C. § 846.....	<i>passim</i>
28 U.S.C. § 1254.....	1

## TABLE OF AUTHORITIES – cont'd

<b>Briefs and Oral Argument Recordings</b>	<b>Page(s)</b>
Brief for the United States, <i>Shular v. United States</i> , No. 18-6662 .....	14
Initial Brief of Appellant, <i>United States v. Achev</i> , No. 18-11900, 2018 WL 4193111 (11th Cir. Aug. 27, 2018).....	6, 7
Reply Brief of Appellant, <i>United States v. Achev</i> , No. 18-11900, 2018 WL 5318451 (11th Cir. Oct. 24, 2018).....	7, 12
Oral Argument Recording for <i>United States v. Achev</i> , No. 18-11900, available at <a href="http://www.ca11.uscourts.gov/oral-argument-recordings">http://www.ca11.uscourts.gov/oral-argument-recordings</a> (last visited Feb. 19, 2020).....	7

## **PETITION FOR A WRIT OF CERTIORARI**

The Petitioner, Jeremy Achey, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

### **OPINION BELOW**

The Eleventh Circuit's opinion is published, 943 F.3d 909 (11th Cir. 2019), and is provided in the attached appendix at 1a-8a (Pet. App.).

### **JURISDICTION**

The Eleventh Circuit issued its opinion on November 21, 2019. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) by the timely filing of this petition within 90 days of the date of the opinion.

### **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Fifth Amendment to the U.S. Constitution states in pertinent 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 . . . .

The Sixth Amendment to the U.S. Constitution 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 defence.

The Controlled Substance Analogue Enforcement Act (Analogue Act) defines a "controlled substance analogue," as relevant here, to mean a substance:

- (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
- (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant,

depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

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

21 U.S.C. § 802(32)(A).

The Analogue Act further provides:

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.

21 U.S.C. § 813.

The Controlled Substances Act (CSA) in turn makes it unlawful for any person “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” 21 U.S.C. § 841(a).

The CSA further provides, in relevant part:

In the case of a controlled substance in schedule I . . . , 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 . . . .

21 U.S.C. § 841(b)(1)(C).

The CSA subjects conspiracy offenders “to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy.” 21 U.S.C. § 846.

## STATEMENT OF THE CASE

Petitioner Jeremy Achey is serving life in prison for his convictions under the Analogue Act. This petition presents the question, when a drug conspiracy allegedly involves multiple substances, whether the government must prove the defendant conspired to distribute the specific controlled substance charged in the indictment to have resulted in death. In the decision below, the Eleventh Circuit upheld Mr. Achey's conviction, and enhanced life sentence under 21 U.S.C. § 841(b)(1)(C), without requiring the government to prove that he conspired with others to distribute the specific analogue (tetrahydrofuran fentanyl) that resulted in death.

The Eleventh Circuit read the statutes, and the indictment in this case, to require the government to prove only that Mr. Achey conspired to distribute any controlled substances generally. The Eleventh Circuit decision, however, conflicts with decisions of this Court and other circuits that require the government to prove the specific allegations that the grand jury presents in the indictment. Because of the importance of the issues presented in this case—and the significance of Mr. Achey's resulting life sentence—Mr. Achey respectfully seeks this Court's review.

1. The grand jury charged Mr. Achey with three counts. Count One of Mr. Achey's indictment alleged specific analogues in two paragraphs, which are set forth in full below:

From in or about July 2016 and continuing through on or about June 27, 2017, in the Middle District of Florida, and elsewhere, the defendant,

JEREMY ACHEY,

did knowingly, willfully, and intentionally conspire with other persons, both known and unknown to the Grand Jury, to distribute and possess with intent to distribute a controlled substance analogue that was intended for human consumption, which violation involved a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)piperidin-4-yl]tetrahydrofuran-2-carboxamide (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue, and a mixture and substance containing a detectable amount of 4-

Acetoxyl-N,N-dimethyltryptamine (4-ACO-DMT), a Schedule I controlled substance analogue, and is therefore punished under 21 U.S.C. § 841(b)(1)(C).

Pursuant to 21 U.S.C. § 841(b)(1)(C), on or about February 27, 2017, a person identified herein as “K.G.” died as a result of the use of a controlled substance analogue that the defendant conspired to distribute and possess with intent to distribute, that is, a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)piperidin-4-yl]tetrahydrofuran-2-carboxamide (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue.

Pet. App. 9a-10a (emphases added).

The first paragraph thus alleges a conspiracy, “which violation involved” two controlled substance analogues: tetrahydrofuran fentanyl and 4-ACO-DMT. *Id.* And, the second paragraph alleges that an individual “died as a result of the use of a controlled substance analogue that the defendant conspired to distribute and possess with intent to distribute, that is, a mixture and substance containing a detectable amount of” tetrahydrofuran fentanyl. *Id.* at 10a.

Count Two of the indictment charged Mr. Achey with the substantive offense related to Count One, alleging that (i) between on or about February 24 and 27, 2017, Mr. Achey distributed a controlled substance analogue, “which violation involved” tetrahydrofuran fentanyl, and (ii) that the individual died as a result of the use of tetrahydrofuran fentanyl distributed by the defendant. *Id.* at 10a-11a. Count Three charged Mr. Achey with a later distribution of 4-ACO-DMT. *Id.* at 11a-12a.

2. At trial, the district court instructed the jury, concerning 21 U.S.C. §§ 813, 841, and 846, that, “When considered together, Sections 841(a)(1) and 813 make it a crime for anyone to knowingly and intentionally distribute, or possess with intent to distribute, for human consumption, a controlled substance analogue and Section 846 makes it a crime for anyone to conspire to do this.” Pet. App. at 17a. The district court then instructed the jury that, “The

substances at issue in this case are as follows" and named only two substances—i.e., tetrahydrofuran fentanyl and 4-ACO-DMT. *Id.*

Addressing the elements of the conspiracy count, the district court instructed the jury:

The defendant, Mr. Achey, can be found guilty if only all of the following facts are proved beyond a reasonable doubt -- now this pertains to Count 1 of the indictment -- that two or more people in some way agreed to try to accomplish a shared and unlawful plan to distribute or possess with intent to distribute a controlled substance analogue knowing it was intended for human consumption;

Number 2, that the defendant, Mr. Achey, knew the unlawful purpose of the plan and willfully joined in it;

Number 3, the object of the unlawful plan was to distribute or possess with intent to distribute a controlled substance analogue knowing it was intended for human consumption.

*Id.* at 18a-19a. As to the death-results enhancement, the district court instructed:

In Count 1 of the indictment, the government has also alleged that K.G.'s use of tetrahydrofuran fentanyl that the defendant or another conspirator conspired to distribute resulted in her death. To prove that allegation, the government must prove all of the following facts beyond a reasonable doubt:

1. That K.G. used the tetrahydrofuran fentanyl and that the defendant or another conspirator conspired to distribute.
2. That K.G.'s use of the tetrahydrofuran fentanyl was the but-for cause of her death.

*Id.* at 19a-20a. (emphases added).

3. The government similarly informed the jury in its closing argument that there were two substances at issue in Mr. Achey's case: "So these are the chemicals that we're talking about here: Tetrahydrofuran-fentanyl and 4-AcO-DMT." *Id.* at 23a. As to conspiracy charge in Count One, the government argued to the jury that "the unlawful purpose of that plan was to distribute or possess with intent to distribute the two controlled substance analogues we've been talking about in this case." *Id.* at 26a (emphasis added); *see also id.* at 25a ("Count 1 is a

conspiracy charge. The defendant conspired with other people to distribute those substances.”) (emphasis added).

As to the death-results enhancement, the government contended to the jury that the “distribution of the tetrahydrofuran fentanyl caused the death.” *Id.* at 26a-27a. The government explained that Mr. Achey was charged in Count Two, the distribution charge, with mailing the package himself that contained the tetrahydrofuran fentanyl at issue. *Id.* at 24a, 26a. The difference between Count One (the conspiracy charge) and Count Two (the substantive distribution charge), the government argued, was that the government could establish the “resulting in death” for Count One regardless of whether Mr. Achey “was the one that actually put the parcel in the mail so long as it was a member of the conspiracy” who did. *Id.* at 26a. The government continued, “But here, we know the defendant put that parcel in the mail.” *Id.*

4. The jury found Mr. Achey guilty of all three counts. The district court sentenced Mr. Achey to life in prison as to Counts One and Two and to 20 years in prison as to Count Three, with all counts to run concurrently. *Id.* at 28a-29a.

5. On appeal to the Eleventh Circuit, Mr. Achey challenged the sufficiency of the evidence as to Count One. Mr. Achey contended that the government had not proven that he had conspired with others to distribute the two specific analogues charged in the indictment—tetrahydrofuran fentanyl and 4-ACO-DMT. And as to the death-results enhancement, Mr. Achey argued that the government had not proven that he conspired with others to distribute the tetrahydrofuran fentanyl that resulted in the death. *See* Initial Brief of Appellant, *United States v. Achey*, No. 18-11900, 2018 WL 4193111, at \*9-\*13 (11th Cir. Aug. 27, 2018) (“Appellant Br.”).

In making this argument, Mr. Achey pointed out that the evidence at trial had not been limited to tetrahydrofuran fentanyl. The government also introduced evidence of the other

substance alleged in the indictment, 4-ACO-DMT, as well as other substances (including, for example, 4fphp). *See id.* at \*3, \*11-\*13; Reply Brief of Appellant, *United States v. Acheay*, No. 18-11900, 2018 WL 5318451, at \*2 (11th Cir. Oct. 24, 2018) (“Reply Br.”).

As to the offenses charged in the indictment, Mr. Acheay contended that the government had not proven that he had conspired with other individuals (including his wife, a reseller, two repackers/reshippers, or the Chinese supply company LS) to distribute the two specific analogues charged in the indictment. Appellant Br. at \*11-\*12; Reply Br. at \*2-\*4. Nor had the government proven that Mr. Acheay conspired with others to distribute the tetrahydrofuran fentanyl resulting in the death. Appellant Br. at \*12-\*13; Reply Br. at \*4. As to the death-results enhancement in particular, Mr. Acheay contended that the government had not established a conspiracy, because the evidence showed that Mr. Acheay himself took the order, packaged the order, and sent the order of tetrahydrofuran fentanyl. Reply Br. at \*4.

6. Mr. Acheay’s challenge to the sufficiency of the evidence on the conspiracy charged in the indictment was the sole issue on appeal. During oral argument, the government agreed that, with respect to the death-results enhancement, it was required to prove the distribution of the particular drug charged in the indictment. The government contended, though, that it had done so.<sup>1</sup>

7. In the decision below, the Eleventh Circuit rejected Mr. Acheay’s insufficiency arguments by holding that the government did not have to prove a conspiracy as to the specific analogues charged in the indictment—either to prove the conspiracy offense or to prove the death-

---

<sup>1</sup> The recording of the argument is available on the Eleventh Circuit’s website. *See* Oral Argument Recording for *United States v. Acheay*, No. 18-11900, available at <http://www.ca11.uscourts.gov/oral-argument-recordings> (last visited Feb. 19, 2020). The pertinent discussion appears at minutes 21:27 to 22:37.

results enhancement. Pet. App. at 3a-8a. The Eleventh Circuit instead held that “the government was only required to prove Achey conspired to distribute a generic controlled substance and that there was sufficient evidence to prove that multiple people conspired with Achey to distribute a generic controlled substance.” *Id.* at 3a.

The Eleventh Circuit reached this conclusion based on its reading of the statutes, 21 U.S.C. §§ 841(a) and 846. The Court read these statutes to require the government to prove only the defendant conspired to distribute any controlled substance generally, as opposed to a specific controlled substance. *Id.* at 5a & nn.4-5 (citing, *inter alia*, 21 U.S.C. § 841(a) (“using the indefinite language of ‘a controlled substance’”); *McFadden*, 135 S. Ct. at 2304; *United States v. Abdulle*, 564 F.3d 119, 126 (2d Cir. 2009) (“[T]he mens rea requirement for conspiracy is satisfied simply if the government shows that the defendant intended to distribute and possess with the intent to distribute *any* controlled substance.”) (internal quotation marks omitted)).

The Eleventh Circuit recognized that an indictment might charge a “subset” of this statutory offense by charging “a specific type of drug in the place of the generic drug element.” *Id.* at 5a. The court of appeals, however, rejected that the indictment here charged a conspiracy as to a specific analogue:

- As to the first paragraph of Count One, the Eleventh Circuit read the indictment’s language—“which violation involved . . . Tetrahydrofuran fentanyl . . . and . . . 4-ACO-DMT”—not as elements of the conspiracy offense, but rather as relevant for sentencing. *Id.* at 3a-4a, 6a-7a. The Eleventh Circuit itself noted, though, that the specific type of analogue had no bearing on the statutory range for sentencing. *Id.* at 7a n.8. The penalty regardless of the type of analogue is 0 to 20 years in prison under 21 U.S.C. § 841(b)(1)(C). *See id.*; 21 U.S.C. § 841(b)(1)(C).

- As to the second paragraph of Count One, the death-results enhancement, the Eleventh Circuit did not address (Pet. App. at 5a-7a) that the indictment alleged that an individual died “as a result of the use of a controlled substance analogue that the defendant conspired to distribute and possess with intent to distribute, that is, . . . Tetrahydrofuran fentanyl.” *Id.* at 10a (emphasis added).

Reading the indictment to allege a generic analogue conspiracy, the Eleventh Circuit concluded that the evidence was sufficient to establish that Mr. Achey conspired with others (“four actors”) to distribute controlled substance analogues generally. *Id.* at 7a-8a. The Eleventh Circuit thus affirmed Mr. Achey’s conspiracy conviction and resulting life sentence. *Id.*

Significantly, the Eleventh Circuit did not affirm Mr. Achey’s conviction based on any finding that the evidence was sufficient to establish that he had conspired to distribute the specific analogues charged in the indictment (tetrahydrofuran fentanyl and 4-ACO-DMT). Nor did the Eleventh Circuit affirm Mr. Achey’s conviction on the death-results enhancement, and life sentence, based on any determination that the government had proven that Mr. Achey had conspired with another person to distribute the tetrahydrofuran fentanyl that resulted in the death.

*See id.*

#### **REASONS FOR GRANTING THE WRIT**

The indictment in this case alleged that Mr. Achey conspired with others to distribute controlled substance analogues, “which violation involved . . . Tetrahydrofuran fentanyl . . . and . . . 4-ACO-DMT.” Pet. App. at 9a-10a. The indictment further alleged one but-for cause of death—the “use of a controlled substance analogue that the defendant conspired to distribute and possess with intent to distribute, that is, . . . Tetrahydrofuran fentanyl.” *Id.* at 10a.

The Eleventh Circuit concluded that the specific controlled substance analogues alleged in the indictment were included “for sentencing purposes.” Pet. App. at 6a-7a. The Eleventh Circuit thus decided that the government did not have to prove Mr. Achey conspired with another person to distribute the two specific analogues alleged in the indictment (tetrahydrofuran fentanyl and 4-ACO-DMT) to convict him of the conspiracy offense. Further, the Eleventh Circuit did not require the government to prove that Mr. Achey conspired with another to distribute the specific analogue (tetrahydrofuran fentanyl) resulting in death. As shown herein, the Eleventh Circuit’s decision is incorrect and conflicts with decisions of this Court and the other Circuits.

1. Contrary to the Eleventh Circuit’s decision, the specific analogue charged in the death-results enhancement was not a mere sentencing factor. The government had to prove that Mr. Achey conspired with another to distribute the tetrahydrofuran fentanyl resulting in death, because those were the elements of the offense charged in the indictment.

This Court has made clear that facts (other than the fact of a prior conviction) that increase a defendant’s statutory minimum or maximum penalty are elements of the offense that must be charged in an indictment and proven to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000). Addressing the carjacking statute’s death or serious-injury enhancements, for example, this Court has held that such enhancements establish “separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.” *Jones v. United States*, 526 U.S. 227, 251-52 (1999) (addressing 18 U.S.C. § 2119). Following *Jones*, other circuits have similarly construed death-results enhancements in other statutes to constitute elements of the offense that must be charged in the indictment and proven to a jury beyond a reasonable doubt. See *United States v. Whitfield*,

695 F.3d 288, 307 (4th Cir. 2012) (collecting cases). And as particularly pertinent here, this Court made clear that the death-results enhancement in the drug statute at issue here is “an element that must be submitted to the jury and found beyond a reasonable doubt.” *Burrage*, 571 U.S. at 210 (addressing 21 U.S.C. § 841(b)(1)(C)).

The indictment here did not charge specific analogues for sentencing purposes. *See* Pet. App. at 6a-7a. Indeed, the statutory penalty range is the same—20 years to life—regardless of whether the analogue resulting in death is substance A or substance B. *See* 21 U.S.C. § 841(b)(1)(C). The purpose, then, of charging the specific analogue resulting in death was to define the elements of the offense. *See Burrage*, 571 U.S. at 887 (describing the “two principal elements” of the death-results enhancement there to be the “(i) knowing or intentional distribution of heroin, § 841(a)(1), and (ii) death caused by (‘resulting from’) the use of that drug, § 841(b)(1)(C)”) (emphasis added; footnote omitted).

In this case, then, Mr. Achey was charged with (i) conspiracy to distribute tetrahydrofuran fentanyl and 4-ACO-DMT and (ii) a death resulted from the use of the tetrahydrofuran fentanyl that the defendant conspired to distribute. Pet. App. at 9a-10a. As to the death-results enhancement, the government therefore had to prove that Mr. Achey conspired to distribute the tetrahydrofuran fentanyl that resulted in death.

By reaching the contrary conclusion, the Eleventh Circuit broadened the bases for Mr. Achey’s conviction beyond that alleged in the indictment. In so doing, the Eleventh Circuit’s decision conflicts with this Court’s precedent on constructive amendments, which precludes a court from rewriting an indictment on constitutional grounds. *See Stirone v. United States*, 361 U.S. 212, 218-19 (1960) (“[W]hen only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that

under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.”).

In this case, the indictment defined only one but-for cause of death—the use of the tetrahydrofuran fentanyl that the defendant conspired to distribute. Pet. App. 10a. The indictment alleged that two substances were involved in the conspiracy offense (tetrahydrofuran fentanyl and 4-ACO-DMT),<sup>2</sup> but that only one substance (“that is, . . . Tetrahydrofuran fentanyl”) resulted in death. Pet. App. 9a-10a. In such a case, the government must prove the offense as charged in the indictment. *Stirone*, 361 U.S. at 217-19.

For example, the government could not prove the death-results enhancement in Count One by showing (i) that Mr. Achey personally distributed, without conspiring with another, the tetrahydrofuran fentanyl that resulted in death, but (ii) that he conspired with others to distribute some other substances. *See* Pet. App. at 9a-10a. Yet, that is precisely what the Eleventh Circuit’s decision permits here. *See id.* at 3a-8a.<sup>3</sup>

The Eleventh Circuit’s broad reading of the indictment in Mr. Achey’s also conflicts with decisions of other circuits that have read similar limiting language (“that is, . . . Tetrahydrofuran fentanyl”) in an indictment to charge a particular subset of the offense. *See, e.g., United States v. Miller*, 891 F.3d 1220, 1234 (10th Cir. 2018) (“[W]e held that a constructive amendment had occurred where the indictment charged the defendant with unlawfully possessing ‘any ammunition

---

<sup>2</sup> Additional substances were also introduced at trial, including 4fphp that Mr. Achey allegedly sold to a reseller. *See, e.g.,* Reply Br. at \*2.

<sup>3</sup> Notably, the government did not appear to read Mr. Achey’s indictment so broadly below. *See* Pet. App. at 26a-27a; note 1, *supra*.

and firearm which has been shipped or transported in interstate commerce, that is a Hi-Point 9mm pistol, serial number P117787,’ but the government introduced evidence and a jury instruction referring to a .38 caliber bullet as well as the Hi-Point pistol. ‘Even though the indictment in question used the language ‘any ammunition and firearm which has been shipped or transported in interstate commerce,’ it explicitly modified that terminology with the phrase ‘that is, a Hi-Point 9mm pistol.’” (citing *United States v. Bishop*, 469 F.3d 896, 901-03 (10th Cir. 2006)) (emphasis added). The Eleventh Circuit’s decision below thus has further implications beyond the death-results enhancement charged in Mr. Achey’s case.

For these reasons, Mr. Achey respectfully asks this Court to review the death-results enhancement in his case. The government had to prove that Mr. Achey conspired with someone to distribute the tetrahydrofuran fentanyl that caused the death. The Eleventh Circuit’s contrary reading of the indictment conflicts with the decisions of this Court and other circuits requiring the government to prove the specific charge in the indictment. Given the importance of this issue, and the significance of Mr. Achey’s life sentence, Mr. Achey respectfully requests this Court’s review.

2. The Eleventh Circuit also incorrectly decided that the government did not have to prove that Mr. Achey conspired to distribute the two specific analogues alleged in the indictment (tetrahydrofuran fentanyl and 4-ACO-DMT) in order to convict him of the charged offense under 21 U.S.C. §§ 813 and 846. *See* Pet. App. at 6a-7a. The Eleventh Circuit read the indictment to allege the two specific analogues “for sentencing purposes.” *Id.* at 6a. This reading of the indictment, however, is flawed.

As the Eleventh Circuit itself noted, the specific type of drug was not required for sentencing under 21 U.S.C. § 841(b)(1)(C). Pet. App. at 7a n.8. The statutory penalty range is

the same—up to 20 years in prison—regardless of whether the indictment had generically alleged “analogues” or specifically alleged substance A or substance B. *See* 21 U.S.C. § 841(b)(1)(C).

The specific analogues were therefore not alleged in the indictment for sentencing purposes.

Instead, the specific analogues were alleged to define the conspiracy offense—“which violation involved . . . Tetrahydrofuran fentanyl and 4-ACO-DMT.” Pet. App. at 9a-10a. The government therefore had to prove the specific conspiracy alleged in the indictment. *See Stirone*, 361 U.S. at 217-19.<sup>4</sup>

Under the Eleventh Circuit’s reading of the indictment, the government could convict Mr. Achey of conspiring to distribute any substance, even substances not charged in the indictment. *See* Pet. App. at 3a-8a. The *actus reus* of a conspiracy, however, is the agreement. *See United States v. Abdulle*, 564 F.3d 119, 127 (2d Cir. 2009) (Sotomayor, J.). The fair reading of the indictment in this case is that the grand jury charged Mr. Achey with conspiring to distribute the two specific substances alleged in the indictment. Indeed, this reading is how the prosecutor explained the charge to the jury: “the unlawful purpose of that plan was to distribute or possess with intent to distribute the two controlled substance analogues we’ve been talking about in this case.” Pet. App. at 26a; *see id.* at 23a (“So these are the chemicals that we’re talking about here: Tetrahydrofuran-fentanyl and 4-AcO-DMT.”).<sup>5</sup>

---

<sup>4</sup> In this regard, it is worth noting that the meaning of “involving,” as used in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), is at issue before this Court in *Shular v. United States*, No. 18-6662. In that case, the government has defined “involving” to mean “necessarily entails.” Brief for the United States, *Shular v. United States*, No. 18-6662, at 9, 13.

<sup>5</sup> Mr. Achey maintains that the government did not provide sufficient evidence to prove this charged conspiracy.

The Eleventh Circuit's broadening of the indictment is contrary to this Court's precedent on constructive amendments. *See Stirone*, 361 U.S. at 217-19. Mr. Achey accordingly seeks this Court's review.

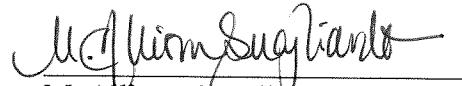
3. Mr. Achey's case is an excellent vehicle to resolve the issues presented herein. Indeed, the Eleventh Circuit did not find that the evidence was sufficient if Mr. Achey were correct that the indictment required the government to prove Mr. Achey conspired to distribute the specific analogues charged in the indictment (tetrahydrofuran fentanyl and 4-ACO-DMT). The Eleventh Circuit also did not find that the government had proven that Mr. Achey had conspired with another person to distribute the tetrahydrofuran fentanyl that resulted in the death. *See* Pet. App. at 7a-8a. Mr. Achey therefore respectfully requests this Court's review of the important questions presented in this petition.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

James T. Skuthan  
Acting Federal Defender



M. Allison Guagliardo  
Assistant Federal Defender  
Federal Defender's Office  
400 N. Tampa Street, Suite 2700  
Tampa, FL 33602  
Telephone: (813) 228-2715  
Facsimile: (813) 228-2562  
E-mail: [allison\\_guagliardo@fd.org](mailto:allison_guagliardo@fd.org)  
Counsel of Record for Petitioner

# **Decision Below**

943 F.3d 909  
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,  
v.

Jeremy ACHEY, Defendant-Appellant.

No. 18-11900

|

(November 21, 2019)

### Synopsis

**Background:** Defendant was convicted in the United States District Court for the Middle District of Florida, No. 6:17-cr-00165-PGB-KRS-1, Paul Byron, J., of conspiracy to distribute controlled substance analogue and distributing controlled substance analogue. Defendant appealed.

**Holdings:** The Court of Appeals, Robreno, District Judge, sitting by designation, held that:

[1] government was not required to prove specific type of drug involved in conspiracy, and

[2] there was sufficient evidence to support defendant's conspiracy conviction.

Affirmed.

**Procedural Posture(s):** Appellate Review.

West Headnotes (11)

### [1] Criminal Law

🔑 Construction in favor of government, state, or prosecution

#### Criminal Law

🔑 Inferences or deductions from evidence

#### Criminal Law

🔑 Reasonable doubt

When reviewing challenge to sufficiency of evidence in criminal case, evidence must be considered in light most favorable to government, drawing all reasonable inferences

and credibility choices in government's favor, and if reasonable jury could conclude that evidence establishes guilt beyond reasonable doubt, verdict will be affirmed.

### [2] Conspiracy

🔑 Issues, proof, and variance

To convict defendant of conspiracy to distribute controlled substance analogue, government was not required to prove specific type of drug involved in conspiracy, only that defendant conspired to distribute what he knew was controlled substance, even though indictment referenced specific drugs, where first reference only stated that offense "involved" specific substances, and second reference followed reference to sentencing provision, not elements-of-the-offense provision. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406,  21 U.S.C.A. §§ 841(a)(1), 846.

### [3] Conspiracy

🔑 Issues, proof, and variance

Whether government is required to prove conspiracy to distribute specific substance depends on role that specific substance plays in indictment, and if reference to specific substance in indictment, fairly read, charges that defendant conspired to violate statutory prohibition against selling controlled substances with specific substance as element, then subset of offense is charged, and government must prove defendant's mens rea regarding specific substance, but if specific substance is referenced only for sentencing purposes, government is not required to prove defendant's mens rea regarding specific substance, and proof of defendant's mens rea regarding generic controlled substances will suffice. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406,  21 U.S.C.A. §§ 841(a)(1), 846.

### [4] Conspiracy

🔑 Narcotics and dangerous drugs

There was sufficient evidence to support defendant's conviction for conspiracy to distribute controlled substance analogue, in light of evidence that defendant obtained 50 grams of tetrahydrofuran fentanyl from supplier in China, that he obtained more than one type of controlled substance from company, that defendant's wife dropped off drug packages at various post offices, that defendant's reseller sold smaller quantities of controlled substances that he or she obtained from defendant, and that repackagers assisted with distribution by packing drugs into smaller packages and shipping them out. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 102, 203, 406,  21 U.S.C.A. §§ 802(32), 813, 846.

**[5] Conspiracy**

 Nature and Elements of Criminal Conspiracy in General

Conspiracy conviction requires government to prove: (1) agreement between two or more persons to achieve unlawful objective; (2) knowing and voluntary participation in that agreement by defendant; and (3) overt act in furtherance of agreement.

**[6] Conspiracy**

 Weight and Sufficiency

Existence of agreement may be established in conspiracy prosecution by proof of understanding between participants to engage in illicit conduct, and typical proof required to prove legitimate contracts is not required.

**[7] Conspiracy**

 Presumptions and burden of proof

**Conspiracy**

 Circumstantial evidence

Proof of conspiracy may be provided through circumstantial evidence, such as inferences from alleged participants' conduct or from circumstantial evidence of scheme.

**[8] Conspiracy**

 Particular crimes

Simple buyer-seller controlled substance transaction does not, by itself, form conspiracy to distribute controlled substance. Comprehensive Drug Abuse Prevention and Control Act of 1970

§§ 401, 406,  21 U.S.C.A. §§ 841(a)(1), 846.

**[9] Conspiracy**

 Particular crimes

Conspiracy to distribute controlled substance can be found if evidence allows inference that buyer and seller knew that drugs were for distribution instead of merely understanding their transactions to do no more than support buyer's personal drug habit. Comprehensive Drug Abuse Prevention and Control Act of 1970

§§ 401, 406,  21 U.S.C.A. §§ 841(a)(1), 846.

**[10] Conspiracy**

 Presumptions and burden of proof

When considering whether purchaser or seller of drugs was in fact conspirator, agreement may be inferred when evidence shows continuing relationship that results in repeated transfer of illegal drugs to purchaser. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406,  21 U.S.C.A. §§ 841(a)(1), 846.

**[11] Conspiracy**

 Presumptions and burden of proof

Conspiracy to distribute controlled substances may be inferred from drug transaction where amount of drugs allows inference of conspiracy to distribute drugs. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406,  21 U.S.C.A. §§ 841(a)(1), 846.

## Attorneys and Law Firms

\***911** Jennifer Waugh Corinis, Colin P. McDonell, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, TAMPA, FL, Sean Siekkinen, Assistant U.S. Attorney, U.S. Attorney's Office, for Plaintiff - Appellee.

Robert Godfrey, Maria Guzman, Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, ORLANDO, Mara Allison Guagliardo, Federal Public Defender's Office, TAMPA, FL, for Defendant - Appellant.

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:17-cr-00165-PGB-KRS-1

Before WILLIAM PRYOR and JILL PRYOR, Circuit Judges, and ROBRENO,\* District Judge.

\* Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

## Opinion

ROBRENO, District Judge:

Achey appeals his conviction for conspiracy to distribute a controlled substance, arguing that there was insufficient evidence to prove the existence of a conspiracy. This argument depends on a contention that the government was required to prove Achey conspired to distribute a specific controlled substance and at trial it only proved that Achey distributed a generic controlled substance. We disagree and hold that the government was only required to prove Achey conspired to distribute a generic controlled substance and that there was sufficient evidence to prove that multiple people conspired with Achey to distribute a generic controlled substance. We affirm.

### I. BACKGROUND

Achey sold controlled substances on the dark web under the name EtiKing. On \***912** February 27, 2017, one of Achey's customers died from an overdose involving an "analogue" of fentanyl, tetrahydrofuran fentanyl ("fentanyl"). The victim had acquired the drug that caused her death from EtiKing on the dark web. Following an investigation that included an undercover agent posing as a customer

of EtiKing's, Achey was arrested and charged with one count of conspiracy to distribute and possess with intent to distribute a controlled substance analogue<sup>1</sup> and two counts of distributing a controlled substance analogue. The jury ultimately returned a conviction on all counts and determined that Achey had sold the drug that caused the victim's death.<sup>2</sup>

<sup>1</sup> We note that the indictment charged Achey with a conspiracy to distribute or possess with intent to distribute a generic controlled substance analogue, not a generic controlled substance. We assume for purposes of this appeal that the mens rea requirement to prove a conspiracy for a generic controlled substance analogue is the same as for a conspiracy for a generic controlled substance. We make this assumption because Achey has not argued that the two crimes have different mens rea requirements, and there is no dispute in this case that the substances Achey conspired to distribute or possess with intent to distribute qualified as controlled substance analogues.

<sup>2</sup> Achey was sentenced to life imprisonment, consisting of a term of life imprisonment on Count One, a term of life imprisonment on Count Two, and a term of 240 months' imprisonment on Count Three, to be served concurrently.

The investigation revealed that various actors were involved in Achey's drug operation. Achey purchased at least two types of fentanyl—methamphetamine and tetrahydrofuran fentanyl—from "LS," a company based in China. Specifically, he bought 50 grams of tetrahydrofuran fentanyl from LS. Others involved in the conspiracy included Achey's wife, who delivered parcels of drugs to various post offices; a reseller of drugs, named "illianlikeavillian," who sold smaller quantities of some of the drugs Achey sold him; and some repackagers who helped Achey ship out orders to customers.

Achey only challenges his conviction for conspiracy under Count One of the indictment. Count One charged:

[Defendant] did knowingly, willfully, and intentionally conspire with other persons, both known and unknown to the Grand Jury, to distribute and possess with intent to distribute a controlled substance analogue that was intended for human consumption, which violation involved a mixture and substance containing a detectable amount of ... (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue, and a mixture and

substance containing a detectable amount of ... (4-ACODMT), a Schedule I controlled substance analogue, and is therefore punished under 21 U.S.C. § 841(b)(1)(C).

Pursuant to 21 U.S.C. § 841(b)(1)(C), on or about February 27, 2017, a person identified herein as "K.G." died as a result of the use of a controlled substance analogue that the defendant conspired to distribute and possess with intent to distribute, that is, a mixture and substance containing a detectable amount of ... (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue.

All in violation of 21 U.S.C. §§ 802(32), 813, and 846.

Achey challenges the sufficiency of the evidence to prove Count One on the basis that the government was required to prove that he conspired to distribute fentanyl or DMT, and it failed to prove a conspiracy as to the specific drug.

## \*913 II. STANDARD OF REVIEW

[1] When reviewing a challenge to the sufficiency of the evidence, the evidence must be considered "in the light most favorable to the Government, drawing all reasonable inferences and credibility choices in the Government's favor."

United States v. Browne, 505 F.3d 1229, 1253 (11th Cir. 2007). "If a reasonable jury could conclude that the evidence establishes guilt beyond a reasonable doubt," the verdict will be affirmed. *Id.*<sup>3</sup>

<sup>3</sup> The parties dispute whether the specific sufficiency of the evidence argument raised on appeal was made below. If an argument regarding the sufficiency of the evidence is not made below, and it is raised for the first time on appeal, we will apply plain error review to that argument on appeal. *United States v. Joseph*, 709 F.3d 1082, 1103 (11th Cir. 2013). Because the application of plain error review here does not change the outcome of the case, we need not decide this issue.

## III. DISCUSSION

There was sufficient evidence to prove a conspiracy to distribute a controlled substance because Achey and at least one other person engaged in conduct from which

an agreement to commit an illegal act can be inferred. The government was only required to prove a conspiracy to distribute a generic controlled substance because the indictment charged a conspiracy to distribute a controlled substance and not a conspiracy to distribute fentanyl or DMT. And in the light most favorable to the government, a reasonable jury could have found that Achey and at least one other person conspired to distribute a generic controlled substance.

### *A. The Government Was Required To Prove A Conspiracy To Distribute A Controlled Substance In General.*

To convict Achey on Count One, the government was required to prove that he conspired to distribute a generic controlled substance. Achey argues otherwise, contending that here the indictment charged him with conspiracy to distribute fentanyl or DMT specifically and that therefore the government was required to prove there was an agreement to distribute fentanyl or DMT.

[2] This argument fails. Achey misses an important distinction: proof of the type of drug involved in the conspiracy is separate and distinct from proof of mens rea as to the type of drug. The statutes under which Achey was indicted do not require proof of a conspiracy to distribute a specific controlled substance. A reference in the indictment to a specific controlled substance does not necessarily put the government to the burden of proving a conspiracy to distribute the specific controlled substance. And the government does not have the burden to prove a conspiracy to distribute the specific controlled substance when the reference to the specific controlled substance is fairly read to apply to the sentencing enhancement provision of the statute and not to the elements of the offense.

We turn to the interplay of the three relevant statutory provisions. 21 U.S.C. § 841(a)(1) makes it a crime for a person to intentionally or knowingly "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id.* (emphasis added). In turn, 21 U.S.C. § 846 makes it a crime to conspire to violate § 841(a)(1). Further, 21 U.S.C. § 841(b) provides the penalties for a violation of either §§ 841(a)(1) or 846, and some of these penalties are based on the specific type of drug involved.

Both §§ 841(a)(1) and 846—the statutes defining the elements of the crime of conspiracy \*914 to distribute a controlled substance—only require the government to prove that the defendant conspired to distribute what he knew was a controlled substance. The specific type of drug involved is not an element of § 841(a) but is instead “relevant only for sentencing purposes.” *United States v. Rutherford*, 175 F.3d 899, 906 (11th Cir. 1999).<sup>4</sup> And, because the type of drug is not an element of the statutory offense, a finding of mens rea with respect to the specific type of drug is ordinarily not required. *United States v. Sanders*, 668 F.3d 1298, 1309–10 (11th Cir. 2012).<sup>5</sup> It follows that, for a § 846 conspiracy charge, the government is ordinarily not required to prove that the defendant conspired to distribute a specific substance but is only required to prove that the defendant conspired to distribute a generic controlled substance. *See United States v. Abdulle*, 564 F.3d 119, 126 (2d Cir. 2009) (“[T]he mens rea requirement for conspiracy is satisfied simply if the government shows that the defendant intended to distribute and possess with the intent to distribute *any* controlled substance.”).

4

*See* 21 U.S.C. § 841(a)(1) (using the indefinite language of “a controlled substance”);

*McFadden v. United States*, — U.S. —, 135 S. Ct. 2298, 2304, 192 L.Ed.2d 260 (2015) (“When used as an indefinite article, ‘a’ means ‘[s]ome undetermined or unspecified particular.’” (alteration in original) (quoting Webster’s New International Dictionary 1 (2d ed. 1954)));

*United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002) (“In reading § 841, it is clear that drug type and quantity are not elements of the offense.”).

5

*See* *McFadden*, 135 S. Ct. at 2304 (“The ordinary meaning of § 841(a)(1) thus requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules.”). But the government may be required to prove the specific type of drug involved for sentencing. *See*

*Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding

that any fact that increases the maximum penalty must be found by the jury); *see also* 21 U.S.C. § 841(b)(1) (providing for increased maximum penalties based on the type and amount of drug involved). The instant case only involves the mens rea question, i.e. whether the government is required to prove the defendant conspired to distribute what he knew was a specific drug. *Cf. Sanders*, 668 F.3d at 1309–10 (discussing both the *Apprendi* issue and the mens rea issue).

A different situation arises if the indictment charges a specific type of drug in the place of the generic drug element of the offense. *United States v. Narog*, 372 F.3d 1243, 1246, 1249 (11th Cir. 2004). Accordingly, an indictment that charges a subset<sup>6</sup> of the statutory conspiracy offense, e.g. charging the specific type of drug for the controlled substance element, requires the government to prove that the defendant conspired to distribute the specific type of \*915 drug charged. *See* *id.* at 1249 (holding that the government was required to prove that the defendants conspired to distribute the specific drug referenced in the indictment because the indictment charged a subset of the statutory offense). The question here is whether the indictment charged a subset of the statutory offense by referencing a specific drug.

6

A subset of a statutory offense is an offense for which all the elements of that subset offense are included within the elements required to prove the statutory offense. *See* *Schmuck v. United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (noting that a lesser offense is not a subset of a greater offense “[w]here the lesser offense requires an element not required for the greater offense”); *see also* *Subset*, Webster’s Ninth New Collegiate Dictionary (1990) (defining subset as “a set each of whose elements is an element of an inclusive set”). Thus, distribution of fentanyl is a subset of the statutory offense of distribution of a controlled substance because all the elements necessary to prove the former are elements of the latter. Indeed, the only difference between these two crimes is that the statutory-offense element requiring knowledge that a controlled substance is being distributed is narrowed for the subset offense to knowledge that fentanyl is

being distributed. *See*  *Sanders*, 668 F.3d at 1311 (“Although knowledge is not required under

 § 841(b), Sanders argues that his particular indictment narrowly charges only a ‘subset’ of the statutory offenses—conspiracy to possess and possession of cocaine—rather than the generic crimes of conspiracy to possess and possession of a controlled substance.”).

Achey argues that Count One, by referencing the specific drugs, charges a subset of the offense, as opposed to the generic statutory crime of conspiring to distribute controlled substances. He relies on  *Narog*, where this Court held that an indictment charged a subset of the offense when it charged that the defendant distributed pseudoephedrine “knowing and having reasonable cause to believe that [it] would be used to manufacture a controlled substance, that is, methamphetamine.”  372 F.3d at 1246.  *Narog* teaches that when an indictment “contains *both* the broad language of the statutory crime and additional language seemingly narrowing the charged crime to a subset of the statutory crime,” the government is required to prove the subset of the crime.  *Id.* at 1248–49. In  *Narog*, the indictment charged that the defendants knew that the substance they were distributing—which was not itself a controlled substance but was an ingredient necessary to manufacture a controlled substance—would eventually be used to manufacture a specific controlled substance.  *Id.* at 1246. Under those circumstances, because the indictment charged a specific substance instead of the generic substance as an element, the government was required to prove mens rea as to the specific substance.  *Id.* at 1249.

But this Court subsequently explained in  *Sanders* that a reference to a specific substance in the indictment does *not* necessarily require the government to prove mens rea as to the specific substance.  668 F.3d at 1309–10.

The  *Sanders* indictment charged that “[the defendant conspired] to knowingly and intentionally distribute and possess with intent to distribute a controlled substance, said conspiracy involving at least five (5) kilograms of cocaine.”

 *Id.* at 1311. Because the indictment in  *Sanders* conveyed that the conspiracy “involved” the specific drug, this reference pertained to sentencing, and the indictment charged that the defendants knew they were distributing a

generic controlled substance and not a subset of the offense.

 *Id.* at 1312–13. That indictment did not substitute the specific substance for the generic substance as an element.

 *Id.* Thus, the government was not required to prove mens rea as to the specific substance.  *Id.*

[3] Under  *Sanders* and  *Narog*, whether the government is required to prove a conspiracy to distribute a specific substance depends on the role the specific substance plays in the indictment. If the reference to the specific substance in the indictment, fairly read, charges that the defendant conspired to violate  § 841 with the specific substance as an element, then a subset of the offense is charged, and the government must prove the defendant’s mens rea regarding the specific substance.<sup>7</sup> But if the specific substance is referenced only for sentencing purposes, the government is not required to prove \*916 the defendant’s mens rea regarding the specific substance, and proof of the defendant’s mens rea regarding generic controlled substances will suffice.

7

Compare  *Sanders*, 668 F.3d at 1312 (“[The] indictment fairly read is not charging that Sanders had *knowledge* of that type or amount of drug but is charging that the overall conspiracy involved that

type and amount of drug.”), with  *Narog*, 372 F.3d at 1247 (“[T]he grand jury charged this case as a methamphetamine case, and the government tried it as such. There was simply nothing else involved. The defendants were accused of collecting large amounts of pseudoephedrine and shipping it to a lab where it would be used to manufacture methamphetamine.”).

The indictment in this case does not charge a subset of the offense. The references in the indictment to fentanyl and DMT are not fairly read as charging Achey with conspiring to distribute those specific drugs. Instead, the references to the specific drugs in the indictment are fairly read to have been included for sentencing purposes.<sup>8</sup> To wit, the first reference to the specific substances in this indictment has the same “involving” language as the reference to the specific substance in the  *Sanders* indictment—indicating that it is included only for sentencing purposes. The second reference follows an explicit reference to 21 U.S.C. § 841(b)(1)(C), which is the sentencing provision,

not the elements-of-the-offense provision. Looking at these circumstances, Achey's indictment is fairly read as charging conspiracy to distribute a generic controlled substance, as in  *Sanders*, and only noting the specific substances involved for sentencing purposes.<sup>9</sup>

8

In  *Sanders*, the specific drug language was required under  § 841(b) to fix the statutory maximum sentence.  668 F.3d at 1309–10. Here, although proof of the specific type of drug ultimately may not have been required for sentencing because  § 841(b)(1)(C) provides the punishment for conspiring to distribute a schedule I or II controlled substance, neither the district court nor the parties focused on this distinction.

9

Additionally,  *Narog* is distinguishable because the indictment here charges a conspiracy to distribute a controlled substance instead of a conspiracy to distribute the ingredient for a controlled substance with knowledge that the ingredient would be used to manufacture the controlled substance. Because distribution of an ingredient was not involved in this case, there was no threat that Achey would be convicted of an offense not charged by the indictment. Thus, unlike in  *Narog*, charging a subset of the statutory offense would have served no purpose in this case.

*See*  *Sanders*, 668 F.3d at 1312 (distinguishing  *Narog* on the basis that there was a risk that the defendants in that case did not know they were aiding in the manufacturing of a controlled substance).

#### *B. There Was Sufficient Evidence To Prove A Conspiracy To Distribute A Controlled Substance.*

[4] When all reasonable inferences are drawn in the government's favor, the evidence adduced at trial was sufficient to prove the existence of a conspiracy to distribute a controlled substance. There was sufficient evidence in the record for the jury to infer that (1) the supplier conspired with Achey based on the amount of drugs supplied, (2) the reseller conspired with Achey based on his distribution of Achey's drugs, (3) the wife conspired with Achey based on

her assistance, and (4) the repackagers conspired with Achey based on their assistance.

[5] [6] [7] A conspiracy conviction requires the government to prove the following: "(1) [an] agreement between two or more persons to achieve an unlawful objective; (2) knowing and voluntary participation in that agreement by the defendant; and (3) an overt act in furtherance of the agreement."  *United States v. Wenzia Man*, 891 F.3d 1253, 1265 (11th Cir. 2018). The existence of an agreement may be established by proof of an understanding between the participants to engage in illicit conduct, and the typical proof required to prove "legitimate contracts" is not required.  *United States v. Jones*, 765 F.2d 996, 1002 (11th Cir. 1985). This proof may be provided through "circumstantial evidence, such as inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme."  \*917 *Wenzia Man*, 891 F.3d at 1265 (quoting *United States v. Elledge*, 723 F.2d 864, 865 (11th Cir. 1984)).

[8] [9] [10] [11] But a simple buyer-seller controlled substance transaction does not, by itself, form a conspiracy.  *United States v. Dekle*, 165 F.3d 826, 829 (11th Cir. 1999). Yet a conspiracy can be found if the evidence allows an inference that the buyer and seller knew the drugs were for distribution instead of merely understanding "their transactions to do no more than support the buyer's personal drug habit."  *Id.* at 829–30. When considering whether a purchaser or seller of drugs was in fact a conspirator, an "agreement may be inferred when the evidence shows a continuing relationship that results in the repeated transfer of illegal drugs to the purchaser."  *United States v. Mercer*, 165 F.3d 1331, 1335 (11th Cir. 1999). A conspiracy to distribute controlled substances may also be inferred from a drug transaction where the amount of drugs allows an inference of a conspiracy to distribute drugs. *United States v. Hernandez*, 433 F.3d 1328, 1333 (11th Cir. 2005).

First, there was sufficient evidence of an agreement between Achey and LS, the supplier from whom he purchased fentanyl. The evidence allows an inference that LS knew that these purchases were more than buyer-seller transactions for Achey's personal use. Achey told investigators that he obtained 50 grams of tetrahydrofuran fentanyl. Given the potency of the substance, that amount was enough for Achey to supply many others. And the record shows that Achey

told the investigators that he obtained more than one type of controlled substance from the company. Under these circumstances, a reasonable jury could infer that the supplier must have known that Achev would further distribute the drugs, and thus was acting with knowledge of the illegal purpose.

Second, there was also sufficient evidence as to Achev's wife, Achev's reseller, and Achev's repackagers. Achev's wife was observed dropping off drug packages at various post offices. Achev's reseller, "illianlikeavillian," sold smaller quantities of the controlled substances that he or she obtained from Achev. Achev's repackagers assisted with the distribution by packing drugs into smaller packages and shipping them out. These actors, in assisting Achev with the distribution of drugs, were acting as individuals who knew of Achev's illegal objective and intended to advance it.

It is thus clear that each of these four actors conspired with Achev to distribute controlled substances. As to any of these actors, the evidence adduced at trial of their assistance in distribution was sufficient for a reasonable jury to infer that these actors knew of the illegal purpose of the operation and understood their participation in an illegal scheme.

#### IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** Achev's conspiracy conviction.

#### All Citations

943 F.3d 909, 28 Fla. L. Weekly Fed. C 610

---

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

# Indictment

FILED

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

2017 JUL 19 PM 4:24  
MIDDLE DISTRICT COURT  
ORLANDO, FLORIDA

UNITED STATES OF AMERICA

v.

CASE NO. 6:17-cr-165-01-40KRS  
21 U.S.C. § 846  
21 U.S.C. § 841(a)(1)

JEREMY ACHEY

INDICTMENT

The Grand Jury charges:

COUNT ONE

From in or about July 2016 and continuing through on or about June 27, 2017, in the Middle District of Florida, and elsewhere, the defendant,

JEREMY ACHEY,

did knowingly, willfully, and intentionally conspire with other persons, both known and unknown to the Grand Jury, to distribute and possess with intent to distribute a controlled substance analogue that was intended for human consumption, which violation involved a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)piperidin-4-yl]tetrahydrofuran-2-carboxamide (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue, and a mixture and substance

containing a detectable amount of 4-Acetoxy-N,N-dimethyltryptamine (4-ACO-DMT), a Schedule I controlled substance analogue, and is therefore punished under 21 U.S.C. § 841(b)(1)(C).

Pursuant to 21 U.S.C. § 841(b)(1)(C), on or about February 27, 2017, a person identified herein as “K.G.” died as a result of the use of a controlled substance analogue that the defendant conspired to distribute and possess with intent to distribute, that is, a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)piperidin-4-yl]tetrahydrofuran-2-carboxamide (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue.

All in violation of 21 U.S.C. §§ 802(32), 813, and 846.

**COUNT TWO**

Between on or about February 24, 2017, and on or about February 27, 2017, in the Middle District of Florida, and elsewhere, the defendant,

JEREMY ACHEY,

did knowingly and intentionally distribute a controlled substance analogue that was intended for human consumption, which violation involved a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-

phenylethyl)piperidin-4-yl]tetrahydrofuran-2-carboxamide (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue, and is therefore punished under 21 U.S.C. § 841(b)(1)(C).

Pursuant to 21 U.S.C. § 841(b)(1)(C), on or about February 27, 2017, a person identified herein as “K.G.” died as a result of the use of the mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)piperidin-4-yl]tetrahydrofuran-2-carboxamide (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance analogue, distributed by the defendant.

In violation of 21 U.S.C. §§ 802(32), 813, 841(a)(1), and 841(b)(1)(C).

**COUNT THREE**

Between on or about March 24, 2017, and on or about March 27, 2017, in the Middle District of Florida, and elsewhere, the defendant,

JEREMY ACHEY,

did knowingly and intentionally distribute a controlled substance analogue that was intended for human consumption, which violation involved a mixture and substance containing a detectable amount of 4-Acetoxy-N,N-

dimethyltryptamine (4-ACO-DMT), a Schedule I controlled substance analogue, and is therefore punished under 21 U.S.C. § 841(b)(1)(C).

In violation of 21 U.S.C. §§ 802(32), 813, 841(a)(1), and 841(b)(1)(C).

**FORFEITURE**

1. The allegations contained in Counts One, Two, and Three are incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of 21 U.S.C. § 853.

2. Upon conviction of a violation of 21 U.S.C. §§ 841(a)(1) and/or 846, the defendant shall forfeit to the United States, pursuant to 21 U.S.C. § 853(a)(1) and (2), any property constituting, or derived from, any proceeds the defendant obtained, directly or indirectly, as a result of such violation, and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.

3. If any of the property described above, as a result of any acts or omissions of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the Court;
- d. has been substantially diminished in value; or

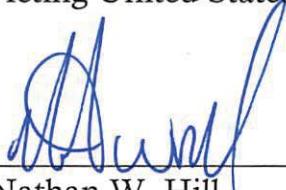
e. has been commingled with other property, which cannot be divided without difficulty,

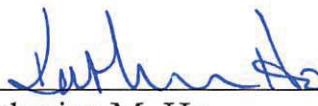
the United States shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p).

A TRUE BILL,

Catherine Wasson  
Foreperson

W. STEPHEN MULDROW  
Acting United States Attorney

By:   
Nathan W. Hill  
Assistant United States Attorney

By:   
Katherine M. Ho  
Assistant United States Attorney  
Chief, Orlando Division

FORM OBD-34  
APR 1991

No.

**UNITED STATES DISTRICT COURT**

Middle District of Florida  
Orlando Division

THE UNITED STATES OF AMERICA

vs.

JEREMY ACHEY

**INDICTMENT**

Violations:

21 U.S.C. § 846  
21 U.S.C. § 841(a)(1)

A true bill,

*Chenee Watson*

Foreperson

Filed in open court this 19th day

of July, 2017.

*M. Roberts*  
Clerk

Bail \$ \_\_\_\_\_

# **District Court's Jury Instructions (Excerpts)**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

**Case Number**  
**6:17-CR-165-ORL-40KRS**

JEREMY P. ACHEY,

**Defendant.**

THURSDAY, JANUARY 25, 2018

**CRIMINAL JURY TRIAL - DAY 4**

IN THE CIRCUIT COURT OF THE STATE OF ILLINOIS  
BEFORE THE HONORABLE PAUL G. BYRON, AND A JURY

**UNITED STATES DISTRICT JUDGE**

## APPEARANCES:

## GOVERNMENT COUNSEL:

Nathan Hill

## DEFENSE COUNSEL:

## Maria Guzman

Official Court Reporter:

K. Stanford

## Proceedings recorded by mechanical stenography.

Transcript produced by computer.

\* \* \* \*

1       their testimony, you may decide for yourself whether to rely  
2       upon the opinion.

3               The indictment charges separate crimes called counts  
4       against the defendant. Each count has a number. You will be  
5       given a copy of the indictment to refer to during your  
6       deliberations.

7               I just noticed a typo, which we'll change. It says  
8       two separate crimes, but it's actually three.

9               Count 1 charges the defendant knowingly, willfully,  
10       and intentionally conspired to distribute and possessed with  
11       intent to distribute a controlled substance analogue that was  
12       intended for human consumption.

13               Counts 2 and 3 charge that the defendant committed  
14       what are called substantive offenses, specifically knowingly  
15       and intentionally distributing a controlled substance analogue  
16       that was intended for human consumption. I will explain the  
17       law governing these substantive offenses in a moment. But  
18       first note that the defendant, Mr. Achey, is not charged in  
19       Count 1 with committing a substantive offense. He is charged  
20       with conspiring to commit that offense. And I will give you  
21       specific instructions on conspiracy.

22               I will now explain the law that applies to each of  
23       the counts at issue in this case. Section 841(a)(1) of Title  
24       21 of the United States Code makes it a federal crime for  
25       anyone to knowingly or intentionally distribute or possess

1 with intent to distribute a controlled substance.

2                   Section 813 of Title 21 provides that a controlled  
3 substance analogue shall, to the extent intended for human  
4 consumption, be treated as a controlled substance.

5                   Section 846 of Title 21 makes it a federal crime for  
6 anyone to conspire with someone else to do something which, if  
7 actually carried out, would be a violation of Title 21, of the  
8 United States code, Section 841(a)(1).

9                   When considered together, Sections 841(a)(1) and 813  
10 make it a crime for anyone to knowingly and intentionally  
11 distribute, or possess with intent to distribute, for human  
12 consumption, a controlled substance analogue and Section 846  
13 makes it a crime for anyone to conspire to do this.

14                   The substances at issue in this case are as follows:

15                   N-phenal-N-[1-(2-phenylethyl)piperidin-4-yl]  
16 tetrahydrofuran-2-carboxamide -- I'm sure I'm mispronouncing  
17 that -- which is commonly known as tetrahydrofuran fentanyl  
18 and 4-Acetoxy-N,N-dimethyltryptamine, which is commonly known  
19 as 4-AcO-DMT. I will refer to these substances by their  
20 abbreviations throughout the rest of these instructions.

21                   Psilocin and fentanyl are controlled substances  
22 under Schedule I and Schedule II, respectively, of the  
23 Controlled Substance Act.

24                   It is a separate federal crime for anyone to  
25 conspire to knowingly distribute or possess with intent to

1 distribute a controlled substance analogue that was intended  
2 for human consumption.

3 Title 21, United States Code, Section 841(a)(1),  
4 makes it a crime for anyone to knowingly distribute or possess  
5 with intent to distribute a controlled substance analogue that  
6 is intended for human consumption.

7 A conspiracy is an agreement by two or more persons  
8 to commit an unlawful act. In other words, it is a kind of  
9 partnership for criminal purposes. Every member of the  
10 conspiracy becomes the agent or partner of every other member.  
11 The heart of a conspiracy is the making of the unlawful plan  
12 itself, so the government does not have to prove that the  
13 conspirators succeeded in carrying out the plan.

14 The defendant, Mr. Achey, can be found guilty if  
15 only all of the following facts are proved beyond a reasonable  
16 doubt -- now this pertains to Count 1 of the indictment --  
17 that two or more people in some way agreed to try to  
18 accomplish a shared and unlawful plan to distribute or possess  
19 with intent to distribute a controlled substance analogue  
20 knowing it was intended for human consumption;

21 Number 2, that the defendant, Mr. Achey, knew the  
22 unlawful purpose of the plan and willfully joined in it;

23 Number 3, the object of the unlawful plan was to  
24 distribute or possess with intent to distribute a controlled  
25 substance analogue knowing it was intended for human

1 consumption.

2                   To intend to distribute is to plan to deliver a  
3 controlled substance analogue to someone else, even if nothing  
4 of value is exchanged.

5                   A person may be a conspirator without knowing all  
6 the details of the unlawful plan or the names and identities  
7 of all the other alleged conspirators. If the defendant  
8 played only a minor part in the plan but had a general  
9 understanding of the unlawful purpose of the plan and  
10 willfully joined in the plan on at least one occasion, that is  
11 sufficient for you to find the defendant guilty. But simply  
12 being present at the scene of an event or merely associating  
13 with certain people and discussing common goals and interests  
14 does not establish proof of a conspiracy. Also, a person who  
15 does not know about the conspiracy, but happens to act in a  
16 way that advances some purpose of one does not automatically  
17 become a conspirator.

18                   In Count 1 of the indictment, the government has  
19 also alleged that K.G.'s use of tetrahydrofuran fentanyl that  
20 the defendant or another conspirator conspired to distribute  
21 resulted in her death. To prove that allegation, the  
22 government must prove all of the following facts beyond a  
23 reasonable doubt:

24                   1. That K.G. used the tetrahydrofuran fentanyl and  
25 that the defendant or another conspirator conspired to

1 distribute.

2                   2. That K.G.'s use of the tetrahydrofuran fentanyl  
3 was the but-for cause of her death.

4                   A person's use of a particular substance is the  
5 but-for cause of death if the person would not have died if  
6 she had not ingested that substance.

7                   A person's use of a particular substance also is a  
8 but-for cause of death if that substance, combined with other  
9 factors to result in the person's death, so long as the other  
10 factors alone would not have resulted in her death if, so to  
11 speak, the particular substance was the straw that broke the  
12 camel's back.

13                  It is a federal crime for anyone to distribute a  
14 controlled substance analogue with the intent that it be  
15 consumed by humans.

16                  Mr. Achey can be found guilty of this crime only if  
17 all the following facts are proved beyond a reasonable doubt:

18                  Number 1, the defendant distributed a controlled  
19 substance analogue knowing it was intended for human  
20 consumption; and, number 2, the defendant did so knowingly and  
21 intentionally.

22                  In Count 2, the government has also alleged that  
23 K.G.'s use of the tetrahydrofuran fentanyl that the defendant  
24 is alleged to have distributed resulted in her death.

25                  To prove that allegation, the government must prove

# **Government's Closing Argument (Excerpts)**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

**Case Number**  
**6:17-CR-165-ORL-40KRS**

JEREMY P. ACHEY,

**Defendant.**

THURSDAY, JANUARY 25, 2018

**CRIMINAL JURY TRIAL - DAY 4**

BEFORE THE HONORABLE PAUL G. BYRON, AND A JURY  
UNITED STATES DISTRICT JUDGE

## 15 | APPEARANCES:

16 GOVERNMENT COUNSEL:

Nathan Hill

18 | DEFENSE COUNSEL:

Maria Guzman

23 | Official Court Reporter

K. Stanford

## Proceedings recorded by mechanical stenography.

## Transcript produced by computer.

1 yesterday afternoon, so we're ready for closing arguments in  
2 this matter. And we'll be hearing from the government first,  
3 Mr. Hill, followed by the defense, and then the government has  
4 the final word. Mr. Hill, go right ahead.

5 MR. HILL: Thank you, Your Honor. Good morning  
6 again, ladies and gentlemen.

7 First of all, again, forgive me. I have my water  
8 and my tissues here, just in case, and I want to thank you for  
9 your attention in this case. I know it's been a long couple  
10 of days and at times some of the evidence has gotten a little  
11 repetitive, I understand, especially some of the scientific  
12 evidence. But I know you've been paying close attention,  
13 and I really appreciate that.

14 As I said when I stood in front of you three days  
15 ago, despite all the testimony about Bitcoin, dark web,  
16 chemical structure, the root of everything, this case is about  
17 Jeremy Achey distributing dangerous synthetic chemicals to  
18 hundreds, maybe thousands of customers throughout the United  
19 States, knowing full well that none of them were research  
20 chemists. And Kristina Gorman is not here today because of  
21 that.

22 Now, the only difference between Jeremy Achey and  
23 the guy who sold D.D. heroin on Sunday night is that Jeremy  
24 Achey is a smart drug dealer. He read the Analogue Act.  
25 He knows what drugs are scheduled, and he knows what drugs

1 are so new there hasn't been enough time to schedule them.

2 I've prepared a little PowerPoint, if you look on  
3 your screens in front of you, that should help display some of  
4 the evidence that you've seen over the course of the last  
5 three days.

6 So these are the chemicals that we're talking about  
7 here: Tetrahydrofuran-fentanyl and 4-AcO-DMT. The defendant  
8 knew exactly what he was doing. He distributed chemicals that  
9 were not scheduled under the drug laws. They're only illegal  
10 under the Analogue Act, which requires, as you've heard, that  
11 they be intended for human consumption.

12 So, he bought these chemicals, he established a  
13 market, and he constructed this elaborate facade that what he  
14 was doing was selling research chemicals. He put labels on  
15 all of his products that says, not for human or veterinary  
16 use, even though you heard Brian Conkle from Cayman Chemicals  
17 say his customers are all law enforcement, ninety percent.

18 Do you know why? So that they know what he's  
19 selling. They have to have something to compare it to, and  
20 that's why Cayman Chemical is around. That's the only  
21 legitimate purpose for these substances, and the defendant  
22 knew it. But nevertheless because he was familiar with the  
23 law, he constructed this facade that what he was doing was  
24 research. He put these labels on everything. He put the  
25 chemical structure, the chemical name.

\* \* \*

1 was the but-for cause of her death.

2 We know that there is tetrahydrofuran fentanyl steps  
3 away from her body. We know that the defendant sent that to  
4 her house. And we know that the tetrahydrofuran fentanyl was  
5 in her body when she died. She used the tetrahydrofuran  
6 fentanyl sold by the defendant.

7 The second element, her use of the tetrahydrofuran  
8 fentanyl was the but-for cause of her death. But-for means  
9 the person would not have died if she had not ingested the  
10 substance. It's also in your jury instructions.

11 You remember the first day of testimony, Dr. Marie  
12 Hansen said exactly that. All she had in her system when she  
13 died was tetrahydrofuran fentanyl, caffeine, a byproduct of  
14 the tetrahydrofuran fentanyl and etizolam.

15 I said, would the defendant (sic) have died but for  
16 the tetrahydrofuran fentanyl? She said no. She died because  
17 of the tetrahydrofuran fentanyl. The amount of etizolam in  
18 her system was a clinical amount, not something she would  
19 expect to result in death. She was not hesitant. That was  
20 her clear opinion.

21 Ladies and gentlemen, we've proven that the  
22 defendant killed Kristina Gorman, and that's Counts 2 and 3.  
23 So we're left with Count 1. And the reason I saved is for  
24 last, because much of the same things we talked about in  
25 Counts 2 and 3, also apply to Count 1.

1                   Counts 2 and 3 are what we call substantive  
2 offenses. It's the actual charge for the defendant  
3 distributing the substances.

4                   Count 1 is a conspiracy charge. The defendant  
5 conspired with other people to distribute those substances.

6                   So the only real addition, the only real different  
7 evidence that applies to this count that doesn't apply to the  
8 other counts is that the defendant had to agree with two or  
9 more people in some way, and we know that because he tells you  
10 that.

11                  How many people do you have re-packing and  
12 re-shipping for you? And you remember he had trouble giving  
13 this up. He didn't want to say it. Two people. Just two.  
14 But I'm sure you guys have already tracked some of the  
15 packages in the two different states that stuff comes from.  
16 One of them was Illinois. The other one was Kentucky or  
17 something. None of them were in Pennsylvania. He had  
18 employees. He was about to hire Agent Armendariz before he  
19 was arrested.

20                  THE COURTROOM DEPUTY: Forty-five minutes, Mr. Hill.

21                  MR. HILL: Thank you.

22                  And not only that, his other conspirators are his  
23 Chinese distributors, LS, that he talks about in the  
24 interview. And we find a package in his house from China to  
25 his P.O. Box, the USDTO P.O. Box.

1                   So, ladies and gentlemen, that element's proven.  
2 He agreed with two or more people. He tried to accomplish a  
3 shared and unlawful plan to distribute or possess with intent  
4 to distribute a controlled substance analogue.

5                   Those elements are the exact same -- the evidence  
6 for those are the exact same in Counts 2 and 3. And then he  
7 knew it was intended for human consumption, exactly the same  
8 evidence as Counts 2 and 3.

9                   The defendant knew the unlawful purpose of the plan  
10 and willfully joined in it. We already talked about that.  
11 The defendant knew exactly what he was doing. He made  
12 \$100,000 doing it. And finally, the unlawful purpose of that  
13 plan was to distribute or possess with intent to distribute  
14 the two controlled substance analogues we've been talking  
15 about in this case.

16                   Count 1 has been proven. Really, the only  
17 difference practically between Counts 2 and 3 and Count 1 is  
18 that in terms of Count 1, we can prove resulting in death  
19 whether or not the defendant was the one that actually put the  
20 parcel in the mail so long as it was a member of the  
21 conspiracy. But here, we know the defendant put that parcel  
22 in the mail, not his co-packer in Kentucky, not his co-packer  
23 in Illinois, the defendant.

24                   The United States has also charged, resulting in  
25 death for Count 1, the exact same, that the distribution of

1 the tetrahydrofuran fentanyl caused the death of Kristina  
2 Gorman. The element here is the same. We just talked about  
3 it. The United States has proven that. And that's the case,  
4 ladies and gentlemen.

5 The United States has proven each one of these  
6 elements, spent three days showing you what the defendant did,  
7 who he talked to. Perhaps the best evidence is the  
8 defendant's statements himself. He's the mastermind, ladies  
9 and gentlemen. He used that term himself. And he is the only  
10 EtiKing, only one that logged onto that computer, the only one  
11 who put that parcel in the mail.

12 Ladies and gentlemen, the defendant is guilty beyond  
13 a reasonable doubt of all three counts, and he is guilty of  
14 killing Kristina Gorman.

15 THE COURT: Thank you, Mr. Hill. Ms. Guzman.

16 MS. GUZMAN: Thank you, Your Honor.

17 Good morning. I suspect when you came to federal  
18 court, the last thing you thought was that you were going to  
19 go through a chemistry class. You had left that behind in  
20 high school. But it is important here, and I'm going to  
21 address that very, very succinctly with you, and I'm not going  
22 to go into a lot of detail about the chemical aspect of it,  
23 only to say Mr. Hill made a comment that the defense had their  
24 own hired expert. Well, the government has their own hired  
25 expert. The difference is their hired expert is on the

# Judgment

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

UNITED STATES OF AMERICA

v

JEREMY P. ACHEY aka Etiking

Case Number: 6:17-cr-165-Orl-40KRS

USM Number: 76109-066

Maria Guzman, FPD  
Ste 300  
201 S Orange Ave  
Orlando, FL 32801-3417

**JUDGMENT IN A CRIMINAL CASE**

The defendant was found guilty to Counts One, Two, and Three of the Indictment. The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Numbers</u>
21 U.S.C. §§ 802(32), 813, 846, and 841(b)(1)(C)	Conspiracy to Distribute or Possess with Intent to Distribute a Controlled Substance Analog Intended for Human Consumption Which Resulted in Death	June 27, 2017	One
21 U.S.C. §§ 802(32), 813, and 841(b)(1)(C)	Distribute a Controlled Substance Analogue Intended for Human Consumption Which Resulted in Death	February 27, 2017	Two
21 U.S.C. §§ 802(32), 813, and 841(b)(1)(C)	Distribution of a Controlled Substance Analogue Intended for Human Consumption	March 27, 2017	Three

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

**IT IS ORDERED** that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

April 27, 2018

  
PAUL G. BYRON  
UNITED STATES DISTRICT JUDGE

*May 1*, 2018

Jeremy P. Achey  
6:17-cr-165-Orl-40KRS

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **LIFE**. This term consists of terms of life on Counts One and Two and a term of 240 months as to Count Three, all such terms to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

### RETURN

I have executed this judgment as follows:

---

---

---

---

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

---

UNITED STATES MARSHAL

By: \_\_\_\_\_  
Deputy U.S. Marshal

Jeremy P. Achey  
6:17-cr-165-Orl-40KRS

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **THREE (3) YEARS**. This term consists of a 3 year term as to Counts One, Two, and Three, all such terms to run concurrently.

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. The mandatory drug testing requirements of the Violent Crime Control Act are imposed. The Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions as follows.

Jeremy P. Achey  
6:17-cr-165-Orl-40KRS

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within **72 hours**.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Jeremy P. Achey  
6:17-cr-165-Orl-40KRS

## CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

<u>Assessment</u>	<u>JVTA Assessment</u> <sup>1</sup>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	<b>\$300.00</b>	<b>N/A</b>	<b>Waived</b>

\*The determination of restitution is deferred. Pursuant to Title 18 U.S.C. § 3664(d)(5), a date for the final determination of victim losses shall be under a separate order and will not exceed 90 days.

## SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk, U.S. District Court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

<sup>1</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.