NO. _____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

SHANNON D. HIXON, PETITIONER,

V.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

WHETHER A DEFENDANT MAY BE CONVICTED UNDER THE "DEATH RESULTS" PROVISION OF 21 U.S.C. § 841(b)(1)(C) WITHOUT INSTRUCTING THE JURY THAT IT MUST DECIDE WHETHER THE VICTIM'S DEATH BY DRUG OVERDOSE WAS A FORSEEABLE RESULT OF THE DEFENDANT'S DRUG-TRAFFICKING OFFENSE

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – Shannon D. Hixon

Respondent/Appellee/Plaintiff – United States of America

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NO. _____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

SHANNON D. HIXON, PETITIONER,

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

Comes the Petitioner, Shannon D. Hixon (hereinafter Mr. Hixon), by court-appointed counsel, and respectfully requests that a Writ of Certiorari issue to review the unpublished Order of the United States Court of Appeals for the Sixth Circuit filed on December 30, 2020, in the case of *United States of America v. Shannon D. Hixon,* No. 19-6378. In this Order, the Sixth Circuit refused to recognize that a conviction under the "death results" provision of 21 U.S.C. § 841(b)(1)(C) must be based on a verdict by a jury instructed to find beyond a reasonable doubt the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense. The decision by the Sixth Circuit led it

to incorrectly affirm the United States District Court's judgment in Mr. Hixon's case wherein a life sentence was imposed.

OPINIONS BELOW

In 2019, Mr. Hixon was convicted by a jury of violating, among other statutes, the "death results" provision of 21 U.S.C. § 841(b)(1)(C). The United States District Court for the Eastern District of Kentucky, based on the verdict, imposed a life sentence. The District Court's judgment dated December 6, 2019 is reproduced in Appendix B. On December 30, 2020, the Sixth Circuit issued an unpublished Order affirming the judgment, which is reproduced in Appendix A.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was filed on December 30, 2020. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

21 U.S.C. § 841 (a)(1) and (b)(1)(C): "…it shall be unlawful for any person to knowingly and intentionally … distribute … a controlled substance … If any person commits such a violation after a prior conviction for a felony drug offense has become final … and if death or serious bodily injury results from the use of such substance [such person] shall be sentenced to life imprisonment …".

STATEMENT OF THE CASE

On November 1, 2018, a Lexington, Kentucky federal grand jury handed up a two count indictment accusing Shannon D. Hixon of conspiring to distribute oxycodone pills and fentanyl between July 1, 2014 and April 13, 2017 (count one) and, distributing fentanyl on April 12, 2017, the use of which resulted in the overdose death of Kyle Farvour (count two). (Indictment, RE #1, page ID #1-3).[1] The case was called by the United States District Court for the

[1] References are made to the docket entries in the District Court record.

Eastern District of Kentucky for a trial by jury beginning on July 22, 2019 and concluding on July 25, 2019. (Criminal Minutes, RE #65 – 67 and 70, Page ID #376-78 and 425).

The evidence at trial established that in April 2017, Kyle Farvour was an addict who was residing in a Volunteers of America (VOA) program in an attempt to "get clean". (Transcript of Trial, July 22, 2019, RE #109, page ID #932 – 33). He had been an addict for 2 or 3 years. (*Id.* at page ID #935). The VOA was a long-term inpatient rehabilitation program for chronic drug users. (Transcript of Trial, July 23, 2019, RE #110, page ID #1083). On April 12, 2017, at 6:03 pm, paramedics were dispatched to the VOA facility where they found Mr. Farvour dead in his bathroom. (Transcript of Trial, July 22, 2019, RE #109, page ID #1063-64).

Subsequent toxicological testing of Mr. Farvour's body fluids revealed the presence of cocaine metabolites, gabapentin (Neurontin), morphine (a metabolite of heroin), and fentanyl. (Transcript of Trial July 23, 2019 RE #110, page ID #1144, 1147, 1149-50, 1153). A government toxicologist testified and opined that the level of fentanyl in Mr. Farvour's blood (5.7 nanograms per milliliter) "would be a very unsafe and lethal level" and "… the detection of fentanyl in this individual is consistent with

resulting in his death and but for the presence of this drug, survival would have been possible." (Transcript of Trial, July 24, 2019, RE #111, page ID #1461, 1487-88).

During the investigation, Mr. Harvey Isaac admitted to police that he had provided heroin to Mr. Farvour on the date of his death. (Transcript of Trial, July 23, 2019, RE #110 at page ID #1204-06, 1257). He told police that his source was Mr. Hixon, whom he knew as Shawn Hicks. (*Id.* at 1206). Mr. Isaac later pled guilty to providing heroin to Mr. Farvour and testified at trial that he obtained heroin from Mr. Hixon, used some of the heroin himself, and sold some heroin to Mr. Farvour. (*Id.* at 1294-95, 1297-99, 1301, 1320). The lead detective testified that Mr. Isaac was not aware that the substance was actually fentanyl. (*Id.* at 1264-65).

Mr. Isaac, however, only knew Mr. Hixon as a pill and heroin dealer, and did not know him to be a distributor of fentanyl. (*Id.* at page ID # 1282 and 1299). No evidence was introduced at trial that Mr. Hixon had previously trafficked in fentanyl nor had any substance that he trafficked caused anyone else to overdose, prior to Mr. Farvour's death.

Despite these foreseeability issues, the District Court did not instruct Mr. Hixon's jury the government was required to prove that Mr. Farvour's death by drug overdose was a foreseeable result of Mr. Hixon's drug trafficking offense. (Jury Instructions, RE #69, page ID #380-424). After deliberations, the jury found Mr. Hixon guilty as to both counts charged in the indictment. (Verdict form, RE # 72, page ID number 427 – 28). Because Mr. Hixon had a prior conviction for a felony drug offense[2], the District Court imposed a life sentence pursuant to 21 U.S.C § 841(b)(1)(C). (Judgment in a Criminal Case, RE # 93, page ID # 663 – 69).

On appeal, Mr. Hixon raised a number of issues including "whether a new trial is required as to count two (the "death results" count) because the District Court failed to instruct on proximate cause." The United States Court of Appeals for the Sixth Circuit affirmed based on its previous decision in *United States v. Jeffries*, 958 F. 3d 517 (6th Cir. 2020) wherein it determined that "[b]ecause death or injury from the use of the [controlled] substance is inherently foreseeable, there is no need to require the government to prove that they were reasonably foreseeable to the defendant." *Jeffries*, 958 F. 3d at 524.

[2] Mr. Hixon had been convicted, in 2004, of trafficking in .9 grams of cocaine for $100. (Transcript of Motion Hearing, RE #106, page ID # 790-92).

REASON FOR GRANTING THE WRIT

A DEFENDANT MAY NOT BE CONVICTED UNDER THE "DEATH RESULTS" PROVISION OF 21 U.S.C. SECTION 841 (B)(1)(c) UNLESS THE TRIAL COURT INSTRUCTS THE JURY THAT IT MUST FIND THE VICTIM'S DEATH BY DRUG OVERDOSE WAS A FORSEEABLE RESULT OF THE DEFENDANT'S DRUG-TRAFFICKING OFFENSE. BECAUSE NO SUCH INSTRUCTION WAS GIVEN, MR. HIXON'S CONVCITION MUST BE OVERTURNED.

The trial court did not instruct the jury that it must find the death of Mr. Farvour was a foreseeable result of Mr. Hixon's drug trafficking offense and thus, the United States was not required to so prove. This was plain error[3], which went unrecognized by the Sixth Circuit. *United States v. Hixon,* 2020 WL 7767999 (6th Cir., December 20, 2020).

Mr. Hixon was convicted under count two of the indictment which alleged that he "… did knowingly and intentionally distribute a mixture or substance containing a detectable amount of fentanyl, a Schedule II controlled substance, the use of which resulted in the overdose death of K.F., all in violation of 21 U.S.C. § 841

[3] The jury instructions were not objected to in the trial court, thus requiring a plain error analysis. The Sixth Circuit has determined that error of the type set forth in this petition constitutes plain error. *United States v. Nelson*, 27 F.3d 199, 202 (6th Cir. 1994)(when a trial judge omits from the jury instructions an element of an offense necessary to find the defendant guilty, the omission is plain error).

(a)(1) and (b)(1)(C)." As set forth in § 841 (b)(1)(C), a defendant who distributes fentanyl after a prior conviction for a felony drug offense has become final shall be sentenced to life imprisonment "if death or serious bodily injury results from the use of such substance". Because it was determined that Mr. Hixon had a prior conviction for a felony drug offense, and because the jury determined that his trafficking in fentanyl was the "but-for" cause of the death of Mr. Farvour (K.F.), Mr. Hixon received a life sentence.

Mr. Hixon was convicted and sentenced to life even though the United States was not required to prove beyond a reasonable doubt that a death by drug overdose was a foreseeable result of his drug trafficking offense. The trial court's failure to instruct the jury regarding foreseeability resulted in the "death results" count of the indictment becoming a strict liability crime. This Court generally disfavors strict liability offenses and only recognizes such offenses in limited circumstances. *Staples v. United States,* 511 U.S. 600, 606 (1994); *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 437-38 (1978). Instead, the common law presumption is that every criminal offense requires a *mens rea* element. *Liparota v. United States,* 471 U.S. 419, 426 (1985).

Over half a century ago, this Court emphasized that requiring proof of a culpable state of mind was an "ancient requirement" – a requirement that "…is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morrissette v. United States,* 342 U.S. 246, 250 (1952).

In the 60+ years since *Morrissette,* this Court's view of the "ancient requirement" has not changed. Proximate cause, said this Court in *Paroline v. United States,* 572 U.S. 434, 445-46 (2014), "is a standard aspect of causation in criminal law" with proximate cause explicated in terms of foreseeability. A defendant generally cannot be convicted, said this Court in *Burrage v. United States,* 571 U.S. 204, 209-10 (2014), unless his conduct is both the actual and proximate cause of the result with proximate cause roughly coinciding with the requirement of foreseeability. *See also United States v. Burkholder,* 816 F. 3d 607, 613 (10th Cir. 2016) *citing Babbitt v. Sweet Home Chapter,* 515 U.S. 687, 713 (1995)(O'Conner, J., concurring)(proximate cause principles inject a foreseeability element into a statute).

This Court's view is in accord with respected legal scholars. Professor LaFave writes that when a crime requires "not merely

conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4 (2d ed. 2003). And in the Model Penal Code, the American Law Institute writes "[w]hen causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actors contract." *Burkholder,* 816 F. 3d at 623 *quoting* Model Penal Code § 2.03(4)(Am. Law Inst. 2001). This Court has rightly concluded that the requirement of *mens rea* "… is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples,* 511 U.S. at 605; *quoting United States Gypsum Co.,* 438 U.S. at 436.

The failure of the trial court to instruct regarding foreseeability, and the Sixth Circuit's affirmance of this practice, in contravention of this Court's decisions and learned legal minds, removes the necessary proximate cause element from § 841 (b)(1)(C), rendering it a strict liability crime. This precedent cannot be allowed to stand.

The statute at issue is silent as to *mens rea,* neither specifying that it is a strict liability statute nor that

foreseeability is an essential element. Instead of concluding that there is no *mens rea* requirement in the statue, the correct decision by the courts below would have been to read into the statue a requirement of foreseeability. In such circumstances this Court, in accord with the common law presumption, sanctions the reading into a criminal statute of a *mens rea* requirement. *Paroline,* 572 U.S. at 446 (given proximate cause's traditional role in causation analysis, this Court has more than once found a proximate cause requirement built into a statute that did not expressly impose one); *Staples,* 511 U.S. at 606 (…we have noted that the common-law rule requiring *mens rea* has been followed in regard to statutory crimes even where the statutory definition did not in terms include it); *U.S. Gypsum Co.,* 438 U.S. at 437 (this Court… has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide). And there is every reason to read a foreseeability requirement into § 841 (b)(1)(C).

First, there is the extreme penalty imposed by the "death results" provision of § 841 (b)(1)(C). This Court recognizes that the potential penalty is a "significant consideration in determining whether the statue should be construed as dispensing

with *mens rea"* and that statutes construed to be without a *mens rea* involve relatively small penalties that do "no grave damage to an offender's reputation." *Staples,* 511 U.S. at 616-18. On the other hand, allowing for a severe punishment under a statute without a *mens rea* element would "seem incongruous" with common law principals. *Id.* at 616-17. The fact that the extreme penalty of a mandatory life sentence is imposed under § 841 (b)(1)(C) requires the conclusion that the crime must be read to contain an element of foreseeability.

Second, the Court should consider that the prohibited result of an overdose death often occurs, as it did in this case, through the intervening actions of others. The jury concluded that Mr. Hixon transferred drugs to Mr. Isaac, who transferred drugs to Mr. Farvour, who chose to use the drugs in a way and in an amount that resulted in his death. As dissenting Sixth Circuit Judge Bernice Donald has pointed out, "[w]ith an intervening act – the use of the drug by a third party – directly tied to the enhancement, the Court should find that proof of proximate cause is even more necessary in § 841." *United States v. Jeffries,* 958 F. 3d 517, 529 (6th Cir. 2020)(Donald, J. dissenting).

Third, the statue requires that death "results from" the distribution of the controlled substance. This language encompasses proximate cause. As determined by this Court, "[a] thing "results" when it "[a]rise[s] as an effect, issue, or outcome *from* some action, process *or design.*" *Burrage,* 571 U.S. at 210; *quoting* 2 The New Shorter Oxford English Dictionary 2570 (1993)(emphasis added). An overdose death cannot arise from the "design" of a defendant unless that result is found to be foreseeable to the defendant. Even the Sixth Circuit has concluded in a similar circumstance that "… proximate cause is the appropriate standard to apply in determining whether a health care fraud violation 'results in death'." *United States v. Martinez,* 588 F. 3d 301, 318-19 (6th Cir. 2009).

Fourth, the rule of lenity should apply. Criminal statutes, of course, are fully subject to that rule. *Burrage,* 571 U.S. at 216. Consistent with the rule, Justices Ginsburg and Sotomayor have indicated that because the language of § 841 (b)(1)(C) leaves room for debate, the Court should not choose to construe it in a way that disfavors the defendant. *Id.* at 219; *See also United States v. Alvarado,* 816 F. 3d 242, 256 (4th Cir. 2016)(other courts and judges have disagreed about the meaning of § 841 (b)(1)(C)'s

text, demonstrating that the meaning of "results from" is not clear without further explanation)(Davis, J. concurring in part and dissenting in part).

This Court has previously granted certiorari on the very question set forth in this petition. *Burrage,* 571 U.S. at 208. But *Burrage* was ultimately decided on other grounds. Since *Burrage,* each circuit that has considered the question has ruled contrary to the arguments set forth in this petition. *Jeffries,* 958 F. 3d at 524; *United States v. Harden,* 893 F. 3d 434, 449 (7th Cir. 2018); *Alvarado,* 816 F. 3d at 250; *Burkholder,* 816 F. 3d at 621. But in two Circuits, there was vigorous dissent. *Jeffries,* 958 F. 3d at 524-32 (Donald, J. dissenting); *Burkholder,* 816 F. 3d at 621-28 (Briscoe, J. dissenting). For the reasons set forth in this petition, and as set forth by the dissenting judges of the Sixth and Tenth Circuits, the decisions in the above cases were erroneous. § 841 (b)(1)(C) must be interpreted in the light of the background rules of the common law. *Staples,* 511 U.S. at 605; *U.S. Gypsum,* 438 U.S. at 437 (Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor). Interpreting the "death results" provision against the common law backdrop compels

the conclusion that proof of proximate cause is required. *Jeffries,* 958 F. 3d at 531 (Donald, J. dissenting); *Burkholder,* 816 F. 3d at 623-24 (Briscoe, J. dissenting).

CONCLUSION

For the reasons set forth above, the Sixth Circuit, in affirming Mr. Hixon's judgment and sentence, has so far departed from the accepted and usual course of judicial proceedings… as to call for an exercise of this Court's supervisory power. And, the issue presented in this petition is an important question of federal law that has not been but should be settled by this Court. A Writ of Certiorari should issue. S.Ct.R. 10(a) and (c).

Respectfully submitted,

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RULE 33.1 (h) CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1 (h), I, Patrick F. Nash, certify that the Petition for Writ of Certiorari in the foregoing case contains 3,671 words, based on the word count of the word processing system used to prepare the document.

/s/ Patrick F. Nash
PATRICK F. NASH

CERTIFICATE OF SERVICE

I, Patrick F. Nash, court-appointed attorney for the petitioner Shannon D. Hixon, do hereby certify that one copy and an electronic copy of this Petition for Writ of Certiorari were served and mailed to the Office of the Clerk, Supreme Court of the United States, Washington, DC 20543; and that a true copy of the foregoing petition was served by mail with first-class postage prepaid, and by email upon:

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This 23rd day of March, 2021.

/s/ Patrick F. Nash
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APPENDIX A

UNITED STATES COURT OF APPEALS
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Re: Case No. 19-6378, *USA v. Shannon Hixon*
Originating Case No. : 5:18-cr-00145-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Robert R. Carr

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0722n.06

No. 19-6378

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiffs-Appellee, v. SHANNON D. HIXON, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Before: MERRITT, KETHLEDGE, and WHITE, Circuit Judges.

KETHLEDGE, Circuit Judge. A jury convicted Shannon D. Hixon of fentanyl distribution resulting in the death of Kyle Farvour, a veteran struggling with drug addiction. The district court imposed a mandatory sentence of life imprisonment. Hixon now appeals his conviction and sentence on various grounds. We affirm.

I.

Kyle Farvour was living at a residential rehab facility in April 2017, when he contacted his dealer, Harvey Isaac, about obtaining heroin. The morning of April 12, Isaac texted Farvour that "[his] dude just came in town with the fire"—referring to Hixon and his "really, really good heroin." They arranged a deal: for $80, Isaac would deliver Farvour a half-gram of heroin and a new syringe. Around lunchtime, Hixon drove Isaac to the rehab facility and handed him a

packaged substance. Isaac then met Farvour outside the facility and delivered that substance and a needle.

Around the same time, a friend of Farvour's at the facility, Zhi Jonathan Wong, lost track of Farvour's whereabouts. Wong heard a bathroom sink running but thought nothing of it until hours later, when he heard the water running still. Wong "jimmied" the door open and found Farvour bent over the sink. Wong shook Farvour and administered two doses of Narcan, to no effect.

Paramedics arrived and initially thought Farvour was alive, given his upright body position. But they found no pulse. Farvour also had a "foam cone" around his mouth—indicative of a person's struggle to breathe after a fentanyl overdose. Police found drug paraphernalia on the bathroom sink, some of which later tested positive for fentanyl. The coroner's office collected Farvour's blood and urine samples for toxicology testing, which revealed a fentanyl blood concentration of almost twice the therapeutic dose.

An investigation into how Farvour obtained the fatal dose of fentanyl led detectives to Hixon. A federal grand jury thereafter indicted Hixon for conspiracy to distribute Oxycodone pills and a mixture or substance containing fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and distribution of fentanyl resulting in death, in violation of 21 U.S.C. § 841(b)(1)(C).

Hixon's case went to trial, where middlemen (including Isaac) and lower-level dealers testified against Hixon. The government also introduced cellphone records and testimony from the Kentucky Medical Examiner's Office, among other evidence. The jury convicted Hixon on both counts. The district court sentenced him to life imprisonment on the "death resulting" count and to 240 months on the conspiracy count. This appeal followed.

II.

A.

Hixon argues that the evidence did not support his conviction under § 841(b)(1)(C) for distribution of fentanyl resulting in death. That offense requires proof of two elements: first, that the defendant knowingly or intentionally distributed fentanyl; and second, that a death resulted from that distribution. *See Burrage v. United States*, 571 U.S. 204, 210 (2014). We view the evidence supporting Hixon's conviction in the light most favorable to the prosecution, and decide whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

As to the first element, Hixon contends that he sold Farvour only heroin, not fentanyl, and that Farvour then left the facility to obtain fentanyl from other sources. But the government presented cellphone evidence suggesting that only Hixon could realistically have been Farvour's source that day. One minute after he and Isaac made their deal, Farvour texted his other potential source, Ray, "I was gonna get some from you. Never mind though." Twenty minutes later, after Isaac said that the dope was "very strong," Farvour again told Ray, "never mind. . . bro."

Cellphone-locational data indicated that Farvour never met with Ray that day. Instead, the records showed, Isaac and Hixon met Farvour near his facility around 12:30pm—the same time that Farvour sent his last text message, and around the time Wong first heard the sink running. Hixon counters that Isaac never testified that the substance he sold to Farvour contained fentanyl; but Isaac conceded that the substance was already packaged when Hixon handed it to him. Thus, the evidence supported an inference that Farvour bought drugs only once that day, that he did so from Hixon (through Isaac), and that the drug that Farvour purchased was fentanyl. A rational jury could therefore find that Hixon's distribution of that fentanyl was knowing or intentional.

That leaves the question whether Farvour died from the fentanyl that Hixon sold him. Mike Ward, a toxicologist at the Kentucky Medical Examiner's lab, opined that Farvour "died as a result of a fentanyl overdose" and that Farvour "would have lived" but for the fentanyl in his blood. Ward also explained that Farvour's "foam cone" was one of the "classic signs" of a fentanyl overdose. Moreover, Farvour's body was surrounded by paraphernalia that tested positive for fentanyl.

Hixon emphasizes that Farvour had no fentanyl in his urine; but another government witness, Dr. George Behonick, testified that Farvour died too quickly for the drug to make its way from his blood into his urine. Hixon also cites Farvour's death certificate, which reported Farvour's cause of death as an "acute combined drug toxicity due to cocaine, fentanyl, and gabapentin[.]" But Ward testified that the cocaine had already metabolized into an inactive form, indicating that Farvour had ingested cocaine well before his death; and Farvour's gabapentin levels were in the therapeutic range. Thus, Ward said, the cocaine and gabapentin would not have caused Farvour's death. Nor would the cocaine or gabapentin have interacted with the fentanyl. Finally, Hixon asserts that Farvour's cause of death is necessarily uncertain because the medical examiner did not perform an autopsy upon him. As the deputy coroner made clear at trial, however, there was hardly a need to examine every organ in Farvour's body to know that the level of fentanyl in his blood was lethal. *See generally United States v. Volkman*, 797 F.3d 377, 397 (6th Cir. 2015). The evidence was sufficient to support Hixon's conviction under § 841(b)(1)(C).

Hixon also argues that, to convict him of violating § 841(b)(1)(C), the jury was required to find that the fentanyl he sold was not only a but-for cause of Farvour's death, but also a proximate cause. As Hixon acknowledges, however, we have already rejected that argument. *See United States v. Jeffries*, 958 F.3d 517 (6th Cir. 2020).

B.

Hixon challenges his life sentence on various grounds. We review that sentence for an abuse of discretion. *See United States v. Jeross*, 521 F.3d 562, 569 (6th Cir. 2008).

Hixon argues that the imposition of a mandatory life sentence under § 841(b)(1)(C) is unconstitutional in light of the First Step Act of 2018, and that—as a matter of statutory construction—the district court wrongly concluded that he was subject to a mandatory life sentence under 21 U.S.C. § 841(b)(1)(C) in the first place. We need not address either of those arguments here, however, because the record makes clear both that the district court would have imposed a life sentence in any event and that Hixon's life sentence was reasonable.

As to the first point, even Hixon agrees that the district court made unmistakably clear during Hixon's sentencing hearing that it would have imposed a life sentence even absent a statutory mandate. Near the end of the hearing, to cite only one example, the district court stated:

> [W]e get caught up sometimes in statutory construction, but sometimes life sentences are earned by the individuals through their conduct. And that's what happened in this particular case. All of the factors of 3553 support a life sentence and it would be improper to impose something less than that in this particular case under the facts presented.

Indeed for all practical purposes the district court conducted Hixon's sentencing hearing as if there were no statutory mandate for a life sentence. As an initial matter, it was common ground in the district court that, even absent a statutory mandatory-minimum sentence of life imprisonment, "[t]he applicable sentencing guidelines recommend[ed] a sentence of life imprisonment." Hixon therefore requested—in the event he could avoid a statutory mandatory-minimum of life—"a downward variance and a sentence below the recommended guideline sentence of life." To that end, during the sentencing hearing, defense counsel stated: "if we were in a situation where life isn't mandatory, my primary argument to the Court would be this: He has

a single prior conviction, drug conviction, it's 15 years old." The district court rejected that argument, and refused to vary downward, only after discussing at considerable length the 18 U.S.C. § 3553 factors and the propriety of a life sentence. Among other things, the court pointed out that a death had resulted from Hixon's distribution of fentanyl (the offense for which was convicted on count 2); that in this very case Hixon had also been convicted of conspiring to distribute Oxycodone (the count 1 offense), for which he was responsible for the distribution of more than 20,000 Oxycodone 30 mg tablets; that Hixon was "selling large amounts of drugs really without any thought of the consequences"; and that Hixon "has not shown remorse in any sense of the word at any time in this proceeding"—notwithstanding a lengthy victim-impact statement by Kyle Farvour's sister during the hearing. The court therefore concluded that, "even if we were in a range of not less than 20 years nor more than life, a life sentence would be appropriate and would be imposed in this particular case, because it would be the correct sentence."

Hixon's only argument (apart from his arguments relating to § 841(b)(1)(C)) as to why we should vacate that sentence is that, he says, his life sentence is substantively unreasonable. Hixon contends that the sentence was unreasonable because, he says, "the sentencing court focused almost exclusively on one single factor—the death of the victim." The above recitation of the district court's reasoning refutes that argument by its terms; and of course it was entirely proper for the court to emphasize the victim's death in this case. Hixon also hypothesizes various ways in which his conduct would have been worse, and contends that a life sentence in his case "leaves virtually no room to make future distinctions" between his case and cases of less-culpable defendants whose drug dealing results in a death. (quoting *United States v. Fink*, 502 F.3d 585, 589 (6th Cir. 2007)). But Hixon's responsibility for distributing more than 20,000 high-potency Oxycodone tablets as part of a separate conviction in this case and his lack of remorse for his

crimes, among other things, leave plenty of room for distinctions between this case and others. The district court did not abuse its discretion by imposing a life sentence.

* * *

The district court's judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Central Division at Lexington

UNITED STATES OF AMERICA
v.
Shannon D. Hixon

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:18-CR-00145-DCR-001

USM Number: 57069-039

Patrick F. Nash
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 & 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	Conspiracy to Distribute Oxycodone and a Mixture or Substance Containing Fentanyl	April 13, 2017	1
21:841(a)(1)	Distribution of a Mixture or Substance Containing Fentanyl, the Use of Which Resulted in an Overdose Death	April 12, 2017	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 6, 2019
Date of Imposition of Judgment

Signature of Judge

Honorable Danny C. Reeves, Chief U.S. District Judge
Name and Title of Judge

December 6, 2019
Date

DEFENDANT: Shannon D. Hixon
CASE NUMBER: 5:18-CR-00145-DCR-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

TWO HUNDRED FORTY (240) MONTHS ON COUNT ONE AND LIFE ON COUNT TWO, TO RUN CONCURRENTLY, FOR A TOTAL TERM OF LIFE IMPRISONMENT

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant participate in a program working toward the completion of a GED.
It is recommended that the defendant participate in a jobs skills and/or vocational training program.
If warranted, it is recommended that the defendant participate in an appropriate drug treatment program.
It is recommended that the defendant be designated to a facility closest to his home for which he may qualify.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Shannon D. Hixon
CASE NUMBER: 5:18-CR-00145-DCR-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

THREE (3) YEARS ON COUNT ONE AND SIX (6) YEARS ON COUNT TWO, TO RUN CONCURRENTLY, FOR A TOTAL TERM OF SIX (6) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Shannon D. Hixon
CASE NUMBER: 5:18-CR-00145-DCR-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Shannon D. Hixon
CASE NUMBER: 5:18-CR-00145-DCR-001

SPECIAL CONDITIONS OF SUPERVISION

1. You shall refrain from the use of alcohol.

2. You must not purchase, possess, use, distribute or administer any controlled substance or paraphernalia related to controlled substances, except as prescribed by a physician, and must not frequent places where controlled substances are illegally sold, used, distributed or administered. Further, you may not use or consume marijuana even if such controlled substance were to be prescribed to you by a physician, licensed professional or other person.

3. Should you not complete a GED while in the custody of the Bureau of Prisons, you are to continue in such a program, as directed by the probation office, as a condition of supervision.

4. You must provide to the USPO, within 7 (seven) days of release from the custody of the Bureau of Prisons, a written report, in a form the USPO directs, listing each and every prescription medication in your possession, custody or control. The list must include, but not be limited to, any prescription medication that contains a controlled substance and encompasses all current, past and outdated or expired prescription medications in your possession, custody, or control at the time of the report;

5. You must notify the USPO immediately (i.e., within no later than 72 hours) if you receive any prescription for a medication containing a controlled substance during the period of supervised release. You must provide the USPO such documentation and verification as the USPO may reasonably request and in a form the USPO directs;

6. You must comply strictly with the orders of any physician or other prescribing source with respect to use of all prescription medications; and,

7. You must report any theft or destruction of your prescription medications to the US Probation Officer within 72 hours of the theft or destruction.

8. You must submit your person, properties, houses, residences, vehicles, storage units, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

9. You must refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or location monitoring which is required as a condition of release.

DEFENDANT: Shannon D. Hixon
CASE NUMBER: 5:18-CR-00145-DCR-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$ N/A	$ Waived	$ Community Waived

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Shannon D. Hixon
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
101 Barr Street, Room 206, Lexington KY 40507

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.