

CASE No. _____

SUPREME COURT OF THE UNITED STATES OF AMERICA

Johnny Benjamin

(petitioner)

v

United States

(respondent)

On Petition for Writ of Certiorari to the United States Court of Appeals for the

Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

LACK OF SUBJECT MATTER JURISDICTION

Federal district courts have their jurisdiction limited to violations of laws of the United States. During the period of indictment, the handling of furanyl fentanyl (Fu-f) did not violate the charged statute, the Controlled Substances Act (CSA). Did the district court have subject matter jurisdiction over this case?

INDICTING LEGAL CONDUCT IS A JURISDICTIONAL DEFECT

The 11th Circuit has long held that in an indictment the affirmative allegation of specific conduct not forbidden by the charged statute is a jurisdictional defect. During the period of indictment, the handling of Fu-f (alleged specific conduct) was not forbidden by the Controlled Substances Act (charged statute). Did the indictment contain a jurisdictional defect?

LIST OF PARTIES AND RELATED CASES

United States of America v Johnny Benjamin,

No. 17-80203-CR

U.S. District Court for the Southern District of Florida

Final Judgment entered July 6, 2018

United States of America v Johnny Benjamin

No. 18-13091-DD

U.S. Court of Appeals for the Eleventh Circuit

Judgment entered May 8, 2020

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- 21 USCS 841(a)(1)	pg. 2
- 21 USCS 841(b)(1)(c)	pg. 2
- 21 USCS 846	pg. 2

CONSTITUTIONAL PROVISIONS

- Article III Section 2 Clause 3- The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. pg. 5
- Article III Section 2 Clause 3- Cases and Controversies clause pg 4
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CODE OF FEDERAL REGULATIONS

- 21 CFR Part 1308-

Schedules of Controlled Substances: Temporary Placement of Furanyl Fentanyl into Schedule 1

"Liability: Any activity involving furanyl fentanyl not authorized by the CSA, occurring as of November 29, 2016, is unlawful, and may subject the person to administrative, civil and criminal sanctions. pg. 6

OPINIONS BELOW

Johnny Benjamin v United States, 2020 US App LEXIS 14755 (published appeal)

United States v Johnny Benjamin, 2020 App LEXIS 9200 (11th Cir. Fl, March 24, 2020).

JURISDICTION

On May 24, 2020, the final judgment of appeal was entered.

On June 17, 2020, the Eleventh Circuit Court of Appeals denied a timely petition for rehearing.

The Supreme Court has jurisdiction not of the merits of this case but to determine the jurisdiction of the lower court. If the lower federal district court is found to be lacking jurisdiction this Court has the jurisdiction for the purpose of correcting the error of the district court in entertaining this case.

STATEMENT OF CASE

FACTS

Federal government charged Dr. Benjamin by superseding indictment [DE41] with Count 1: Conspiracy to possess with intent to distribute furanyl fentanyl [hereinafter Fu-f], a controlled substance analogue as defined in 21 USCS 802(32)(a) in violation 21 USCS 846, and that a death resulted to M.C., in violation of 21 USCS 841(b)(1)(C) and Count 2: Distribution of a controlled substance [Fu-f] to M.C., 21 USCS 841(a)(1) and that substance was a controlled substance analogue as defined by 21 USCS 802(32)(a).

- The defense and the government entered into a stipulation about Fu-f: " It is hereby stipulated and agreed upon by the government, the defendant and the defendant's counsel, that at all times material to this case, furanyl fentanyl was a controlled substance analogue, as defined in title 21, USC section 802, subparagraph (32)(A), that was intended for human consumption, as provided in title 21 USC, section 813." [DE191:249].

- The DEA criminalized Fu-F on November 29, 2016 by temporarily adding it to Schedule 1 of the CSA banned substances list. This is the only date of criminalization published and recorded for Fu-f. 21 CFR part 1308 states-

"Liability- Any activity involving furanyl fentanyl not authorized by, or in violation of the CSA, occurring as of November 29, 2016, is unlawful, and may subject the

person to administrative, civil, and/or criminal sanctions."

- The period of indictment was March 2016- September 3, 2016, which ended BEFORE Fu-f was criminalized.
- On July 6, 2018, after trial and guilty verdict the district court entered the final judgment of conviction.
- On May 8, 2020, the appellate court affirmed the decision of the district court.
- On May 22, 2020, a timely petition for rehearing was filed consistent with Fed. R. App. P. 40(a)(2) to address whether "the court has overlooked or misapprehended" points of law or fact.
- On May 24, 2020 the appellate court entered the judgment of affirmation.
- On June 17, 2020, the appellate court denied the petition for rehearing without commenting.
- The appellate court failed to perform a de novo review of the district court's subject matter jurisdiction.
- Fu-f has never been proven in federal court to satisfy the statutory definition of a controlled substance analogue.
- The record contains no proof to the contrary regarding any of the above stated facts.

REASONS TO GRANT WRIT

A court must examine subject matter jurisdiction de novo whenever the possibility arises that it may not exist. The appellate court also failed to investigate the assertion of a jurisdictional error, which is a constitutional claim. No federal court possesses the discretion to ignore or evade the potential denial of a constitutional right or lack of jurisdiction.

Because legal conduct does not satisfy the 'Cases and Controversies' clause of the Constitution, the district court lacked jurisdiction.

The court of appeals failed to honor its longstanding doctrine that in an indictment the allegation of specific conduct not forbidden by the charged statute is a jurisdictional defect.

The judicial circuits are divided regarding the proper disposition of an indictment that alleges specific conduct not forbidden by the charged statute.

Throughout the nation, numerous people have been illegally prosecuted and convicted based on the government's willful misrepresentation that Fu-f was proven to be an analogue controlled substance in violation of the CSA.

Condemning a surgeon to a life sentence in a federal penitentiary for alleged conduct that does not constitute a crime violates the 'due process' protections guaranteed by the Constitution.

INTRODUCTION

18 USCS 3231 grants federal district courts original jurisdiction limited to violations of laws of the United States. This statute does not grant district courts 'unlimited' jurisdiction over conduct that does not violate federal statutes. Simply put, federal district courts have its' power to determine the law limited to deeds that constitute a crime; jurisdiction does not extend to legal conduct.

To be free of prosecution under an indictment that alleges legal conduct is a substantial right protected by the 5th Amendment. To conclude that the district court's limited jurisdiction extends to legal conduct that does not violate federal statutes exceeds the plain language of the statutory grant of power. Article III Section 2 Clause 1 of the Constitution extends federal judicial powers to actual controversies involving the United States; 'potential', 'hypothetical' and 'speculative' controversies are not recognized. Legal conduct i.e. conduct not proven to be illegal does not create an actual controversy. The district court lacked constitutional and statutory power to adjudicate this case.

This petition is not a claim regarding the sufficiency of the evidence required to establish liability nor that the government failed to allege a fact or element that would have made the indictment's criminal charge complete. This claim challenges the presence of recorded evidence required to establish subject matter jurisdiction of the federal district court. This distinction is critical.

The merits of this case are irrelevant. The alleged specific conduct contained in counts One and Two negates any violation of the charged statutes. Review of the indictment and record reveals the alleged conduct was legal.

ARGUMENT 1- FEDERAL DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION

Counts One and Two of the indictment alleged violations of the Controlled Substances Act (CSA). For the district court to have subject matter jurisdiction in this case, Fu-f must violate the CSA. That could have occurred in two ways. During the period of indictment, the record must reflect either: 1) Proof that Fu-f was scheduled, or 2) Proof that Fu-f satisfied the definition of a controlled substance (CS) analogue (21 USCS 802(32)(a)), which is a three-pronged test that the government did not satisfy. Fu-f was scheduled November 29, 2016 (21 CFR part 1308). Fu-f has never been proven in federal court to satisfy the statutory definition of a CS analogue. The record contains no proof that a crime existed in counts One and Two.

The Controlled Substances Analogue Enforcement Act (CSAEA) of 1986 is simply a definition written as a three-pronged test. It is part of the Controlled Substances Act at 21 USCS 802(32)(a). Once the definition of a CS analogue is proved in court, the CSAEA provides a pathway for the government to use the prohibitions of the Controlled Substances Act to prosecute a newly encountered unscheduled

substance. Because of this structure, a substance is legal until it is shown in court to satisfy the definition of a CS analogue.

Fu-f remained a legal substance not in violation of the CSA until it was scheduled November 29, 2016. This occurred after the period of indictment.

There was a stipulation that Fu-f was a CS analogue. A stipulation cannot confer subject matter jurisdiction.

ARGUMENT 2- INDICTMENT OF LEGAL CONDUCT IS A JURISDICTIONAL DEFECT

The Eleventh Circuit has long held "...there is no jurisdictional defect when the 'indictment fail[s] to allege an element of the charged offense, 'but there is one when the indictment affirmatively alleges conduct that does not constitute a crime at all because the conduct falls outside the sweep of the charging statute.'" United States v Brown, 752 F. 3d 1344,1352 (11th Cir. 2014) (citing Peter, 310 F. 3d at 714-15).

Counts One and Two of this indictment affirmatively allege the specific conduct of handling Fu-f in violation of the CSA. During the period of indictment, the handling of Fu-f has never been proven to violate the CSA. The record contains no proof to the contrary.

When the indictment affirmatively alleges conduct that negates the existence of an offense against the laws of the United States merely citing a valid statute neither cures the defect nor invokes the district court's jurisdiction.

The Eleventh Circuit doctrine that the allegation of specific conduct not forbidden by the charged statute is a jurisdictional defect does not offend this Court's opinion in *United States v Cotton*, 535 US 625, 152 L. Ed 2d 860, 122 S Ct 1781 (2002). The question addressed in *Cotton* was significantly different than the questions in this case and 11th Circuit doctrine. Chief Justice Rehnquist wrote in *Cotton* "In this case, we address whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence even though the defendant did not object in the trial court." [This Court is now] "freed from the view that indictment omissions deprive a court of jurisdiction."

As the Eleventh Circuit Court of Appeals stated in *Brown*, 'this Court concluded in *Izurieta* that *Cotton* did not alter "our established precedent recognizing that the failure to allege a crime in a violation of the laws of the United States is a jurisdictional defect." *Izurieta*, 710 F. 3d at 1179; see also *Peter*, 310 F. 3d at 714 ([T]he Supreme Court [in *Cotton*] did not address whether insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges, and on which a subsequent guilty pleas is based described conduct that is not proscribed by the charging statutes.") Multiple Supreme Court opinions seem to support this 11th Circuit doctrine.

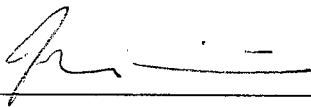
In *Cleveland v United States*, 531 US 12, 148 L. Ed 2d 221 S Ct. 365 (2000), this Court determined that the specific conduct of receiving a video poker license was

not the receipt of 'property' and consequently did not constitute a violation of the charged statute of mail fraud. This Court reversed the appeals court and vacated the conviction.

As recently as 2018, in *Class v United States*, 538 US ___, 138 S Ct. ___, 200 L. Ed 2d 37, this Court held that a claim of conduct that did not constitute a crime was not barred to direct appeal by a guilty pleas. Apparently, this Court concluded that the assertion was in fact a valid jurisdictional claim since it was allowed to survive a guilty plea, which if otherwise would have waived all non-jurisdictional claims. As the opinion stated: 'Class challenged the Government's power to criminalize his (admitted) conduct and thereby calls into question the Government's power to "constitutionally prosecute" him. Ibid. (quoting *Menna*, supra. at 61-62, n. 2, 96 S. Ct. 241, 46 L. Ed. 2d 195). A guilty plea does not bar a direct appeal in these circumstances. Pp. __-__. 200 L. Ed. 2d, at 44-45.

CONCLUSION

Because the indictment was fatally and structurally defective this entire case should be dismissed. The district court lacked subject matter jurisdiction, as counts One and Two charged a legal substance that was not criminalized during the time of the indictment. The indictment also alleged specific conduct not forbidden by the charged statutes. This was a jurisdictional defect. A jurisdictional defect is one that strips a court of its power and makes its judgment void. As this Court long ago held in *Ex Parte McCardle*, 74 U.S. (7 Wall) 506, 19 L. Ed 264 (1868) "without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to determine the law, and when it ceases to exist the only function remaining to the court is that of announcing the fact and dismissing the cause."



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(date) 3 day of September 2020