No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN SHIELDS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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 Sixth Circuit's blanket policy of relying on the waiver doctrine as justification for refusing to review an insufficiency of the evidence claim that rests on a ground or argument that was not asserted in the defendant's motion for acquittal in the district court conflicts with this Court's plain error jurisprudence?

II. Whether conducting a financial transaction to pay for a controlled substance that is intended for distribution constitutes money laundering under 18 U.S.C. §1956?

III. When a defendant advances a non-frivolous claim that his guilty plea to a count of conspiracy operates as a double jeopardy bar to prosecution under a subsequent indictment for conspiracy, must the district court conduct an evidentiary hearing, or receive evidence on the issue in some other manner, for purposes of determining whether the two conspiracy counts charge the same offense?

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 John Shields ("Petitioner") 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 Nos. 19-6428 and 19-6429 on April 6, 2021.

UNOFFICIAL CITATION

On April 6, 2021, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed an opinion and judgment affirming Petitioner's convictions and aggregate 240-month prison term for drug trafficking and money laundering offenses. (App. 1a). The opinion is unofficially reported at 2021 WL 1259417.

JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on April 6, 2021. He invokes this Court's jurisdiction pursuant to 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:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor 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.
>
> . . . .

18 U.S.C. §1956:

> (a)
>
> (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)

(i) with the intent to promote the carrying on of specified unlawful activity;

. . . .

or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

. . . .

shall be sentenced [as provided by statute].

21 U.S.C. §841:

(a) Unlawful acts.

. . . [I]t shall be unlawful for any person knowingly or intentionally—
(1) to . . . distribute . . ., or possess with intent to . . . distribute . . . a controlled substance[.]

STATEMENT OF THE CASE

Between 2013 and 2017, members of the Peda Roll Mafia ("PRM"), a street gang, engaged in the distribution of a variety of controlled substances in the Memphis, Tennessee area. The members obtained their supply of drugs from two sources located in California. The Wright Organization supplied them with marijuana; the Avendano Organization supplied them with marijuana, heroin, methamphetamine and cocaine.

The Wrights and the Avendanos followed the same protocol for delivery of product and collection of payment. They utilized the Postal Service or a commercial courier to ship

drugs to a residence associated with a member of the PRM. The PRM member typically paid for a drug shipment by depositing cash into a "funnel" account at the Memphis branch of a national bank having branches also in California. On some occasions, the money was wired directly to the supplier in California.

The illicit activities of the PRM ultimately drew the attention of the U.S. Postal Inspector and the Memphis police department. Following an extensive criminal investigation, those agencies turned the results over to the United States Attorney for the Western District of Tennessee for prosecution.

The United States Attorney made an highly unconventional charging decision. Although the evidence pointed overwhelmingly to the existence of a single overarching conspiracy involving sales of controlled substances by a unitary drug ring, the United States Attorney divided the conspiracy charges between two indictments.

The sole criterion for charging a particular PRM member in any one particular indictment (or both indictments) was the identity of his supplier. The first indictment named members who had obtained marijuana from the Wright Organization ("the Wright indictment"). The second indictment charged members who had obtained marijuana and other drugs from the Avendano Organization ("the Avendano indictment"). The government charged Petitioner in both indictments.

From the outset, Petitioner admitted his involvement in marijuana trafficking. He promptly pled guilty to counts in the Wright indictment charging him with conspiracy to distribute marijuana and related offenses.

Another co-defendant did the same thing. After entering guilty pleas to the Wright counts, the co-defendant filed a motion to dismiss the conspiracy counts in the Avendano indictment on double jeopardy grounds, and requested an evidentiary hearing. Petitioner joined in the co-defendant's motion.

The district court declined to hold an evidentiary hearing. After accepting the government's unsworn version of the facts, it denied the motion to dismiss.

Petitioner proceeded to trial on the Avendano indictment. A jury found him guilty of conspiracy to distribute heroin, conspiracy to distribute methamphetamine, possession with intent to distribute heroin, and conspiracy to commit money laundering.

The district court sentenced Petitioner to concurrent aggregate prison terms of 95 months for the convictions under the Wright indictment, and 240 months for the convictions under the Avendano indictment. The court of appeals affirmed his convictions and sentence.

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

Rule 10(a) of this Court's Rules of Practice directs that a petition for a writ of certiorari will be granted only for compelling reasons. Such reasons include a decision by a circuit court of appeals that conflicts with another circuit on an important federal question, or a decision that departs from accepted and usual practice to the extent that this Court should exercise its supervisory power.

Petitioner believes this petition raises three important questions that meet the criteria identified in Rule 10(a) for acceptance and review by this Court.

I. THE SIXTH CIRCUIT'S BLANKET POLICY OF RELYING ON THE WAIVER DOCTRINE AS JUSTIFICATION FOR REFUSING TO REVIEW AN INSUFFICIENCY OF THE EVIDENCE CLAIM THAT RESTS ON A GROUND OR ARGUMENT THAT WAS NOT ASSERTED IN THE DEFENDANT'S MOTION FOR ACQUITTAL IN THE DISTRICT COURT CONFLICTS WITH THIS COURT'S PLAIN ERROR JURISPRUDENCE.

On appeal, Petitioner challenged the sufficiency of the evidence to support his conviction for aiding and abetting a co-defendant (Jeremy Davis) in the commission of the crime of possession with intent to distribute heroin. He argued that the lack of evidence to demonstrate Davis' guilt of the principal offense precluded Petitioner's conviction on an aiding and abetting theory.

The appellate panel refused to address the merits of Petitioner's insufficiency claim. Citing *United States v. Dandy*, 998 F.2d 1344 (6th Cir. 1993), it reasoned that trial counsel had "waived" this particular ground of insufficiency by failing to assert it in the first instance in the district court during arguments on a defense motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. (App. 17a)

The *Dandy* waiver rule rests on the assumption that "[t]he specification of grounds in the [Rule 29] motion is an indication that counsel has evaluated the record and has these particular reasons for his motion." *Id.* 998 F.2d at 1357. Petitioner submits that the Sixth Circuit's blanket application of the waiver doctrine to an un-preserved sufficiency of the evidence claim is inconsistent with this Court's plain error jurisprudence.

In *United States v. Olano*, 507 U.S. 725 (1993), the Court explained that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

It does not inescapably follow that a defense attorney's decision to press a particular ground or argument for acquittal in the district court is indicative of an "intentional relinquishment or abandonment" of other viable grounds or arguments. On the contrary, it is more reasonable to infer that counsel's failure to raise the omitted ground was due to inadvertence, inexperience, indifference, or lack of knowledge. *See United States v. Goode*, 483 F.3d 676, 681 (10th Cir.2007) (en banc) (declining to find a waiver of omitted ground where "there is no suggestion of a knowing, voluntary failure to raise the matter.") An omission of this type is more accurately characterized as a forfeiture that may be reviewed by an appellate court for plain error. *Id.*

Under the plain error standard, a reviewing court may grant relief for a deviation from a legal rule that is "clear" or "obvious," that affected the defendant's "substantial rights," and that seriously affected "the fairness, integrity or public reputation" of the judicial proceedings. *Olano*, 507 U.S. at 732-36. These familiar requirements are readily satisfied in Petitioner's case for the following reasons.

The federal aiding and abetting statue, 18 U.S.C. §2, requires proof that a principal offender committed the crime; and that the defendant aided, abetted, counseled, commanded, induced, or procured the principal in its commission. *Rosemond v. United*

States, 572 U.S. 65, 70 (2014). Here the government prosecuted Petitioner on a theory that he commanded Davis to retrieve a package of heroin that was en route to a residence in Memphis.

Trial testimony revealed that the postal inspector had intercepted the package and had *removed* the entirety of the heroin before making the controlled delivery. Davis was arrested after he appeared at the residence to retrieve an *empty* package.

Under this set of facts, Davis never actually or constructively possessed the heroin. He therefore did not commit each and every element of the principal offense of possession with intent to distribute heroin under 21 U.S.C. §841. Davis' innocence of the principal charge foreclosed Petitioner's conviction for aiding and abetting him.[1]

In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court announced the rule that "an essential of the due process guaranteed by the Fourteenth Amendment" is "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." *Id.* at 316. Other courts have recognized that "[a] defendant's 'substantial rights,' as well as the 'fairness' and 'integrity' of the courts, are seriously affected when someone is sent to jail for a crime that, as a matter of law, he did not commit[.]" *United States v. Cruz*, 554 F.3d

[1]The government arguably could have charged Davis and Petitioner for an *attempt* to commit the offense pursuant to 21 U.S.C. §846. However, appellate affirmance on an attempt theory is foreclosed because the indictment did not charge an *attempt* under §846, and the district judge did not instruct the jury on the elements of an attempt, or aiding and abetting an attempt, to commit the crime. *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.")

840, 845 (9th Cir. 2009). The Sixth Circuit panel's refusal to review Petitioner's claim for plain error amounts to a radical departure from accepted and usual appellate practice that deprived Petitioner of his right to meaningful review of a compelling constitutional claim.

A majority of circuits apply the plain error standard to an insufficiency of the evidence claim that relies on a ground or argument not previously asserted in the motion for acquittal in the district court. *See United States v. Williams,* 974 F.3d 320, 361, n. 29 (3rd Cir. 2020); *United States v. Hosseini*, 679 F.3d 544, 550 (7th Cir. 2012); *United States v. Samuels*, 874 F.3d 1032, 1036 (8th Cir. 2017); *Goode*, 483 F.3d at 681; *United States v. Baston*, 818 F.3d 651, 664 (11th Cir. 2016); *United States v. Spinner*, 152 F.3d 950, 955 (D.C. Cir. 1998). The Sixth Circuit is the only circuit to apply the waiver rule in such an absolute and unyielding manner. Acceptance of certiorari in this case will provide the Court with a suitable factual and procedural record for resolving this Circuit split.

II. CONDUCTING A FINANCIAL TRANSACTION TO PAY FOR A CONTROLLED SUBSTANCE THAT IS INTENDED FOR DISTRIBUTION DOES NOT CONSTITUTE MONEY LAUNDERING UNDER 18 U.S.C. §1956.

The money laundering statute, 18 U.S.C. §1956, requires proof that the accused conducted a financial transaction involving the "proceeds" of specified unlawful activity for the purpose of promoting the activity or concealing the source of the funds. The government prosecuted Petitioner for conspiracy to commit money laundering on a theory that his bank deposits and wire transfers were financial transactions involving the "proceeds" of drug trafficking.

On appeal, Petitioner challenged the sufficiency of the evidence to support his conviction under this theory. The Fifth and Sixth Circuits have taken diametrically opposing views on this important question.

The appeal in *United States v. Harris*, 666 F.3d 905 (5th Cir. 2012) involved an identical payment arrangement. Trial testimony established that a Texas defendant (Miller) paid over $2 Million to his California supplier (Harris) by making bank deposits or initiating wire transfers for earlier shipments of narcotics. A jury convicted both men of conspiracy to commit money laundering and substantive counts of money laundering.

On appeal, Miller and Harris argued that "the funds did not become proceeds of unlawful activity until Miller paid Harris for the drugs received." *Id.* 666 F.3d at 909. They maintained that "the deposits and withdrawals and wire transfers that form the basis of the money laundering charges, did not involve proceeds of unlawful activity." *Id.*

The Fifth Circuit agreed with the appellants on this point:

> These facts are simply not enough to meet the government's burden of showing that the funds transferred from Miller to Harris were proceeds of drug trafficking or anything other than payment of the purchase price for drugs. Money does not become proceeds of illegal activity until the unlawful activity is complete. The crime of money laundering is targeted at the activities that generally follow the unlawful activity in time.

Id. at 910.

The Sixth Circuit has expressly rejected the Fifth Circuit's analysis. In *United States v. Tolliver*, 949 F.3d 244 (6th Cir. 2020), the appellate panel reasoned that the buyer's timely

payment for a delivery of drugs "promotes the conspiracy by allowing it to continue to grow." *Id.* at 248.

Petitioner's hearing panel followed *Tolliver* and denied his insufficiency claim. It reasoned that "a rational juror could easily have found that Shields made financial transactions using money obtained from the sales of illegal narcotics." (App. 12a)

The flaw in the Sixth Circuit's approach is that it fails to draw a distinction between the "laundering transaction" and the "criminal conduct generating the proceeds to-be-laundered." *United States v. Anderson*, 932 F.3d 344, 350 (5th Cir. 2019). As the law now stands, a financial transaction to pay for drugs is fully subsumed under a drug trafficking count in the Fifth Circuit, but is a separately chargeable offense in the Sixth Circuit. Acceptance of certiorari in this case will provide the Court with a suitable factual and procedural record for resolving this Circuit split.

III. WHEN A DEFENDANT ADVANCES A NON-FRIVOLOUS CLAIM THAT HIS GUILTY PLEA TO A COUNT OF CONSPIRACY OPERATES AS A DOUBLE JEOPARDY BAR TO PROSECUTION UNDER A SUBSEQUENT INDICTMENT FOR CONSPIRACY, THE DISTRICT COURT MUST CONDUCT AN EVIDENTIARY HEARING, OR RECEIVE EVIDENCE ON THE ISSUE IN SOME OTHER MANNER, FOR PURPOSES OF DETERMINING WHETHER THE TWO CONSPIRACY COUNTS CHARGE THE SAME OFFENSE.

During the proceedings on the motion to dismiss the Avendano conspiracy counts on double jeopardy grounds, defense counsel argued that a comparison of the language of the two indictments discloses the existence of single conspiracy centered around a core drug trafficking ring - the Memphis Chapter of the PRM. The government countered that

the Memphis group's patronage of two different drug suppliers - the Wright Organization and the Avendano Organization - automatically resulted in separate conspiracies.

The government's position is inconsistent with the prevailing view in the circuits that "the type of conspiracy charged here--an ongoing drug distribution conspiracy involving core members who buy from and sell to various suppliers and dealers who may change over time--as a single conspiracy rather than as a series of smaller separate conspiracies." *United States v. Sophie*, 900 F.2d 1064, 1081 (7th Cir. 1990). *Accord United States v. Pou*, 953 F.2d 363, 369-70 (8th Cir. 1992) (cocaine ring's reliance on multiple suppliers "does not lead to the conclusion that, each time a new source for cocaine joined the conspiracy, a new conspiracy was born"); *United States v. Laetividal-Gonzalez*, 939 F.2d 1455, 1466 (11th Cir.1991) ("shift from one supplier to another did not change the essential nature and objectives of the single conspiracy"); *United States v. Morris*, 46 F.3d 410, 416 (5th Cir. 1995) ("we believe that a separate conspiracy was not created because from time to time Costa used other sellers or purchasers to keep the scheme alive.")

The court of appeals upheld the district court's refusal to conduct an evidentiary hearing ostensibly because Petitioner had failed to make "at least some initial showing of contested facts." (App. 7a, citation omitted) The Sixth Circuit's position fails to appreciate the procedural conundrum faced by a defendant in Petitioner's situation.

The Fifth and Eleventh Circuits have recognized that "[w]here a defendant has entered a guilty plea in response to a conspiracy charge in one [prosecution] and later is charged again with conspiracy under the same statute in another [prosecution], it is

particularly difficult, because of the absence of a trial record in the first case, to determine whether the conspiracies arose from one unlawful agreement or two." *United States v. Benefield,* 874 F.2d 1503, 1506 (11th Cir. 1989), citing *United States v. Atkins*, 834 F.2d 426, 434 (5th Cir.1987).

And in *United States v. Inmon*, 568 F.2d 326 (3rd Cir. 1977), the Third Circuit discussed the unfairness of depriving a defendant of an evidentiary forum for the development of the facts needed to demonstrate whether the conspiracy count to which he has already pled guilty is the same offense as the conspiracy charge in the new indictment:

> This case, in which the defendant has already pleaded guilty to one indictment, illustrates the impracticality of placing the evidentiary burden on him. Inmon would be required to prove facts establishing the charge of conspiracy to which he pleaded guilty and to prove facts establishing the second conspiracy as well. How he could do either, without access to the proof on which the government proposed to rely and without the ability to offer immunity to prospective witnesses, is not readily apparent. Even after a trial on the first indictment, the defendant would lack access to the government's proof of the second offense.

Id. at 329-30.

Due to these considerations, the rule has developed in the Third, Fifth and Eleventh Circuits that when a defendant advances a non-frivolous claim that his guilty plea to a conspiracy count operates as a double jeopardy bar to a prosecution under a subsequent indictment for conspiracy, the burden shifts to the government to prove by a preponderance of evidence that the counts charge separate crimes. *Inmon*, 568 F.2d at 330-32; *Atkins*, 834 F.2d at 434; *Benefield,* 874 F.2d at 1505-06. While a proffer of relevant

documentation (an investigative report, an affidavit, or transcript of judicial proceedings) may suffice in some instances, *Benefield,* at 1506, generally "the court must hold an evidentiary hearing if there is a factual dispute. *Inmon*, at 331.

Petitioner satisfied his initial burden of demonstrating a legitimate double jeopardy claim. The conspiracy counts of each indictment allege a violation of the same statute (21 U.S.C. §846); an overlapping time frame (March 2013 to May 2017 for the Wright count and March 2013 to September 2015 for the Avendano count); the same ringleader, multiple overlapping co-defendants; and a single geographic area where drugs were trafficked (Memphis, Tennessee). Moreover, each indictment incorporates an identical five-paragraph "Introduction" describing the nature and scope of the underlying criminal activity.

The allegations in the two indictments plainly "overlap in a way which suggests a double jeopardy problem." *Adkins*, 834 F.2d at 440. It therefore follows that consideration of "evidence outside the record [that] helps flesh-out the charges in the indictments" was "essential" to fair, just and complete resolution of Petitioner's motion to dismiss. *Id.*

The Sixth Circuit appellate panel readily accepted the lower court's frail explanation for not conducting an evidentiary hearing. According to the district judge, "the parties did not disagree about the facts," but only about "the legal implications of those facts." (App. 26a, at n.7) But this is not an accurate depiction of the record.

The district judge's written decision makes frequent references to unsubstantiated allegations in the government's brief as if they were proven fact. However, the accuracy of these allegations was not stipulated by the defense; and the United States Attorney did not

attach evidentiary material, such as investigative reports, affidavits, or transcripts, to his brief to support these allegations.

Thus, Petitioner was faced with the very same conundrum described in *Inmon*. He could not effectively challenge the prosecution's allegations because he was "without access to the proof on which the government proposed to rely." *Id.* at 330.

The Sixth Circuit's position squarely conflicts with the approach of the Third, Fifth and Eleventh Circuits on this important question.[2] Acceptance of certiorari in this case will provide the Court with a suitable factual and procedural record for resolving this Circuit split.

CONCLUSION

This Court has recognized a distinction between waiver and forfeiture of a constitutional claim. Unless the defendant has intentionally abandoned the claim, he may obtain appellate review for plain error.

The Sixth Circuit's unyielding policy of refusing to consider an insufficiency of the evidence argument that was not first asserted in the district court is inconsistent with this Court's plain error jurisprudence. It is a policy that truly represents a departure from

[2]It also conflicts with a prior unpublished opinion of the Sixth Circuit. In *United States v. Corral*, 562 Fed. Appx. 399, 409 (6th Cir. 2014), the appellate panel ruled that where there were several overlapping allegations in conspiracy counts of the California and Michigan indictments, such that "one could reasonably conclude that the conspiracies are one and the same, [] [t]he district court abused its discretion in denying Corral's request for an evidentiary hearing."

"accepted and usual practice" warranting the intervention of this Court under its supervisory power to ensure fundamental fairness in the appellate review process.

Under the Sixth Circuit's expansive interpretation of the money laundering statute, "any criminal activity involving an exchange of money would double as a laundering offense." *Anderson*, 932 F.3d at 350 (footnote omitted). This construction cannot be reconciled with Congress's intent in enacting the statute. The issue of the proper scope of the money laundering statute is ripe for this Court's review.

When a defendant raises a non-frivolous claim that his re-indictment for the same conspiracy charge to which he has already pled guilty violates his rights under the Double Jeopardy Clause, the government bears the burden of demonstrating that the two counts do not involve the same offense. Under the prevailing view in the circuits, a district court deprives a defendant of a fair and accurate determination of the claim if it summarily accepts the government's version of events without requiring it to produce supporting evidence.

The Sixth Circuit's affirmance of the district court's denial of an evidentiary hearing on Petitioner's colorable double jeopardy claim violated his right to an informed and equitable ruling. As a consequence, Petitioner is serving a 240-month prison term rather than the 95-month prison term separately imposed for the conspiracy to which he had previously pled guilty. This Court's intervention is needed to correct this injustice.

For these reasons, Petitioner asks the Court issue a writ of certiorari to the Sixth Circuit and to schedule this case for full briefing and oral argument.

Respectfully submitted,

Dated: June 29, 2021

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