

No.

IN THE SUPREME COURT OF THE UNITED STATES

RUSSELL DAVIS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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## **QUESTIONS PRESENTED FOR REVIEW**

I. Whether the government must satisfy the evidentiary requirements for accomplice liability under 18 U.S.C. §2 or co-conspirator liability under *Pinkerton v. United States*, 328 U.S. 640 (1946) before a remote seller may be subjected to an enhanced penalty under 21 U.S.C. §841(b)(1)(C) for death or serious bodily injury resulting from a third-party's distribution of a Schedule I or II controlled substance?

II. Whether an unforeseen and retroactive adoption of a new standard of strict liability for determining eligibility for an enhanced penalty under 21 U.S.C. §841(b)(1)(c) violates a defendant's rights under the Due Process Clause?

**LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

**RELATED CASES**

There are no cases related to the case that is the subject of this petition.

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Petitioner Russell “Red” Davis (“Petitioner” or “Davis”) respectfully prays that a writ of certiorari will issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in Case No. 19-3094 on August 14, 2020.

**OPINION BELOW**

On August 14, 2020, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed an opinion and judgment affirming Petitioner’s conviction and life prison term for distribution of fentanyl resulting in death. (App. 1a, 22a). The opinion is published. The court denied a timely petition for rehearing en banc by order filed on

September 18, 2020. (App. 30a) The United States District Court entered its criminal judgment on February 01, 2019. (App. 23a).

### **JURISDICTION**

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on August 14, 2020. Jurisdiction is invoked under 28 U.S.C. §1254(1), which permits a party to petition the Supreme Court of the United States to review any civil or criminal case before or after rendition of judgment or decree.

### **CONSTITUTIONAL PROVISION AND STATUTES INVOLVED**

#### **United States Constitution, Fifth Amendment:**

No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

#### **18 U.S.C. §2:**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

#### **21 U.S.C. §841 (version in effect August 3, 2010 to December 20, 2018):**

(a) Unlawful acts

.... [I]t 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[.]

....

(b) Penalties

.... [A]ny person who violates subsection (a) of this section shall be sentenced as follows:

(1)

....

(C) 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[.] . . .

**STATEMENT OF THE CASE**

Jacob Castro-White, a 23-year old resident of Lorain, Ohio, died sometime during the early morning hours of March 7, 2016. The county coroner ruled the young man had died from an overdose of fentanyl.

The police investigation immediately focused on Zaharis “Harry” Karaplis, the last person to see him alive. Karaplis repeatedly lied about his role in his friend’s death. After retaining legal counsel and being assured he would not be prosecuted, Karaplis finally admitted that he distributed a fatal drug dose to Castro-White. He claimed he obtained the

substance from Davis shortly after midnight on March 7. However, he said the purchase was for heroin, not fentanyl.

A federal grand jury in the Northern District of Ohio returned an indictment charging Davis with one count of distribution of fentanyl, a Schedule II controlled substance, in violation of 21 U.S.C. §841(a)(1). The count included a penalty enhancement specification alleging that Davis personally distributed the fentanyl to Castro-White resulting in his death.

The prosecutors revised their theory of guilt in respect to the specification after learning Davis did not have any contact with Castro-Davis on March 7, 2016 (or on any other date). At trial, they insisted Davis was strictly liable for Castro-White's death because the substance distributed by Karaplis could be traced back to Davis.

Davis' attorneys relied on the defense of alibi: Davis had fallen asleep in his home and never answered his door when Karaplis arrived to purchase heroin. Text messages between Davis and Karaplis supported the alibi.

On March 6 at 11:48 p.m. Karaplis sent Davis a message: "Hey man can I get for me dude[?]" Davis answered Karaplis' text at 11:21 a.m. on March 7 with an apologetic message explaining he "was asleep."

In closing argument, the prosecutor admitted Davis did not distribute fentanyl to Castro-White on March 7, 2016, but insisted this inconvenient fact did not matter:

Harry Karaplis gets the drugs from Red. Red doesn't give them directly to [Castro-White] He gives them to Harry Karaplis. Harry Karaplis then takes them and gives them and shares them with [Castro-White] That is the case. Red didn't give them directly to [Castro-White] . . . We don't have to prove that Red sold directly to [Castro-White].

Davis' attorney told the jury in closing argument that when Davis failed to answer his door, Karaplis turned to an alternate supplier - his close friend and fellow addict, Erika Matus. Matus lived about a half-mile away from Davis. Counsel pointed out that toll records revealed Karaplis had made a flurry of cell phone calls to Matus upon learning about Castro-White's death.

The jury returned a verdict of guilty. Because Davis had a record of prior drug convictions, the district court sentenced him to a mandatory life prison term.

On appeal, Davis challenged the sufficiency of the evidence to support his conviction and sentence. He argued that the government needed to prove Davis was responsible for Castro-White's death under a theory of accomplice liability or co-conspirator liability, and that the prosecution had failed to discharge this burden.

A Sixth Circuit panel ruled that Davis was strictly liable for the penalty enhancement upon a mere showing that the drug that he allegedly sold to Karaplis "is the same drug that was the but-for cause of the victim's death." (App. 6a) The panel concluded that the evidence was sufficient in this regard, and affirmed the judgment of the district court.<sup>1</sup>

#### **REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE**

This Court has lamented that "the en banc Sixth Circuit has been unwilling (or unable) to reconcile its precedents." *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761, 765, n. 2

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<sup>1</sup>The panel issued a limited remand to the district court to conduct additional proceedings upon a Fourth Amendment claim raised by Davis. (App. 22a)

(2018) (per curiam). Davis’ petition presents yet another instance of a Sixth Circuit panel charting its own course without deference to binding precedent of this Court or controlling precedent in the same Circuit.

Under 21 U.S.C. §841(b)(1)(C), an enhanced penalty of not less than 20 years, and not more than life, applies to a conviction for distribution of a Schedule I or II controlled substance resulting in death or serious bodily injury. If the defendant has a prior conviction for a qualifying drug offense,<sup>2</sup> the penalty increases to a mandatory life prison term.

At the time of Castro-White’s death, the standard in the Sixth Circuit for determining a defendant’s vicarious liability under §841(b)(1)(C) for a third-party’s distribution of a controlled substance resulting in death or serious bodily injury was controlled by *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000). *Swiney* relied on this Court’s opinion in *Pinkerton v. United States*, 328 U.S. 640 (1946) and the Relevant Conduct Guideline for guidance on the issue.

The *Swiney* court concluded that “*Pinkerton* principles, as articulated in the relevant conduct guideline, U.S.S.G. §1B1.3(a)(1)(B), determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty set forth in 21 U.S.C. § 841(b)(1)(C).” *Id.* 203 F.3d at 406. The *Swiney* standard was intended to apply with equal force to convictions for

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<sup>2</sup>At the time of the offense conduct in Davis’ case, a qualifying drug offense was labeled as a “felony drug offense.” The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, effective December 21, 2018, substituted “serious drug felony” for “felony drug offense.” The purpose of the amendment was to narrow the type of felony drug crimes and the age of convictions that may be used for enhancing the penalties under 21 U.S.C. §841(b).

distribution of a controlled substance under §841(a)(1). *United States v. Hamm*, 952 F.3d 728, 747 (6th Cir. 2020).

An activist Sixth Circuit panel in Davis' appeal decided *sub silentio* that the doctrine of strict liability in tort<sup>3</sup> provides a better model for determining criminal liability for an enhanced penalty under §841(b)(1)(C) in instances where the defendant did not personally distribute a controlled substance to the user.

The appellate panel made this point crystal clear in the following hypothetical:

Consider a defendant who runs a cartel that manufactures large amounts of fentanyl. The defendant's "manufacture" of that fentanyl would violate § 841(a)(1). But the defendant might sell this fentanyl to wholesalers, not end users. And the wholesalers might resell it through a diverse chain ending with small dealers. If the government proves that the fentanyl the defendant manufactured is the same fentanyl that caused a user's death, § 841(b)(1)(C)'s text triggers this enhancement even if the defendant did not know the dealer or the decedent. Any other reading would require us to add words to the statute that are not there.

(App. 7a)

Davis filed a timely petition for a rehearing en banc. He asked the Sixth Circuit to resolve the conflict between the panel's decision in his appeal and the decision in *Swiney*. He further asked the en banc court to consider whether the ex post facto enforcement of

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<sup>3</sup>Sec. 402A of the Restatement 2d of Torts generally holds a seller "strictly liable for harm to person or property caused by 'any product in a defective condition unreasonably dangerous to the user.'" *Bruesewitz v. Wyeth L.L.C.*, 562 U.S. 223, 233-34 (2011). Subsection (2)(b) of the Restatement directs that strict liability applies even though "the user or consumer has not brought the product from or entered into any contractual relationship with the seller."

a strict liability standard in his case violated his right to due process. The court denied the petition without comment or explanation. (App. 30a)

Davis urges the Court to grant this petition for a writ of certiorari and order full briefing and oral argument to decide the appropriate legal standard for determining a remote seller's eligibility for an enhanced penalty under §841(b)(1)(C) for a drug distribution conducted by a third-party.

Alternatively, Davis asks the Court to enter a "GVR" disposition, granting a writ, vacating the judgment, and remanding his case to the Sixth Circuit to re-adjudicate his sufficiency, constructive amendment, and jury instruction challenges under the controlling law in effect at the time of the offense conduct, *i.e.* "Pinkerton principles, as articulated in the relevant conduct guideline, U.S.S.G. §1B1.3(a)(1)(B)" pursuant to *Swiney*, 203 F.3d at 406.

**I. THE GOVERNMENT MUST SATISFY THE EVIDENTIARY REQUIREMENTS FOR ACCOMPLICE LIABILITY UNDER 18 U.S.C. §2 OR CO-CONSPIRATOR LIABILITY UNDER *PINKERTON V. UNITED STATES*, 328 U.S. 640 (1946) BEFORE A REMOTE SELLER MAY BE SUBJECTED TO AN ENHANCED PENALTY UNDER 21 U.S.C. §841(B)(1)(C) FOR DEATH OR SERIOUS BODILY INJURY RESULTING FROM A THIRD-PARTY'S DISTRIBUTION OF A SCHEDULE I OR II CONTROLLED SUBSTANCE.**

The appellate panel stated that its interpretation of 21 U.S.C. §841(b)(1)(C) is compelled by the plain language of the statute:

The text requires only that the defendant have a connection to the death-causing drugs, not to the deceased person. That is, the drugs supporting a defendant's § 841(a) conviction must be the same drugs that caused death. If so, the enhancement applies whether or not the defendant has a connection to (or even knowledge of) the person who died.

(App. 6a). Davis counters that the “plain language” rule of statutory construction does not countenance interpreting legislation out of context and without a frame of reference.

Justice Thomas has emphasized that “[t]he plainness or ambiguity of statutory language” is determined not only “by reference to the language itself,” but also “the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Chief Justice Burger declared that a reviewing court must presume Congress “legislated against the background of our traditional legal concepts.” *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978). More recently, Chief Justice Roberts remarked that “[p]art of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions,” and that “correctly reading a statute demands awareness of certain presuppositions.” *Bond v. United States*, 572 U.S. 844, 857 (2014).

In *Nye & Nissen v. United States*, this Court explained that federal law recognizes two legal standards for imputing liability to an accused for the criminal act of another. *Id.* 336 U.S. 613, 618-19 (1949)

The first standard is accomplice liability under 18 U.S.C. §2. *Id.* Subsection (b) of the statute directs that “[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is *punishable* as a principal.” (Emphasis supplied)

The second standard is the *Pinkerton* doctrine. In order to hold one conspirator vicariously liable for the criminal offense of a co-conspirator, the prosecution must prove

the co-conspirator's act was done "in furtherance of the conspiracy" and was "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* 328 U.S. at 647-48.

Congress added the death or serious bodily injury penalty enhancement language to 21 U.S.C. §841 in 1986 as part of the Anti-Drug Abuse Act. *See Burrage v. United States*, 571 U.S. 204, 209 (2014). The accomplice liability and co-conspirator liability rules were firmly established concepts of federal criminal law by this point in time. It therefore must be presumed that Congress intended that the penalty enhancement provisions would be enforced in a manner consistent with these rules.

Congress presumably was also aware that this Court had emphatically rejected an effort by the government to subject an individual to punishment based solely on the *results* of his conduct. In *United States Gypsum Co.*, the Court reviewed a court of appeals decision that reversed the defendants' convictions for price-fixing in violation of the Sherman Act.

The appellate panel ruled that "the trial judge erred in instructing the jury that an effect on prices *resulting* from an agreement to exchange price information made out a Sherman Act violation regardless of whether respondents' sole purpose in engaging in such exchanges was to establish a defense to price discrimination charges." *Id.* 438 U.S. at 433 (emphasis supplied). This Court agreed with the court of appeals and affirmed the decision.

The majority explained that "an *effect* on prices, without more, will not support a criminal conviction under the Sherman Act." *Id.* 438 U.S. at 435 (emphasis supplied). It reasoned that "[w]hile strict-liability offenses are not unknown to the criminal law and do

not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses, attest to their generally disfavored status.” *Id.* at 437-38 (cleaned up).

The Sixth Circuit failed to consider the historical context in which Congress legislated when it added the death or serious bodily injury penalty enhancement to §841. The panel’s aberrant and cramped application of the “plain language” rule of statutory construction adversely affected the outcome of Davis’ appeal.

The government did not ask the district court to instruct Davis’ jury regarding the principles of accomplice or co-conspirator liability. *See Dunn v. United States*, 442 U.S. 100, 106 (1979) (a reviewing court may not “uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial.”) Nor would the evidence have supported an instruction on either theory.

Davis did not know Castro-White. He was not one of his customers. The government did not present proof that Davis employed Karaplis as his accomplice or intermediary to distribute a controlled substance to Castro-White.

Nor was there any evidence of a conspiratorial relationship between Karaplis and Davis. The prosecutor pointedly asked Karaplis on direct examination, “[w]ould it be fair to say that the nature of your relationship with Red was dealer-to-buyer?” The witness answered “yes”. On cross-examination, he clarified, “I wasn’t buying it to resell it.”

In sum, the government’s evidence was insufficient to establish Davis’ criminal responsibility for Castro-White’s death under traditional standards for imposing accomplice

liability or co-conspirator liability. The Sixth Circuit’s decision to employ a new standard of strict liability to affirm Davis’ life prison term represents a truly radical departure from the language and plain meaning of the statute, this Court’s binding legal precedents, and the will of Congress.

**II. AN UNFORESEEN AND RETROACTIVE ADOPTION OF A NEW STANDARD OF STRICT LIABILITY FOR DETERMINING ELIGIBILITY FOR AN ENHANCED PENALTY UNDER 21 U.S.C. §841(b)(1)(C) VIOLATES A DEFENDANT’S RIGHTS UNDER THE DUE PROCESS CLAUSE.**

This Court has declared that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, has the same effect as an *ex post facto* law and violates the rights of the accused under the Due Process Clause. *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). In *Bouie*, the Court remarked that a novel interpretation given to a South Carolina criminal statute by the state’s supreme court could not have been foreseeable to the petitioner because it “ha[d] not the slightest support in prior South Carolina decisions.”

*Id.* at 356.

At the time of the offense conduct alleged in Davis’ indictment, the standard in the Sixth Circuit for determining a defendant’s liability for death or serious bodily injury resulting from a third-party’s distribution of a controlled substance was set by *Swiney*. The standard in *Swiney* was reaffirmed as recently as five months prior to the announcement of the panel’s decision in Davis’ appeal. *Hamm*. The strict liability rule adopted by Davis’ panel “ha[d] not the slightest support” in prior Sixth Circuit decisions.

The evidence against Davis was not sufficient to support a finding that Karaplis was an accomplice or co-conspirator, or that his distribution of the fatal dose to Castro-White was reasonably foreseeable and was within the scope of a conspiracy. Therefore, the retroactive application of the strict liability rule to Davis was prejudicial.

### CONCLUSION

The decision to treat Davis' appeal from a life prison term as if it were a run-of-the-mill product liability case sets dangerous precedent. A Justice of this Court has warned that "analogies from private commercial law and the law of torts are dangerous . . . for transfer to the criminal field." He reasoned that "[g]uilt there, with us, remains personal, not vicarious, for the more serious offenses. *It should be kept so.*" *Pinkerton*, 328 U.S. at 652 (Rutledge, J., dissenting) (emphasis supplied).

Petitioner urges this Court to grant his petition for a writ of certiorari to settle the law on the standard for determining guilt of the death or serious bodily injury penalty enhancement of 21 U.S.C. §841(b)(1)(C) in instances where privity between the defendant and the user is lacking. Alternatively, he asks the court to summarily grant a writ, vacate the Sixth Circuit's judgment, and remand his case for rehearing under the standard that was in effect at the time of the offense conduct.

Respectfully submitted,

Dated: November 6, 2020

s/Dennis C. Belli

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