No.

IN THE SUPREME COURT OF THE UNITED STATES

Robert Lee Shields,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

THOMAS C. LYONS
Law Offices of Thomas C. Lyons
201 West Short Street, Suite 800
Lexington, Kentucky 40507
859-231-0055
thomaslyons@hotmail.com
Attorney for Petitioner

QUESTIONS PRESENTED

I. When the evidence in a drug distribution case demonstrates only two sales, what additional factors support an inference of a drug distribution conspiracy, rather than a buyer-seller relationship?

II. Where there is only evidence of a buyer-seller relationship in a drug transaction, as opposed to a conspiracy to distribute narcotics, must a defendant's convictions on substantive drug distribution counts be reversed when the trial court gave jury instructions permitting Pinkerton co-conspirator liability on those substantive counts?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Lee Shields, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, Docket No. 18-5121.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption to this petition.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at United States v. Hamm, 952 F.3d 728 (6th Cir. 2020).

JURISDICTION

The panel of the Sixth Circuit Court of Appeals entered its judgment on March 6, 2020. Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1) states:

> Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

21 U.S.C. § 841(b)(1)(C) states, in relevant part:

> In the case of a controlled substance in schedule I or II . . . such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . .

21 U.S.C. § 846 states:

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

STATEMENT OF THE CASE

This petition presents important issues regarding the application of the buyer-seller doctrine and overreach of conspiracy law, pertaining to both 21 U.S.C. §§ 841(a)(1) and 846.

Proceedings in the District Court

After a jury trial, Robert Shields and his co-defendant, Wesley Hamm, were convicted of the three counts set forth in the Third Superseding Indictment: conspiracy to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1) and 846 (Count 1); distribution of carfentanil resulting in death in violation of 21 U.S.C. § 841(b)(1) (Count 2); and distribution of carfentanil resulting in serious bodily injury, in violation of 21 U.S.C. § 841(b)(1) (Count 3).

I. Evidence at Trial

The evidence at trial was summarized by the Sixth Circuit in its Opinion and Order. Pet. App. 2. In the summer of 2016, Tracey Myers ("Myers"), Wesley Hamm ("Hamm"), and Wesley's wife Jennifer Hamm ("Jennifer") were roommates in Mount Sterling, Kentucky. Id. Hamm was addicted to opioids and each day he made the two-hour drive to Cincinnati, where he typically bought several grams of fentanyl. Id. When he returned to Mt. Sterling, he and his wife used some of the drug

themselves and gave the rest to their roommate, Tracey Myers, a local drug dealer. Myers diluted, divided, and sold her share. Id.

On August 22, 2016, Hamm went to the Cincinnati area to purchase fentanyl from someone new – Robert Shields. Pet. App. 3. On August 24, Hamm again travelled to Cincinnati to purchase fentanyl from Shields, this time accompanied by Jennifer and a friend. Id. This was Hamm's second and last purchase from Shields. Myers did not go with Hamm and there is no evidence that she ever had any personal or telephone contact with Shields.

When Hamm and Jennifer got home on August 24, Hamm kept some of the drugs and gave the rest to Myers. Pet. App. 4. That evening, Myers sold drugs to L.K.W. Id. He died that night of a drug overdose. Id. The medical examiner later determined that L.K.W. died of "acute carfentanil and methamphetamine intoxication." Id. Carfentanil, a synthetic opioid, is similar in action to other opioids like fentanyl and morphine (a major component in heroin) but it is much more potent. Id. Local police officers quickly traced L.K.W.'s drugs back to Myers. Pet. App. 4-5. Police arrested Myers for drug trafficking and Hamm on outstanding warrants on August 25. Pet. App. 5.

Myers confessed to having sold what she thought was either heroin or fentanyl to L.K.W. the previous night. Id. Hamm admitted that he had bought what he believed to be fentanyl the day before, that he kept some for himself, and gave the rest to Myers. Id. He identified Shields as his supplier and agreed to make several recorded calls to him. Id. Officers then set up an undercover

operation to purchase narcotics from Shields, and arrested him the next day. Id. No actual drug transaction occurred on this date.

Subsequently, on August 27, while in jail, Myers provided the same narcotics, which she had smuggled into the jail in her body, to three other inmates in her cell. Pet. App. 5. These women had an immediate overdose reaction and two had to be administered Narcan, but all women recovered. Id. Tracey Myers committed suicide in jail about a week later. Pet. App. 2.

Both Hamm and Myers had other sources of supply. Pet. App. 10. One issue at trial was whether Shields sold carfentanil to Hamm, or whether he sold him fentanyl, which Myers later mixed with carfentanil that she had obtained from another source. Id. Jennifer testified at trial that Myers mixed her drugs with other substances and that she did this in private in her room. Id. Moreover, Myers's supply of carfentanil killed L.K.W. and caused Myers' cellmates to overdose. Id. However, the drugs that Shields sold to the Hamms on August 26 did not cause the Hamms (who sampled the product upon purchase) to overdose, and while the friend who went with them to Cincinnati with them had a bad reaction, he never lost consciousness and survived without any medical treatment. Id.

II. Jury Instructions, Verdict, and Sentencing

Shields moved for a judgment of acquittal under Fed. R. Civ. Pro. 29 at the close of the government's case-in-chief and at the close of all the evidence, but those motions were overruled. See Pet. App. 10. Shields also objected to the United States' proposed co-conspirator liability instruction for Counts 2 and 3, allowing the

jury to find the defendants liable for distribution of carfentanil resulting in the death of L.K.W. and serious bodily injury to Myers' cellmates based solely upon the actions of Myers, pursuant to Pinkerton v. United States, 328 U.S. 640 (1946). Pet. App. 14. That instruction, No. 17, explained that "[t]here are two ways that the government can prove the defendants guilty" of Counts 2 and 3:

> The first is by convincing you that the defendant personally committed or participated in the crimes. The second is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement . . . . In other words, under certain circumstances, the act of one conspirator may be treated as the act of all.

Pet. App. 17. The court overruled this objection.

The jury subsequently returned a verdict of guilty on Counts 1, 2, and 3 for both defendants. Pet. App. 2. The trial court determined that Shields had a prior "felony drug offense" under 21 U.S.C. § 802(44) and applied the mandatory minimum set forth in 21 U.S.C. § 841(b)(1)(C), sentencing him to life in prison. Id.

Proceedings in the Court of Appeals

On appeal to the Sixth Circuit, Shields challenged the jury instructions on the § 841(b)(1)(C) sentencing enhancements, a remark in the prosecutor's closing argument, and the sufficiency of the evidence on all counts, including conspiracy. Pet. App. 2. Shields also argued that because the Government failed to prove a conspiracy as to Shields at trial, rather than simply a buyer-seller relationship between Shields and Hamm, the trial court erred in giving Jury Instruction Number 17 on co-conspirator Pinkerton liability as to Counts 2 and 3. Shields sought to vacate and remand his convictions on all counts. See Corrected Appellant

Brief, Sixth Circuit Docket 18-5121, Entry No. 20, p. 27.

In its Opinion and Order, the Sixth Circuit found that there was sufficient evidence to sustain Shields' convictions on all counts. As to Count 1, the court held:

> Viewing the evidence in the light most favorable to the government, a reasonable juror could have found that Shields, Hamm, Jennifer, and Myers had an agreement to distribute opioids in Mt. Sterling. While it "is not totally implausible" that Hamm and Shields had only a buyer–seller relationship, "this was not the version of the events that the jury chose to accept," and the evidence is sufficient to support its verdict on Count 1.

Pet. App. 8. (citation omitted). As to Counts 2 and 3, the court found that the evidence was sufficient for a jury to find that the carfentanil Myers distributed to L.K.W. and her cellmates was the same substance Shields sold to Hamm in Cincinnati. Pet. App. 10. Because it found sufficient evidence of a conspiracy as to Count 1, rather than a buyer-seller relationship, the Sixth Circuit did not address the issue of whether the trial court committed reversible error as to Count 2 and 3 by giving the Pinkerton instruction on those counts, had the Government failed to establish the existence of a conspiracy.

However, the Sixth Circuit held that the jury instructions misstated the law as to the ***sentencing enhancement*** on Counts 2 and 3, because the jury could not use a Pinkerton theory to apply § 841(b)(1)(C)'s death-or-injury enhancement.[1] Pet. App. 6, 23, 24. Instead, based on Sixth Circuit precedent espoused in United States v. Swiney, 203 F.3d 397, 406 (6th Cir. 2000), the death-or-injury enhancement only

[1] The court noted that the indictment and the jury instructions conflated Counts 2 and 3, the substantive distribution offenses under § 841(a)(1), and the death- or-injury sentencing enhancement under § 841(b)(1)(C), and they listed the sentencing provision as if it were an element of the substantive offense. Pet. App. 17.

applies to defendants who were "part of the distribution chain" to the overdose victim. Pet. App. 13. The Sixth Circuit vacated Shields' and Hamm's sentences, and remanded for a new trial solely on the question of whether to apply the Section 841(b)(1)(C)'s death-or-injury enhancement to their convictions on Counts 2 and 3. Pet. App. 24.

REASON FOR GRANTING THE WRIT

The federal circuit courts of appeal, while each recognizing the buyer-seller doctrine, have applied the doctrine inconsistently and with no uniform test. Furthermore, in most circuits, the buyer-seller exception has become increasingly rare, applying only to single transactions of personal-use quantity. This Court's intervention is necessary to prevent every other buy-sell agreement from automatically becoming a conspiracy to distribute drugs and to harmonize this body of law.

I. Certiorari should be granted to provide a uniform test on the application of the buyer-seller doctrine.

Two 1940s cases from this Court, United States v. Falcone, 311 U.S. 205 (1940) and Direct Sales Co. v. United States, 319 U.S. 703 (1943), gave rise to the proposition that a conspiracy is not established simply by a relationship between a buyer and seller. In Falcone, the Court affirmed the judgment reversing the convictions of sugar and yeast suppliers who knowingly sold the products to illegal distillers, where the proof showed only that the suppliers knew that illicit distillation was contemplated, but not that they knew of the conspiracy. 311 U.S. 210-11. By contrast, in Direct Sales, this Court affirmed the conviction of a drug

manufacturer and wholesaler who had, over a period of years, supplied large amounts of morphine sulfate to a doctor who was illegally distributing the drug. 319 U.S. at 704. The large quantities of morphine at issue in Direct Sales, together with the prolonged cooperation between the seller and buyer, provided the evidence sufficient to convict the seller of conspiracy to violate the narcotics laws. Id. at 713-14.

Since then, as the Congressional Research Service recently reported:

> Each of the federal circuit courts of appeal has acknowledged an exception to liability in controlled substances cases: an agreement of buyer to purchase a small amount of drugs and of seller to provide them does not constitute a conspiratorial agreement. The courts claim different explanations for the narrow exception. Some do so under the rationale that there is no singularity of purpose, no necessary agreement, in such cases: "the buyer's purpose is to buy; the seller's purpose is to sell." Others do so to avoid sweeping mere one-time customers into a large-scale trafficking operation. Still others do so lest traffickers and their addicted customers face the same severe penalties.

Federal Conspiracy Law: A Brief Overview (April 3, 2020), p. 7 (citations omitted).[2] The circuit courts have also struggled to apply a uniform test in determining when the exception applies. Furthermore, application of the buyer-seller doctrine has become increasingly narrow. In most circuits, the doctrine is now rarely extended "beyond the one-time small transaction." Id.

For example, the Eighth Circuit, while acknowledging that "proof of a conspiracy requires evidence of more than simply a buyer-seller relationship," the court has, in application, "limited buyer-seller relationship cases to those involving only evidence of a single transient sales agreement and small amounts of drugs

[2] Available at: https://fas.org/sgp/crs/misc/R41223.pdf

consistent with personal use." United States v. Davis, 867 F.3d 1021, 1034 (8th Cir. 2017). The Fifth Circuit has similarly explained that the "[t]he buyer-seller exception prevents a ***single*** buy-sell agreement, which is necessarily reached in every commercial drug transaction, from automatically becoming a conspiracy to distribute drugs." United States v. Delgado, 672 F.3d 320, 333 (5th Cir. 2012) (en banc) (emphasis added). The First Circuit has also narrowly construed the doctrine. See United States v. Moran, 984 F.3d 1299, 1304 (1st Cir. 1993) (a "classic" buyer-seller transaction is a spontaneous, single sale of a personal use quantity of drugs).

The Second Circuit, on the other hand, requires more. See, e.g. United States v. Brock, 789 F.3d 60, 64 (2d Cir. 2015) (finding insufficient evidence of a shared conspiratorial purpose despite numerous sales, where there was no exclusivity between buyer and seller, no sales on credit, and no shared profits, among other things). In the Second Circuit, "a non-exclusive list of considerations relevant to a jury's determination of whether a defendant was a member of a charged conspiracy, or merely a buyer and user of drugs," includes:

> Did the buyer seek to advance the conspiracy's interests? Was there mutual trust between buyer and seller? Were the drugs provided on credit? Did the buyer have a longstanding relationship with the seller? Did the buyer perform other duties on behalf of the conspiracy? Were the drugs purchased for a re-distribution that was part of the conspiratorial enterprise? Did the quantity of drugs purchased indicate an intent to re-distribute? Were the buyer's profits shared with the members of the conspiracy? Did the buyer/re-distributor have the protection of the conspiracy (physically, financially, or otherwise)? Was his point of sale assigned or protected by members of the conspiracy? Did the buyer use other members of the conspiracy in the re-distribution? The jury may consider these, and any other relevant matters, in deciding whether a buyer of drugs is a member of the distribution conspiracy.

United States v. Rojas, 617 F.3d 669, 675 (2d Cir. 2010).

The Seventh Circuit has also held that "large-quantity, repeat sales alone do not support an inference of conspiracy." United States v. Moreno, 922 F.3d 787, 794 (7th Cir. 2019) (citations omitted). In the Seventh Circuit, "[c]ircumstantial evidence that indicates conspiracy, and not just a buyer-seller relationship, includes[]: large-quantity drug sales; repeated or standardized transactions; a lengthy relationship between the parties; sales on credit (i.e., fronting); warnings of threats by competitors or law enforcement; and sharing tools and supplies." Id.

The Sixth Circuit has espoused similar factors as to evidence that may support a finding of conspiracy. See United States v. Deitz, 577 F.3d 672, 681 (6th Cir. 2009). In Shields' case, the court explained:

> [T]his court has often upheld conspiracy convictions where there was additional evidence, beyond the mere purchase or sale, of a wider agreement. For instance, we have considered circumstantial evidence on the following factors to establish that a drug sale is part of a larger drug conspiracy including: evidence of advanced planning; multiple transactions involving large quantities of drugs; repeat purchases . . . or other enduring arrangements; the length of the relationship; the established method of payment; the extent to which transactions are standardized; and the level of mutual trust between the buyer and the seller.

Pet. App. 7 (internal quotation marks and citations omitted).

Other circuits take varying approaches. In the Fourth Circuit, "evidence of a defendant buying or selling a substantial quantity of drugs over a short period of time is enough to raise an inference of a distribution conspiracy." United States v. Allen, 716 F.3d 98, 104 (4th Cir. 2013). The Ninth Circuit has noted additional

factors, including: "whether the parties advised each other on the conduct of the other's business; whether the buyer assisted the seller by looking for other customers; and whether the parties agreed to warn each other of potential threats from competitors or law enforcement." United States v. Moe, 781 F.3d 1120, 1125-26 (9th Cir. 2015) (citations omitted). The Tenth Circuit takes a different approach altogether, limiting the exception to retail buyers only. See United States v. Sells, 477 F.3d 1226, 1236 n. 12 (10th Cir. 2007) ("Anthony's confusion about whether a buyer-seller relationship establishes a conspiracy stems from a misunderstanding of the retail buyer rule. Our circuit has previously held that a buyer in a retail drug transaction is not considered part of the larger conspiracy to manufacture and distribute a drug.").

This divergent treatment of the buyer-seller doctrine in the circuit courts of appeal demonstrates the need for guidance on issues surrounding the buyer-seller doctrine. Questions include: Does the doctrine apply only to single-sale transactions? Is the doctrine only applicable when personal use quantities of drugs are involved? May a seller rely on the buyer-seller defense? Should equal weight be given to all factors? In the instant case, the Sixth Circuit found there was sufficient evidence that Shields – who had sold to Hamm on only two occasions – was part of a drug distribution conspiracy, even thought the weight of the evidence demonstrated only a buyer-seller relationship. Certiorari should be granted in this case to resolve these issues and to provide a uniform test on the application of the buyer-seller doctrine.

II. Certiorari should be granted to prevent the continued expansion of conspiracy law in the buyer-seller context.

It has long been held that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." Pinkerton v. United States, 328 U.S. at 643. However, as pointed out by the Seventh Circuit, "[dr]ug sales complicate the situation. A drug sale is itself an agreement: a buyer and seller come together, agree on terms, and exchange money or commodities at the settled rate. But, although the substantive trafficking crime is an agreement, it cannot also count as the agreement needed to find conspiracy." United States v. Brown, 726 F.3d 993, 997-98 (7th Cir. 2013) (citations omitted). Or, as stated by the Ninth Circuit:

> A conviction for conspiracy cannot be based solely on the purchase of an unlawful substance, even though such a transaction necessarily involves an agreement between at least two parties, the buyer and the seller. Rather, conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sale itself. Were the rule otherwise, every narcotics sale would constitute a conspiracy.

United States v. Lapier, 796 F.3d 1090, 1095 (9th Cir. 2015).

As explained above, applying various tests and reasoning, each of the circuit courts of appeal has acknowledged some buyer-seller exception to liability in controlled substances cases. However, in practice, the doctrine has become increasingly narrow, rarely extending beyond the one-time, personal-use transaction. For example, the Eleventh Circuit recently held that a "conspiracy to distribute controlled substances may [] be inferred from a drug transaction where the amount of drugs allows an inference of a conspiracy to distribute drugs." United

States v. Achey, 943 F.3d 909, 916 (11th Cir. 2019). Permitting such an inference, especially in the case of only one or two sales, stretches the law of conspiracy too far and ignores that 21 U.S.C. § 841(a)(1) criminalizes drug ***distribution*** and § 841(b)(1) contemplates the statute's application in large quantities.

The doctrine's limited applicability was demonstrated by the Sixth Circuit's decision in this case, where it found sufficient evidence of drug distribution conspiracy based on scant evidence. Despite acknowledging that Shields sold Hamm 2-3 grams of fentanyl on only two occasions, the Sixth Circuit held that "a reasonable juror could have found that Shields, Hamm, Jennifer, and Myers had an agreement to distribute opioids in Mt. Sterling." Id., p. 8. The Court explained:

> [T]he evidence cuts both ways. There were only two transactions between Shields and Hamm, and the relationship was only a few days old when they were both arrested. On the other hand, the quantities involved were large. Jennifer testified that each transaction involved two to three grams of fentanyl. This estimate (the most conservative in the record) suggests that each sale yielded twenty to thirty doses. Also, the trips to Cincinnati required extensive planning carried out by phone calls and text messages. And Shields's involvement did not stop with the sales; he also offered to teach Hamm how to mix the drugs for resale.
>
> Most importantly, there was evidence that the Mt. Sterling trio's relationship with Shields, while new, was meant to be exclusive and ongoing. Hamm told Shields he did not want to "make other arrangements," the Hamms declined an offer from a previous supplier once they started dealing with Shields, and Shields told Hamm, "I like to build relationships with my people . . . ."
>
> A reasonable juror could have inferred from all of this that Shields had a tacit agreement with Hamm.

Pet. App. 8.

In so finding, the Sixth Circuit largely ignored the factors it had previously

enumerated: "(1) the length of the relationship; (2) the established method of payment; (3) the extent to which transactions are standardized; and (4) the level of mutual trust between the buyer and the seller." See United States v. Deitz, 577 at 681. Instead, the court looked to a few text messages and calls between Hamm and Shields to demonstrate "extensive planning." Pet. App. 8. Under this standard, would only a chance "street corner" sale fall under the buyer-seller exception? The court also relied on speculative statements by Hamm and Shields, which – although perhaps indicative of a potential future relationship – did little to show that the two sales were part of a larger conspiracy to distribute drugs. Id.

On the other hand, this was not a lengthy relationship, there was no time to establish "mutual trust," and there was no evidence of "standardized" transactions. The buying and selling of drugs on two occasions, even if the parties were contemplating whether to enter into an agreement, did not establish that Shields joined a conspiracy with Hamm and Myers (whom he had never met). The application of the buyer-seller test by the Sixth Circuit in this case demonstrates the overreach of conspiracy law in the buyer-seller context, and the need for this Court to intervene.

III. Certiorari should also be granted on the issue of whether, if Shields' conspiracy conviction is vacated, his conviction as to Counts 2 and 3 must also be vacated, as the Pinkerton instruction may have produced a conviction on those substantive charges based on a non-existent conspiracy.

This buyer-seller issue is further complicated in Shields' case, where the trial court overruled his Rule 29 motion on Count 1 (conspiracy), and then gave a

Pinkerton instruction on Counts 2 and 3 (the substantive distribution counts under § 841(a)(1)), over the defendant's objection. The jury was therefore permitted to find Shields liable under Counts 2 and 3 for the overdoses of L.K.W. and Myers' cellmates based on Myers' distribution of carfentanil, even if she obtained that drug from another source.

Because the Sixth Circuit found sufficient evidence of a conspiracy, it did not address whether giving the Pinkerton instruction on Counts 2 and 3 was reversible error, if the Government failed to establish the existence of a conspiracy, rather than a buyer-seller relationship. However, if Shields' conviction on Count 1 is vacated, then his conviction as to Counts 2 and 3 must also be vacated, as Jury Instruction Number 17 permitted the jury to convict him on those counts based on vicarious liability for the acts of Myers.

Confronted with a similar issue, the Sixth Circuit has found that reversal on the substantive counts is required, even if the defendant failed to object below. In United States v. Henning, 286 F.3d 914 (6th Cir. 2002), the trial court gave a Pinkerton instruction, and the defendant was convicted of both the conspiracy and several substantive counts. Id. at 918-19. The defendant moved for and was granted a post-verdict judgment of acquittal on the conspiracy count based on insufficient evidence. Id. at 919. On appeal, the Sixth Circuit later found plain error in the district court's failure to reconsider the substantive charges as well, because the Pinkerton instruction may have produced a conviction on the substantive charges based on a non-existent conspiracy. Id. at 920, 921. The court

explained:

> While normally the Government could rely on the presumption that jurors convicted on the factually sufficient theory, in this case there is evidence to the contrary, indicating that the jurors may have convicted on the factually inadequate theory. The jurors originally convicted Henning on the conspiracy charge, which the district court judge later determined was not supported by sufficient evidence. It is therefore not only logical, but likely that the jurors may have convicted Henning on the substantive counts based upon Pinkerton liability. Indeed, courts presume that jurors "attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985). The problem with the substantive convictions is that the jury could have closely followed the jury instructions and convicted Henning based upon the actions of his associates.

Id. at 922.

Similarly, in this case, should Shields' conviction on Count 1 be vacated, his conviction as to Counts 2 and 3 must also be vacated, as the Pinkerton instruction may have produced a conviction on those substantive charges based on a non-existent conspiracy. Moreover, if Counts 2 and 3 are not vacated, despite insufficient evidence of a conspiracy, substantial injustice may result. Upon remand, on the issue of whether to apply Section 841(b)(1)(C)'s "death or serious bodily injury" sentencing enhancement as to Counts 2 and 3, the jury could determine that Shields was ***not*** part of the chain of distribution resulting in the overdoses – meaning that the evidence was insufficient to prove that the carfentanil Myers distributed to L.K.W. and her cellmates came from Shields, instead of another source. However, his judgment of conviction on Counts 2 and 3 would remain. In that scenario, even though the mandatory life sentence would not apply,

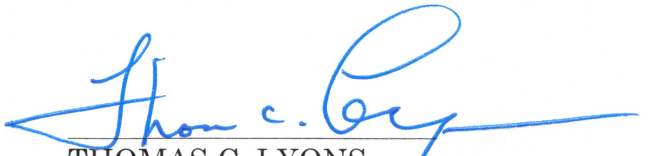
Shields would still be subject to 30 years in prison based solely on the actions of Myers, despite the conspiracy count being vacated. See 21 U.S.C. § 841(b)(1)(C) ("If any person commits such a violation [of § 841(a)(1)] after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . ."). Such a result would be unconscionable. The Supreme Court should grant certiorari on this issue to prevent this injustice.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Dated: June 3, 2020.

RESPECTFULLY SUBMITTED,



THOMAS C. LYONS
Law Offices of Thomas C. Lyons
201 West Short Street, Suite 800
Lexington, Kentucky 40507
859-231-0055
thomaslyons@hotmail.com
Counsel for Petitioner, Robert Shields

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.2(b), I hereby certify that this Petition for Writ of Certiorari complies with the page limitations of the rule. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of June, 2020.

THOMAS C. LYONS
Law Offices of Thomas C. Lyons
201 West Short Street, Suite 800
Lexington, Kentucky 40507
859-231-0055
thomaslyons@hotmail.com
Counsel for Petitioner