No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

_____

***TRUMAINE MULLER*, 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

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QUESTIONS PRESENTED

I. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO INSTRUCT THE JURY THAT THE GOVERNMENT HAD TO PROVE *MENS REA* AS TO EACH DRUG OFFENSE AND THE RESULTING DEATH.

II. THE GOVERNMENT FAILED TO ESTABLISH THAT MULLER'S ACTS WERE THE PROXIMATE CAUSE OF THE DEATH OF ARIELL BRUNDIGE.

III. THE EVIDENCE IN THIS CASE PLAINLY ESTABLISHES THAT AN INTERVENING ACT RESULTED IN THE DEATH OF ARIELL BRUNDIGE.

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The Petitioner, TRUMAINE MULLER, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit Court of Appeals decision, *United States v. Trumaine Muller*, is an unpublished decision reported at 2020 U.S. App. LEXIS 19960, __ Fed. Appx. __ , 2020 WL 3485135. The decision entered June 26, 2020. A copy of the unpublished opinion is included in the attached appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit pursuant to Title 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

21 U.S.C. § 841(a)(1):

> UNLAWFUL ACTS Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 841(b)(1)(C):

> In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), 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, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. 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, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an

> individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

28 U.S.C. § 2106

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law.

STATEMENT OF THE CASE

PROCEEDINGS

Trumaine Muller ("Muller" or the Petitioner) was indicted September 13, 2018 in a four count superseding indictment charging in count one distribution of a controlled substance on or about November 9, 2016, which involved a mixture containing fentanyl, which resulted in the death of Ariell Brundige as a result of the use of the mixture distributed by Muller, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and in count two distribution on or about January 31, 2017 of a mixture containing furanylfentanyl, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and in count three distribution on or about February 8, 2017 of a mixture containing furanylfentanyl, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and in count four possession of a firearm on or about February 8, 2017 after having been convicted of certain prior enumerated felony offenses, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

September 16, 2018 the Government filed an information under 21 U.S.C. § 851 alleging a prior conviction, which enhanced the sentencing penalty for count one of the superseding indictment to life imprisonment. An amended information was filed January 5, 2019 to the same effect, mandating life imprisonment upon conviction of count one.

Trial by jury commenced January 14, 2019, continued the following day, January 15, 2019, and concluded January 16, 2019 with a guilty verdict as to all counts, including a special verdict as to the death resulting enhancement of count one.

Muller was sentenced May 6, 2019 to life imprisonment as to count one, 360 months as to counts two and three, all such terms to run concurrently; supervised release of 72 months as to counts one through three, all such terms to run concurrently. Muller was sentenced on count four to 120 months concurrent to counts one, two and three with a term of supervised release as to count four of 48 months, concurrent with the supervised release on counts one, two and three.

Muller filed a timely notice of appeal the same day he was sentenced. The Eleventh Circuit affirmed his convictions in an unpublished opinion.

FACTS

On November 9, 2016, Ariell Brundige (Brundige), age 18, expressed to her boyfriend, Tyler William Hamilton (Hamilton), that she wanted to obtain prescription pills. Hamilton advised he could not obtain pills but could obtain heroin for them. On November 9, 2016, at approximately 10:00 p.m., Christopher Allen Williams (Williams) picked up Hamilton and Brundige from their place of employment. Hamilton advised Williams he was unable to obtain heroin from his heroin dealer and asked that Williams contact his heroin dealer to purchase heroin. Williams contacted

Trumaine Muller (Muller) using Hamilton's phone and arranged to purchase heroin from Muller at a particular location. Shortly thereafter, Muller sold Williams two bags of a substance purported to be heroin for $40. The substance contained a detectable amount of fentanyl. Hamilton kept one of the bags and told Williams to have the second bag and provide a small amount from that bag to Brundige since she had not used heroin before.

Williams drove Hamilton to Hamilton's residence where Hamilton went inside to intravenously use his share of the heroin. At approximately 11:00 p.m., while Williams and Brundige waited in the vehicle in Hamilton's driveway, Hamilton's brother came outside and told them Hamilton was experiencing a seizure and that paramedics were being dispatched to the residence and asked them to leave. Williams and Brundige left and went to Williams' residence. At Williams's residence, Williams provided Brundige a quantity of the heroin obtained from Muller, the same heroin mixture which they both knew had just caused Hamilton to overdose. Nevertheless, despite this knowledge, she later used the heroin mixture.

At approximately 11:30 p.m., Hamilton having recovered from his overdose and seizure with the help of the paramedics, asked Williams to come pick him up. Williams brought Hamilton to Williams' residence at approximately midnight. When Hamilton got to Williams' residence, Brundige appeared to be asleep on the couch

in the living room. Williams went to bed and Hamilton remained on the couch with Brundige. During the early morning hours of November 10, 2016, Hamilton observed Brundige having trouble breathing. Instead of calling for help, he conducted internet searches related to heroin overdoses. After Hamilton determined that Brundige stopped breathing, Hamilton woke Williams for assistance, and Williams called 911 at 4:14 a.m. Brundige was dead when paramedics arrived. Toxicology results revealed a lethal amount of fentanyl in Brundige's system and the medical examiner ruled Brundige died from an accidental overdose of fentanyl.

On January 31, 2017, a confidential informant (CI) made two separate controlled purchases of heroin and crack cocaine from Muller at his apartment, located at 460 Brentwood Lane, Unit C, Orange Park, Florida. During the first purchase, Muller sold the CI approximately 0.3 grams of heroin and 0.4 grams of crack cocaine. Laboratory analysis revealed the heroin contained furanylfentanyl. During the second purchase, Muller sold the CI approximately 0.3 grams of heroin and 0.3 grams of crack cocaine. Laboratory analysis revealed the heroin contained furanylfentanyl.

On February 8, 2017, law enforcement executed a search warrant at 480 Brentwood Lane, Unit C. The search revealed 2.7 grams of heroin which contained furanylfentanyl, 6.5 grams of crack cocaine, 62 hydrocodone pills (27.4 grams), a

stolen .38 caliber Smith and Wesson revolver loaded with five rounds of ammunition, a pill press, a digital scale, $449, and two marijuana grinders.

Prior to February 8, 2017, Muller had been convicted of multiple felony offenses, including those specifically outlined in Count Four of the superseding indictment.

The defense conceded guilt as to counts two and three (the controlled buys) in opening statement at trial. The jury returned guilty verdicts on all four counts including a special verdict that death resulted from the distribution of the drug.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO INSTRUCT THE JURY THAT THE GOVERNMENT HAD TO PROVE *MENS REA* AS TO EACH DRUG OFFENSE AND THE RESULTING DEATH IN COUNT ONE.

The trial court followed the most recent pattern jury instructions from the Eleventh Circuit and in so doing failed to instruct the jury that the drug offenses in counts one, two and three and the death resulting enhancement offense must be committed wilfully.

The pattern jury instructions do not constitute any sort of precedent and cannot foreclose the construction of the necessary elements of a crime. *United States v. Gutierrez*, 745 F.3d 463, 471 (11th Cir. 2014). Following the pattern instructions is

not a guarantee against reversible error. See, e.g., *United States v. Ruiz*, 59 F.3d 1151 (11th Cir. 1995) (pattern instructions on willfulness failed to adequately cover defendant's theory of defense); See also *United States v. Ettinger*, 344 F.3d 1149, 1158 (11th Cir. 2003), *United States v. Polar*, 369 F.3d 1248 (11th Cir. 2004) (pattern jury instruction improperly included wilfullness); *United States v. Dohan*, 508 F.3d 989, 994 (11th Cir. 2007) (pattern instruction improperly included willfulness).

The Government conceded at sentencing that the Petitioner did not know or care what drug he was distributing and did not know or care if a death resulted. The statute on its face does not impose a willfulness requirement or any intention that death result to be liable for the minimum mandatory twenty year sentence which in this case based on a prior drug conviction was enhanced to a minimum mandatory life sentence. But the absence of a scienter or willfulness requirement in the face of the statute does not mean that the offense can be punished as a strict liability offense.

Yet all courts which have looked at the statute have treated it as if it did not require any forseeablity, much less intention to cause death. See, e.g., *United States v. Houston*, 406 F.3d 1121 (9th Cir. 2005); *United States v. Soler*, 275 F.3d 146 (1st Cir. 2002); *United States v. Rebmann*, 226 F.3d 521 (6th Cir. 2000), rev'd *United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002); *United States v. Robinson*, 167 F.3d 824 (3d Cir. 1999); *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994). But

see *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001) (applying death enhancement under § 841(b)(1)(A) where defendant convicted of manufacturing methamphetamine).[1] This is not surprising, given the inherent difficulty of proving that the particular drugs an individual used resulting in their death were the same drugs distributed, let alone possessed, by a defendant. Proof of distribution, at the very least, provides a connection between the user and the defendant. Each of the cases above analyzed the death enhancement and concluded that the unambiguous language of the statute did not require a finding that death or serious bodily injury from the use of the drug was reasonably foreseeable. *Houston,* 406 F.3d at 1124-25 (holding that proximate case was not a required element under § 841(b)(1)(C)); *Soler*, 275 F.3d at 152-53 (describing § 841(b)(1)(C) as a "rule of strict liability" and concluding "section 841(b)(1)(C) applies without any independent proof that the death was a reasonably foreseeable event."); *Rebmann*, 226 F.3d at 525 ("On its face, the statute is, in effect, a strict liability statute with respect to the injury or death of another arising out of the distribution of drugs."); *McIntosh*, 236 F.3d at 972 (concluding that statute did not require a showing of proximate cause or reasonable foreseeability); *Patterson*, 38 F.3d at 145 ("[T]he plain language of § 841(b)(1)(C) does not require, nor does it indicate, that prior to applying the enhanced sentence,

[1] The language of § 841(b)(1)(A) is identical to § 841(b)(1)(C).

the district court must find that death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event.").

But this view of the law is mistaken. Due Process requires proof of *mens rea* when it comes to attaching a mandatory life imprisonment penalty for an act which results in the death of another.

Until recently, the most common exception to the *mens rea* principle has been in cases involving what are characterized as "public-welfare offenses." Criminal liability has been permitted to attach without regard to fault in instances in which the actor's conduct involves

> minor violations of the liquor laws, the pure food laws, the anti-narcotics laws, motor vehicle and traffic regulations, sanitary, building and factory laws and the like.

Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 78 (1933) [hereinafter Sayre, Public Welfare]; see generally American Law Institute, Model Penal Code § 2.05 Comment at 284-90 & n.7 (Official Draft and Rev. Comm. 1985) (collecting cases, from nineteenth century through mid-1970s).

Sayre dated the development of this welfare-exception doctrine to the middle of the nineteenth century. Emphasizing that he was speaking of "light" offenses, he explained it as follows:

The decisions permitting convictions of light police offenses without

> proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests.

Sayre, Public Welfare, supra, at 67; see also *Morissette v. United States*, 342 U.S. 246, 253-60, 96 L. Ed. 288, 72 S. Ct. 240 (1952) (describing "a century-old but accelerating tendency, discernible both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent" and attributing trend in part to the industrial revolution); *R. v. Woodrow*, 15 M. & W. 404 (Exch. 1846) (conviction for selling adulterated tobacco upheld under statute silent as to mens rea requirement); *R. v. Dixon*, 3 M. & S. 12 (K.B. 1814) (conviction for selling adulterated bread upheld under statute silent as to *mens rea* requirement). Sayre cautioned against overstating the significance of this development. "Criminality is and always will be based upon a requisite state of mind as one of its prime factors." Sayre, Public Welfare, supra, at 56.

Sayre was able to discern from the cases two principles identifying the contours of the public-welfare offense doctrine. Id. at 72. First, if punishment of the wrongdoer far outweighs regulation of the social order as a purpose of the law in question, then *mens rea* is probably required. Id. Second, if the penalty is light,

involving a relatively small fine and not including imprisonment, then *mens rea* probably is not required. Id.; see also Herbert L. Packer, *Mens Rea* and the Supreme Court, 1962 Sup. Ct. Rev. 107, 148-51 (1962) (arguing that public-welfare offense doctrine should not include crimes permitting imprisonment since the "stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes"); 1 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law 342-44 (1986) (if punishment is severe, strict liability is unlikely to have been intended by legislature).

Justice Jackson once described the public-welfare offenses as, for practical purposes, imposing a negligence standard:

> The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Morissette, 342 U.S. at 256.

Other commentators have described and delimited this doctrine of strict liability on similar grounds. See, e.g., 1 Joel Prentiss Bishop, Bishop on Criminal Law § 206a (9th ed. 1923) (recognizing but minimizing limited exception to *mens rea* principle for public-welfare offenses); H.L.A. Hart, Punishment and Responsibility 32 (1968) (Public-welfare offenses "are usually punishable with a fine and are

sometimes said by jurists who object to strict liability not to be criminal in any 'real' sense."); 1 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law 340-41 (1986) ("Usually, but not always, the statutory crime-without-fault carries a relatively light penalty -- generally of the misdemeanor variety."); Glanville Williams, Criminal Law: The General Part 235 (2d ed. 1961) (Public-welfare offenses "presuppose a continuous activity, such as carrying on a business, so that (a) special skill and attention may reasonably be demanded, and (b) if the law is broken there will be a suspicion that it was a deliberate breach due to self-interest."); Anthony A. Cuomo, *Mens Rea* and Status Criminality, 40 S. Cal. L. Rev. 463, 521-22 (Public-welfare offenses are not crimes but rather are "regulatory measures" because of their light penalties and lack of stigma.).

Given this modern development, anti-drug offenses might once have been characterized as public-welfare offenses, particularly as this country moved from a "freedom to use" model through some tax and medical models beginning in the 1910s. When, however, criminal penalties were markedly increased, particularly through such severe sentencing mechanisms as those adopted in our current war on drugs that now include life sentences, see 21 U.S.C. § 960(b)(3) (maximum term of life imprisonment for narcotics importation in which death or serious injury results), and even capital punishment, see 21 U.S.C. § 848(e) (possible sentence of death for

drug offenses in which killing results), the legal-constitutional situation changed radically. What once may have been a minor welfare offense, *malum prohibitum*, is now a major criminal offense, *malum in se*. Older cases that may have allowed conviction of narcotics offenses without proof of *mens rea* have no precedential value in this new setting.[2]

The Supreme Court has permitted the imposition of strict liability in a variety of criminal contexts, some involving public welfare-type statutes and others involving corporate actors. These decisions, particularly the early ones, provide little in the way of detailed guidance on matters of constitutional law and statutory construction. The Court gave perhaps its strongest endorsement to strict liability in *United States v. Balint*, 258 U.S. 250, 66 L. Ed. 604, 42 S. Ct. 301 (1922), though the terse opinion included little in the way of reasoning. The defendants were indicted under the Narcotics Act of 1914 for selling an amount of opium derivative and an amount of coca derivative without completing the required Internal Revenue Service (IRS) form. They complained that the indictment did not charge that they knew the substances to be drugs falling within the statute's reach. The Court stated, "While the general rule at common law was that the scienter was a necessary element in the indictment and

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[2] Above argument taken from *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 496-97 (E.D.N.Y. 1993).

proof of every crime . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement." Id. at 252. The Court rejected the notion that due process invariably requires proof of intent, stating, "Many instances of [strict liability] are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." Id. In the case of this statute, Congress' intent to dispense with *mens rea* was clear since the law "merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic." Id. at 253.

Those who have severely criticized the *Balint* decision have probably overstated its significance and continuing import. See, e.g., Sayre, Public Welfare, supra, at 80-81 (Balint decision can be justified "only on the ground of the extreme popular disapproval of the sale of narcotics"); Herbert L. Packer, *Mens Rea* and the Supreme Court, 1962 Sup. Ct. Rev. 107, 113-15 (1962) ("flimsy" opinion in *Balint* was "egregious" example of Court's casual approach to *mens rea*). It remains a striking and probably anomalous decision because of the severity of penalty the statute allowed: up to a $ 2000 fine and five years imprisonment. Narcotics Act of 1914, Pub. L. No. 223, § 9, 38 Stat. 785 (1914) (Harrison Act). Nevertheless, the

statute must be understood in context. It predated the era during which all possession and sale of drugs came to be regarded as serious crimes. Aside from its penalty, it fairly can be characterized as a regulation. It required manufacturers and distributors of certain narcotics to register with the IRS, pay a special tax of one dollar per year and record all transactions on forms provided by the IRS. Id. §§ 1-3 and 8.

As a case about strict liability and narcotics, *Balint* has no application today. Prior to the Harrison Act narcotics had been freely available without prescription. This change by tax statute was a first modest transitional step towards the present complex and serious criminal statutes dealing with narcotics offenses. They have come to be treated as among the most serious of crimes in the federal criminal code. See, e.g., 21 U.S.C. § 960 (mandatory minimum sentences as high as 10 years for certain drug offenses); § 848(e) (possible sentence of death for drug offenses in which killing results).

It violates Due Process to remove from the Government the burden of showing any intent to cause death as an element of the death resulting sentencing element of this offense. See *Lambert v California*, 355 U.S. 225 (1957) and *Rehaif v. United States*, 139 S. Ct. 2191 (2019). There was no evidence of any intent and there was no evidence of the Petitioner having knowledge even a reasonable probability that death would result. Indeed, the opposite may be inferred because the drug dealer has

no reason to want to have customers die from consumption of his product rather he wants his customers to use the product and return to purchase more. That there was a potential risk of death is not sufficient to satisfy the *mens rea* required to impose a mandatory life sentence or the other severe sentences for counts two and three.

ELEVENTH CIRCUIT'S UNIQUE VIEW OF INVITED ERROR

The Eleventh Circuit denied relief on the basis of its unique view of the invited error doctrine - in this case Muller's trial counsel, in good faith, accepted without objection a standard, pattern jury instruction based on then binding circuit precedent which contained neither a wilfulness nor a proximate cause element.

In categorically ruling out any exception to the invited error doctrine, the Eleventh Circuit's doctrine directly contradicts every other circuit that has addressed the issue, conflicts with the Federal Rules of Criminal Procedure and the statute governing appellate review, and creates an ill-conceived rule of law. Indeed, the Eleventh Circuit's conception of the "invited error" doctrine is so clearly incorrect and had so obvious an impact upon the instant case that this Court should summarily reverse the decision below. Alternatively, this Court should grant certiorari to resolve the significant conflict between the Eleventh Circuit and the five circuits that have acknowledged an exception to the "invited error" rule.

The Eleventh Circuit has announced and routinely applied as in Muller's

appeal a doctrine that renounces the power to review any error, no matter how clear and decisive, if it views the error as "invited." *See United States v. Fulford*, 267 F.3d 1241, 1247 (11th Cir. 2001). This self-abnegation, however, improperly abandons the authority Congress entrusted to that court and every other federal appellate court. Under 28 U.S.C. § 2106 (2020), a court of appeals

> "*may* affirm, modify, *vacate, set aside or reverse any judgment*, decree, or order of a court *lawfully brought before it for review*, and may * * * direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had *as may be just under the circumstances*." (Emphasis added.)

The thrust of the statute is to direct federal appellate courts to focus on determining what disposition is "just under the circumstances." It leaves no room for absolute rules that bar consideration even of serious errors identified by appellants. The Eleventh Circuit's approach is inconsistent with the recognized doctrine that, even in the absence of an objection, an appellate court has the power to notice "plain errors affecting substantial rights."

CONFLICT AMONG THE CIRCUITS

Against this backdrop, it is not surprising that the Eleventh Circuit's absolutist approach to "invited error" conflicts with the view of at least five other circuits. Using slightly varying formulations, every other circuit that has addressed the issue has ruled that fundamental legal errors may be raised, reviewed and remedied on

appeal, even if "invited" by the appellant. See, e.g., *Borden v. Paul Revere Life Ins. Co.*, 935 F.2d 370, 375 (1st Cir. 1991) (in "exceptional circumstances," litigant is not bound by the "choice of law which it successfully urged the trial court to follow"); *United States v. Herrera*, 23 F.3d 74, 76 (4th Cir. 1994) (invited error reviewable where error "tainted 'the integrity of the judicial process' * * * or 'caused a miscarriage of justice'") (quoting *Wilson v. Lindler*, 995 F.2d 1256, 1256 (4th Cir. 1993)); *United States v. Green*, 272 F.3d 748, 754 n.16 (5th Cir. 2001) (allowing for review of "invited error" if "'the error was so patent as to have seriously jeopardized the rights of the appellant'") (quoting *United States v. Lemaire*, 712 F.2d 944, 949 (5th Cir. 1983)); *United States v. Barrow*, 118 F.3d 482, 491-92 (6th Cir. 1997) ("Invited error * * * does not foreclose relief when the interests of justice demand otherwise."); *United States v. Schaff*, 948 F.2d 501, 506 (9th Cir. 1991) (an exception to the "invited error" doctrine is appropriate where the circumstances under which the error occurred were "exceptional").[3]

[3] The invited error argument above was taken from the petition for certiorari filed by Mayer, Brown & Platt in *Ford v. Garcia*, Supreme Court case number 02-405.

II. THE GOVERNMENT FAILED TO ESTABLISH THAT MULLER'S ACTS WERE THE PROXIMATE CAUSE OF THE DEATH OF ARIELL BRUNDIGE.

Causation is an important issue in many drug-induced homicide prosecutions. As summarized by the Supreme Court in *Burrage v. United States*, 571 U.S. 204, 210 (2014) (first citing H.L.A. Hart & Tony Honoré, Causation in the Law 104 (1959); then quoting Wayne R. Lafave, Substantive Criminal Law § 6.4(a) (2d ed. 2003)):

> [t]he law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause . . . . When a crime requires "not merely conduct but also a specified result of conduct," a defendant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result."

Burrage left undecided whether legal cause, that is, proximate cause, must be proved to obtain a conviction for a death resulting offense. Muller argues that it was plain error to fail to charge the jury and require proof beyond a reasonable doubt to a unanimous jury that Muller's remote act of selling a drug mixture to a third party was the proximate cause of Ariell Brundige's death.

Under traditional causation principles, the first step to determining whether a defendant's acts caused death is the but-for causation requirement. But-for causation "represents 'the minimum requirement for a finding of causation when a crime is

defined in terms of conduct causing a particular result.'"[4] But-for causation requires the prosecutor to prove that, but for the defendant's acts, the harm would not have occurred when it did.[5] In *Burrage*, the United States Supreme Court resolved the question of whether but-for causation applies to the federal drug-induced death statute.39 The law levies heavy mandatory minimum penalties in some controlled-substance prosecutions—including, as in Muller's case, a mandatory life sentence—"if death or serious bodily injury results from the use of" the substance.40 For a time, courts were split on the question of whether the traditional but-for causation principles applied to this statute or whether, by using the phrase "results from," Congress indicated an intent to apply a broader approach to causation. In *Burrage*, the Supreme Court held that but-for causation is required under the federal statute.

But, in addition to but-for causation which the Supreme Court has mandated under *Burrage*, traditional criminal causation principles also require proof of proximate causation. Proximate cause, also called legal cause, is a way of identifying a but-for cause

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[4] *Burrage*, 571 U.S. at 211 (quoting Model Penal Code § 203(1)(a)).

[5] See Causation, Lawshelf Educ. Media, https://lawshelf.com/courseware/entry/causation.

> [t]hat we're particularly interested in, often because we want to eliminate it. We want to eliminate arson, but we don't want to eliminate oxygen, so we call arson the cause of a fire set for an improper purpose rather than calling the presence of oxygen in the atmosphere the cause, though it is a but-for cause just as the arsonist's setting the fire is.[6]

Proximate cause requires proof that death was a reasonably foreseeable consequence of the defendant's conduct. All of the circuits to have considered the issue have concluded that the federal drug-induced death statute does not require proof of proximate cause.[7] One of the two questions on which the Supreme Court granted review in *Burrage* was "[w]hether the defendant may be convicted under the 'death results' provision . . . without separately instructing the jury that it must decide

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[6] *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010).

[7] "Whether § 841(b)(1)(C)'s penalty enhancement requires proof of proximate causation is a question of first impression for this court [Sixth Circuit]. We note, however, that every sister circuit to address the question (before and after *Burrage*) holds that the penalty enhancement does not require proof of proximate causation. See *United States v. Harden*, 893 F.3d 434, 447-49 (7th Cir. 2018), cert. denied, 139 S. Ct. 394, 202 L. Ed. 2d 300 (2018); *United States v. Alvarado*, 816 F.3d 242, 249-50 (4th Cir. 2016), cert. denied, 137 S. Ct. 492, 196 L. Ed. 2d 408 (2016); *United States v. Burkholder*, 816 F.3d 607, 617-18 (10th Cir. 2016), cert. denied, 137 S. Ct. 623, 196 L. Ed. 2d 532 (2017) (interpreting similar language in § 841(b)(1)(E)); *United States v. Webb*, 655 F.3d 1238, 1254-55 (11th Cir. 2011); *United States v. De La Cruz*, 514 F.3d 121, 137-38 (1st Cir. 2008); *United States v. Houston*, 406 F.3d 1121, 1124-25 (9th Cir. 2005); *United States v. Carbajal*, 290 F.3d 277, 283-85 (5th Cir. 2002); *United States v. McIntosh*, 236 F.3d 968, 972-73 (8th Cir. 2001) (abrogated on other grounds by *Burrage*, 571 U.S. at 204); *United States v. Robinson*, 167 F.3d 824, 830-32 (3d Cir. 1999); *United States v. Patterson*, 38 F.3d 139, 144-45 (4th Cir. 1994)." *United States v. Jeffries*, 958 F.3d 517, 520 (6th Cir. 2020). But s*ee* the lengthy and well reasoned dissent by Judge Bernice Bouie Donald in *Jeffries.*

whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense." 571 U.S. at 208 (citing *United States v. Burrage*, 569 U.S. 957 (2013)). However, the court "[found] it necessary to decide only" the question of actual causation. Id. at 210.

Muller argues that proximate cause is an essential element of the death resulting enhancement and the *Government* had the burden of requesting a jury instruction requiring proof of proximate cause, and by failing to request such an instruction the Government waived any argument that proximate cause has been established.

Clearly the evidence in this case did not suffice as a matter of law to establish beyond a reasonable doubt that Muller's act of selling a mixture the Government itself conceded Muller did not know contained any fentanyl much less a lethal dose of fentanyl was the proximate cause of the death of Ariell Brundige. At no point did the Government argue that it was reasonably foreseeable to Muller that his sale of two points of what was assumed to be heroin would cause the death of anyone. Therefore the error was not harmless and Muller is entitled to have the death resulting mandatory life enhancement removed from his sentence and be resentenced without

the enhancement.[8]

III. THE EVIDENCE IN THIS CASE PLAINLY ESTABLISHES THAT AN INTERVENING ACT RESULTED IN THE DEATH OF ARIELL BRUNDIGE, IN COUNT ONE.

At sentencing, United States District Judge Marcia Morales Howard summarized the evidence as follows:

> THE COURT: Because I -- I -- I feel it's necessary for me to say out loud, Tyler Hamilton was the individual who purchased these drugs for Ms. Brundige.
>
> Tyler Hamilton was the one who knew that she had never done heroin before. He facilitated her receipt of the drugs that ultimately killed her. And worse yet, he watched her after she had ingested the drugs, and didn't -- didn't call for help until it was too late.
>
> And the -- and Christopher Williams, if I understand the testimony, he gave her the drugs after knowing that Tyler Hamilton had OD'd on that same drug. So...
>
> MR. DUVA: I think that, yes, that's true. That's correct.

In his trial testimony, Tyler Hamilton explained that as soon as he and Christopher Williams bought the drugs they were going to use that night, with Ariell Brundige, who later died, he went first to his home and went inside alone and used

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[8] Because Muller failed to object to the jury instructions which did not include a proximate cause or willfulness element, the Eleventh Circuit found that Muller invited this error.

some of the drugs he had just purchased, and when he did so, he had a seizure and passed out and his mother had to call the emergency ambulance:

> Q . . . When you got to your house that evening, did Christopher Williams and Arielll Brundige come inside with you?
>
> A No, they did not.
>
> Q What did you do when you got to the house?
>
> A When I got there, I went inside to grab clothes and to use my drugs, to shoot up.
>
> Q So there were 22 points of heroin at that point; is that right?
>
> A Yes.
>
> Q I should say "at that time," so that it's clear. Did you take one of those foil packets of heroin inside with you?
>
> A Yes.
>
> Q Where was the other packet at that point?
>
> A That was in the car. I believe it was left with Christopher Williams.
>
> Q When you went inside, did you go in your room?
>
> A Yes.
>
> Q How did you use the heroin that you had in your possession at that point?

A I used it through a needle, as I described earlier.

Q What happened?

A I ended up blacking out, and I guess I had a seizure, from what the EMT said.

Q So paramedics were called to your home?

A Paramedics and police, yes.

Q Ultimately, did you receive any treatment or Narcan or anything like that from the paramedics that evening?

A I don't recall. I don't think they gave me any Narcan.

Q So after you sort of stabilized and got your wits about you again, what did you do at that point?

A At that point, I was trying to get in contact with Chris, and I eventually did make contact with him and went over to his house.

Q Did he ever come back and pick you up?

A Yes.

After overdosing and being revived by the paramedics, he had Christopher Williams come get him and take him to Williams' house where he found Brundige passed out on the couch after having used the remainder of the drugs he had purchased earlier that evening. He did nothing:

Q Okay. When you got to Christopher Williams' house, where was Arielll Brundige at that point?

A On the couch.

Q Inside?

A Inside, yes.

Q What was she doing?

A Sleeping.

Q Did you think anything was unusual about that at that point?

A No.

After getting into an argument with his sister over his drug usage and her calling the police, who came and went, he went back inside and Brundige was still passed out:

Q And when you were finished talking to your dad, you go back inside the house and see Ms. Brundige on the couch?

A Yes.

Q What happened at that point in terms of her sleeping, and what did you notice, if anything, about it?

A She was sleeping. She was sleeping, I guess, kind of hard. I made sure she was on her side.

And eventually some time did pass and she started throwing up in her sleep, and then that's when Chris got woken up too and then 911 was called.

Christopher Williams had made the hand to hand transaction and had given

some of the drugs to Hamilton and kept some for Brundige. Hamilton went home and used the drugs they had just purchased and immediately had an overdose. He knew these were deadly drugs. But after being revived he met back up with Williams and went to his house and found Brundige passed out . . . but did nothing to help her. Only after she started vomiting an hour or more after first finding her passed out did anyone call for help.

It was through Tyler Hamilton's failure to get help for Ariell Brundige that she died. He knew the drugs were toxic, he had overdosed and 911 had had to be called to revive him, he then found Brundige passed out, but did nothing to summon help until it was too late.[9]

His criminally gross negligence was a sufficient intervening factor to extinguish the criminal liability of Muller. The Eleventh Circuit has not decided whether there can be an intervening cause exception to the death resulting enhancement of 21 U.S.C. § 841. *United States v. Rodriguez*, 279 F.3d 947, n. 5 (11th Cir. 2002). But the Eleventh Circuit has recognized the principle that criminal liability can be interrupted by a sufficient intervening deliberate cause:

> A new action or event is only considered to be sufficiently "intervening" if it is made freely, deliberately, and knowledgeably. See, e.g., Hart &

[9] Tyler Hamilton pled guilty in state court to a charge of criminal manslaughter for his actions in this case.

> Honore, Causation in the Law at 136. Thus, the actions of uninformed agents who unwittingly further the principal's purposes are generally deemed inadequate to break the causal chain. Cf. *Rodriguez*, 279 F.3d at 952 (noting that it is a "basic principle of criminal law that foreseeable negligent acts of a third party do not sever the chain of causation"); Rest. (2d) Torts § 452 (stating that a third person's failure to prevent harm is not a superceding cause of the harm). In contrast, the exercise of independent judgment by a later actor may suffice to sever the connection to the original wrongful action.

Johnson v. Governor of Fla., 353 F.3d 1287, 1299-300 (11th Cir. 2003).[10]

That is the case here. Tyler Hamilton, as Judge Howard stated, knew that the drugs involved had already caused him to overdose. When he found Brundige had used the same drugs and was passed out, his deliberate failure to immediately call for help - help which we know would have saved her life because the same help with the same drugs had just hours before saved Hamilton's life - was the sufficient intervening cause of Brundige's death to sever Muller's criminal liability.

In denying relief, the Eleventh Circuit held:

> We have never decided whether there is an intervening cause exception to the death results sentence enhancement of § 841(a)(1)(C). See *United States v. Rodriguez*, 279 F.3d 947, 951 n. 5 (11th Cir. 2002). In this case, we can assume *arguendo*, but we expressly do not decide, that the intervening cause doctrine can operate to extinguish criminal liability under § 841(a)(1)(c).
> . . .

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[10] Vacated on other grounds and rehearing *en banc* granted, and on rehearing *Johnson v. Governor of Fla*., 405 F.3d 1214 (11th Cir. 2005) (*en banc*).

Muller faces a substantial hurdle because he did not request a jury instruction with respect to intervening cause. Nor did he assert intervening cause as a basis for his motions for judgment as a matter of law. Thus, we construe Muller's intervening cause argument—raised for the first time on appeal—as an argument that the district court should have *sua sponte* granted a judgment of acquittal on the ground that Hamilton should have intervened and saved Brundige from dying as a result of the drugs that Muller sold.

We construe Muller's new argument on appeal as a challenge to the sufficiency of the evidence. We note that ordinarily we would review a sufficiency challenge *de novo*. However, when a defendant did not move for a judgment of acquittal on the ground relied upon for the first time on appeal, we no longer review de novo. See *United States v. Hunerlach*, 197 F.3d 1059, 1068 (11th Cir. 1999) (where the defendant asserted for the first time on appeal a ground not argued in the district court in support of his motion for judgment of acquittal, we review "the district court's decision to deny the motion for judgment of acquittal on that basis only for 'plain error'").

In any event, we cannot conclude that there is error, much less plain error. Without objection, the district court charged the jury:

> The Defendant can be found guilty of the crime charged in Count One only if all the following facts are proved beyond reasonable doubt:
>
> (1) The Defendant distributed a mixture of substance containing a detectable amount of fentanyl; and
>
> (2) The Defendant did so knowingly and intentionally. . . If you determine that the Defendant distributed the controlled substance as charged in Count One, you must also determine whether [Brundige's] death resulted from the use of the controlled substance distributed by the Defendant. To establish that [Brundige's] death resulted from the use of the mixture and substance containing a

> detectable amount of fentanyl distributed by the Defendant, the Government must prove that [Brundige's] use of the fentanyl distributed by the Defendant was the "but for" cause of her death.
>
> "But for" causation is proven when you find beyond a reasonable doubt that had [Brundige] not taken the fentanyl distributed by the Defendant, then [Brundige] would not have died.

> Thus, the jury found beyond a reasonable doubt that had Brundige not taken the drugs distributed by Muller, she would not have died. Although Muller's counsel did not request a jury charge that Hamilton's failure to save Brundige was an intervening cause, he did assert in his closing argument to the jury that Hamilton had caused her death. The jury rejected Muller's argument. We cannot conclude that there is insufficient evidence in the record to support that finding. And we certainly cannot conclude that there is plain error.

There is simply no rational logic to the Eleventh Circuit's conclusion. If intervening cause is an exception to the death resulting enhancement, then this was plain error on the facts of this case.

CONCLUSION

Based on the foregoing arguments, Petitioner Muller respectfully requests this Honorable Court grant certiorari to decide the above questions.

Respectfully submitted,

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