

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA EDWARDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

D. AARON NOVOD, La. Bar No. 31275
Law Office of D. Aaron Novod
P.O. Box 740985
New Orleans, LA 70174
Telephone: 347-974-5074
Fax: 347-344-6222
aaron.novod.esq@gmail.com

**COUNSEL FOR PETITIONER
JOSHUA EDWARDS**

QUESTIONS PRESENTED FOR REVIEW

- I. Did the United States Court of Appeals for the Fifth Circuit err when it held that the district court's failure to instruct the jury on the elements of the underlying crime did not necessitate a new trial where omitted elements implicated the Petitioner's trial defense that he did not agree to or take part in that underlying crime?

Petitioner Joshua Edwards respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Joshua Edwards, Plaintiff/Appellant
2. United States of America, Defendant/Respondent

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING IN THE COURTS BELOW.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	iv
OPINION DELIVERED IN THE COURT BELOW.....	1
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THE COURT SHOULD GRANT THE WRIT TO GIVE EFFECT TO THE REQUIREMENT THAT A DEFENDANT’S CONVICTION CAN ONLY STAND WHEN THE GOVERNMENT IS HELD TO ITS BURDEN TO PROVE EACH ELEMENT OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT.....	4
INDEX OF APPENDICES	i

TABLE OF AUTHORITIES

CASES

<i>In re Winship</i> , 397 U.S. 358, 364 (1970).....	5
<i>Johnson v. Louisiana</i> , 460 U.S. 356 (1971)	5
<i>United States v. Binetti</i> , 552 F.2d 1141 (5th Cir. 1977).....	5
<i>United States v. Foote</i> , 413 F.3d 1240 (10th Cir. 2005).....	5
<i>United States v. Jimenez Recio</i> , 537 U.S. 270 (2003)	5
<i>United States v. Pinckney</i> , 85 F.3d 4 (2d Cir. 1996).....	5, 6
<i>United States v. Pope</i> , 561 F.2d 663 (6th Cir. 1977).....	5
<i>United States v. Rose</i> , 590 F.2d 232 (7th Cir. 1978)	5
<i>United States v. Warshawsky</i> , 20 F.3d 204 (6th Cir. 1994).....	5

STATUTES

21 U.S.C. § 846	3
28 U.S.C. § 1254.....	1

OTHER AUTHORITIES

Fifth Circuit Pattern Jury Instruction (Criminal) § 2.95 (2015).....	2
--	---

RULES

Fed. Rule Crim. Pro. 31(a)	5
----------------------------------	---

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.....	2, 5
----------------------------	------

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA EDWARDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Edwards respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINION DELIVERED IN THE COURT BELOW

The final judgment and decree rendered by the United States Court of Appeals for the Fifth Circuit on February 26, 2020, denying Petitioner's appeal from his conviction in the United States District Court for the Western District of Louisiana, is attached as Appendix A.

**STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION
OF THE COURT IS INVOKED**

The United States Court of Appeals for the Fifth Circuit issued its denial of Petitioner's appeal on February 26, 2020, and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1254 to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States 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 defense.” U.S. Const. amend. VI.

STATEMENT OF THE CASE

At the close of the evidence at Petitioner Joshua Edwards’ trial for conspiracy to distribute and possess with intent to distribute controlled substances, the district court instructed the jury on the law relevant to their deliberations. The instructions including an explanation of the “proof necessary in this case” that tracked the Fifth Circuit’s pattern instruction for a conspiracy charge related to controlled substances. The notes to the pattern instruction also state that a trial court must instruct the jury on the elements of the object crime of the conspiracy. The district court appeared prepared to follow this mandate, informing the jury that:

In this case the defendant is charged with conspiring to distribute and possess with intent to distribute a controlled substance; namely, heroin. *The elements of the offense of distribution or possession with the intent to distribute are explained later in this instruction.*

But despite this pledge, the district court never instructed the jury on the elements of possession with the intent to distribute. Nor did the district court define or explain the term to the jury in another fashion.

Mr. Edwards had been indicted on March 16, 2017, along with Jacob K. Arceneaux, Terrence T. Woods, and Robert Jenkins, and charged with Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances in violation of 21 U.S.C. § 846. Mr. Edwards was tried alone; each of his co-defendants had previously entered pleas of guilty.

The primary point of contention at Mr. Edwards's trial was whether or not he dealt heroin. Mr. Edwards did not dispute that he possessed heroin. But Mr. Edwards argued that while he did buy and use heroin, he did not sell it.

The prosecution presented evidence that a task force had secured a wiretap of Arceneaux's telephone based on information from a confidential informant. The task force identified additional persons of interest, including Mr. Edwards, through telephone intercepts and surveillance of Arceneaux's heroin trafficking from his sister's house. The jury heard some of these intercepted phone calls, including calls suggesting that on multiple occasions Mr. Edwards went to Arceneaux's sister's house to buy two grams of heroin from Arceneaux's nephew. A law enforcement witness stated that two grams is a "relatively small quantity of heroin." On other calls played for the jury, Arceneaux appeared to offer Mr. Edwards a larger amount of heroin. There is not an indication that Mr. Edwards agreed to buy the offered, larger quantity.

On December 28, 2016, law enforcement executed search warrants at the homes of multiple individuals suspected to be involved in drug trafficking. Approximately 80 grams of heroin were recovered. A search warrant was not sought or secured for Mr. Edwards's home.

Mr. Edwards's trial counsel told the jury during opening and closing statements that Mr. Edwards was a user, but not a seller, of heroin. In support of this defense, trial counsel pointed to an intercepted call during which a caller told Arceneaux that Mr. Edwards was

playing “junkie games.” On cross-examination, a law enforcement witness stated that the term junkie refers to a heroin user. The witness also testified that Mr. Edwards lived with a known heroin user, and that it was certainly possible that Mr. Edwards was a heroin user himself.

The jury that was not instructed on the elements of possession with the intent to distribute voted to convict Mr. Edwards of conspiracy to distribute and possess with intent to distribute controlled substances.

On August 15, 2019, Mr. Edwards timely filed an appeal with the United States Court of Appeals for the Fifth Circuit. The application was denied on February 26, 2020. The Court of Appeals stated that the “[t]he district court committed an error that was clear or obvious when it failed to instruct the jury on the elements of the conspiracy’s object crimes”, but Mr. Edwards “has not shown that this clear or obvious error amounted to reversible plain error.” The Court reasoned that “the defense did not raise questions as to the nature of the acts constituting these offenses or whether Edwards’s codefendant and others were members of the charged conspiracy”, but “[r]ather, Edwards’s claim that he was a mere user and buyer of heroin challenged whether he was a member of that conspiracy, i.e., whether he willfully joined in the conspiracy with the intent to further its unlawful purpose of distributing or possessing with intent to distribute heroin.” Appendix A at 3-4.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO GIVE EFFECT TO THE REQUIREMENT THAT A DEFENDANT’S CONVICTION CAN ONLY STAND WHEN THE GOVERNMENT IS HELD TO ITS BURDEN TO PROVE EACH ELEMENT OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT

Petitioner seeks the Court’s intervention to prevent defendants such as Mr. Edwards from being convicted irrespective of whether the Government has proven that the intended

future conduct the defendant agreed upon includes all the elements of the charged offense. Given the stark nature of the issue in this case, if Mr. Edwards' conviction is allowed to stand then the requirement that the government prove each element of the offense charged beyond a reasonable doubt to sustain a conviction will be rendered a nullity.

The district court's failure to instruct the jury in this case regarding the elements of possession with the intent to distribute reduced the Government's burden of proof, and allowed Mr. Edwards to be convicted without the Government being required to prove each element of the offense charged beyond a reasonable doubt as required by the Sixth Amendment. *See In re Winship*, 397 U.S. 358, 364 (1970); *see also Johnson v. Louisiana*, (Powell, J. concurring) 460 U.S. 356, 369 (1971) (Sixth Amendment right to a jury trial requires jury unanimity to convict a defendant); Fed. Rule Crim. Pro. 31(a).

The essence of a conspiracy is the agreement to commit a particular crime. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003); *United States v. Binetti*, 552 F.2d 1141, 1142 (5th Cir. 1977) (reversing a defendant's conviction for conspiracy to possess and distribute cocaine when the defendant did not conspire to sell cocaine, but rather a substance that looked like cocaine). It is therefore part of the Government's burden to prove that "the intended future conduct [the conspirators] agreed upon includes all the elements of the substantive crime." *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996) (quoting *United States v. Rose*, 590 F.2d 232, 235 (7th Cir. 1978)); *see also United States v. Foote*, 413 F.3d 1240, 1250 (10th Cir. 2005); *United States v. Warshawsky*, 20 F.3d 204, 209 (6th Cir. 1994).

In this instance, the district court did not merely fail to define a relevant term or phrase. Instead, the district court failed to inform the jury of the elements and definition of the underlying crime. *See United States v. Pope*, 561 F.2d 663, 670-71 (6th Cir. 1977)

(finding the district court’s jury instructions “failed to adequately inform the jury that the ‘intent to distribute’ is an essential element of” the charged crime because “[a]lthough the instructions define ‘intent’ in general terms along with other statutory definitions, nowhere in the instructions is either ‘distribution’...or ‘intent to distribute’ defined for the jury”). The district court’s failure therefore reduced the Government’s burden of proof because it allowed the jury to convict Mr. Edwards irrespective of whether the Government had proven that “the intended future conduct [Mr. Edwards] agreed upon includes all the elements of [possession with the intent to distribute].” *Pinckney*, 85 F.3d at 8.

The Court of Appeals was unconcerned, stating that “the defense did not raise questions as to the nature of the acts constituting these offenses or whether Edwards’s codefendant and others were members of the charged conspiracy”, but “[r]ather, Edwards’s claim that he was a mere user and buyer of heroin challenged whether he was a member of that conspiracy, i.e., whether he willfully joined in the conspiracy with the intent to further its unlawful purpose of distributing or possessing with intent to distribute heroin.” Appendix A at 3-4. However, the Court failed to illustrate how the Government was held to its burden and made to prove that the intended future conduct Mr. Edwards agreed upon included all the elements of possession with the intent to distribute. Indeed, Mr. Edwards’ trial defense—that that he was a buyer, and not a seller, of heroin—contested this very point. This contention was so clear that in its brief to the Court of Appeals, despite advancing various arguments against Mr. Edwards’ claim that his conviction must be vacated because of the trial court’s instructional error, the Government *did not* contest the assertion that Mr. Edwards’s defense raised a question regarding whether he conspired to “possess with intent to deliver or transfer possession of a controlled substance to another

person . . .” The Court’s silence on how the Government was held to its burden is therefore profound. Analysis of the trial record shows that the Government was clearly *not* held to its burden.

Allowing Mr. Edwards’ conviction to stand would therefore abrogate the requirement that a defendant can only be convicted when the government is held to its burden to prove each element of the offense charged beyond a reasonable doubt.

For the foregoing reasons, the Court should grant Mr. Edwards’ petition and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Dated: July 17, 2020

/s/ D. Aaron Novod
D. AARON NOVOD, La. Bar No. 31275
Law Office of D. Aaron Novod
P.O. Box 740985
New Orleans, LA 70174
Telephone: 347-974-5074
Fax: 347-344-6222
aaron.novod.esq@gmail.com

**COUNSEL FOR PETITIONER
JOSHUA EDWARDS**

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA EDWARDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via email upon Assistant United States Attorney Thomas Forrest Phillips. All persons required to be served have been served.

Dated: July 17, 2020

/s/ D. Aaron Novod

D. AARON NOVOD, La. Bar No. 31275

Law Office of D. Aaron Novod

P.O. Box 740985

New Orleans, LA 70174

Telephone: 347-974-5074

Fax: 347-344-6222

aaron.novod.esq@gmail.com

**COUNSEL FOR PETITIONER
JOSHUA EDWARDS**

INDEX OF APPENDICES

Appendix A The United States Court of Appeals for the Fifth Circuit, *United States of America v. Joshua Edwards*, February 26, 2020

Appendix A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

February 26, 2020

Lyle W. Cayce
Clerk

No. 18-31171
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSHUA EDWARDS,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:17-CR-3-4

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Joshua Edwards appeals his jury conviction on one count of conspiracy to distribute and possess with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and 21 U.S.C. § 846. He contends that the district court erred in denying his motion to dismiss the superseding indictment on grounds that his Sixth Amendment right to a speedy trial had been violated.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-31171

The Sixth Amendment guarantees a defendant the right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 515 (1972). To determine whether this right has been violated, a court must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial rights; and (4) the prejudice to the defendant resulting from the delay. *United States v. Molina-Solorio*, 577 F.3d 300, 304 (5th Cir. 2009) (citing *Barker*, 407 U.S. at 530). The determination involves a mixed question of law and fact: We review the district court's factual findings for clear error and its application of the *Barker* test de novo. *Id.* at 303-04.

The record reflects that Edwards was indicted on March 16, 2017, and that his trial commenced approximately 16 months later, on July 30, 2018. Although this delay was sufficient to trigger an examination of the remaining *Barker* factors, *see United States v. Serna-Villarreal*, 352 F.3d 225, 230 (5th Cir. 2003), it was not sufficient to create a presumption of prejudice or weigh in Edwards's favor, *see United States v. Harris*, 566 F.3d 422, 432 (5th Cir. 2009); *see also United States v. Parker*, 505 F.3d 323, 328-29 (5th Cir. 2007).

Neither does the second *Barker* factor weigh in Edwards's favor. The record reflects that the case is complex and that Edwards acquiesced in much of the post-indictment delay. Although the trial date was continued because of his codefendant's last-minute substitution of counsel, Edwards has pointed to no evidence that the delay was the result of the Government's negligence or that the Government intentionally caused the delay to gain a tactical advantage against him at trial. *See Serna-Villarreal*, 352 F.3d at 232. Nonetheless, because Edwards promptly asserted his right to a speedy trial and sought to sever his case from that of his codefendant on learning that the trial date would likely be continued, the third *Barker* factor does weigh in his favor. *See Harris*, 566 F.3d at 432.

No. 18-31171

Because only one of the first three *Barker* factors weighs in Edwards's favor, he had to prove actual prejudice sufficient to outweigh the other factors to prevail on his motion to dismiss the superseding indictment. *See United States v. Bishop*, 629 F.3d 462, 465 (5th Cir. 2010). Edwards's assertion that he suffered actual prejudice because he was detained for 451 days prior to the commencement of his trial is insufficient to make this showing. *See United States v. Frye*, 489 F.3d 201, 213 (5th Cir. 2007). There was therefore no Sixth Amendment violation, and the district court did not err in denying Edwards's motion to dismiss the superseding indictment. *See Parker*, 505 F.3d at 330.

Edwards also contends that the district court committed reversible plain error by failing to instruct the jury on the elements of the conspiracy's object crimes. He argues that the error affected his substantial rights because his theory of defense—that he was a user and buyer but not a seller of heroin—raised questions as to the elements of the object crimes.

The district court committed an error that was clear or obvious when it failed to instruct the jury on the elements of the conspiracy's object crimes. *See United States v. Vaglica*, 720 F.2d 388, 391 (5th Cir. 1983). Nevertheless, Edwards has not shown that this clear or obvious error amounted to reversible plain error. *See United States v. Piper*, 912 F.3d 847, 860 (5th Cir.), *cert. denied*, 139 S. Ct. 1639 (2019). The district court (1) explained that Edwards was charged with conspiring to distribute and possess with intent to distribute heroin and (2) gave the pattern jury instructions for a controlled substance conspiracy and the definitions of "possession," "knowingly," and "willfully." The district court did not, however, instruct the jury as to the elements of distribution and possession with intent to distribute, but the defense did not raise questions as to the nature of the acts constituting these offenses or whether Edwards's codefendant and others were members of the charged

No. 18-31171

conspiracy. Rather, Edwards's claim that he was a mere user and buyer of heroin challenged whether he was a member of that conspiracy, i.e., whether he willfully joined in the conspiracy with the intent to further its unlawful purpose of distributing or possessing with intent to distribute heroin. The district court correctly instructed the jury on these issues, *see United States v. Delgado*, 672 F.3d 320, 333-34 (5th Cir. 2012) (en banc), and the record contains ample evidence from which the jury could have inferred that Edwards was a heroin dealer and willful member of a conspiracy to distribute or possess with intent to distribute heroin. The district court's judgment is **AFFIRMED**.