

No. 21-7299

IN The

Supreme Court of the United States

Rasheed Ali Muhammad

Petitioner,

v.

United States of America

Respondent.

ON Rehearing
Petition For Writ Of Certiorari

REHEARING
PETITION FOR WRIT OF CERTIORARI

Rasheed Ali Muhammad
PRO SE REPRESENTATION
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CERTIFICATE STATING GROUNDS

This petition for rehearing to obtain a writ of certiorari is based on a substantial ground not previously presented that includes intervening circumstances.

The Petitioner argued for an instruction to include that he knew the substances were analogues. The district court overruled an instruction that the defendant knew the substances were analogues, and directed a verdict based on an instruction presented by the prosecution citing circuit precedent.

This Court determined in *McFadden v. United States*, 135 S. Ct. 1222, 260 (2015) that knowledge is a requirement in § 841.

This Court cautioned that a "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury," reasoning that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict... regardless of how overwhelming the evidence, may point in that direction." *Id.* at 578 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977)).

The Sixth Amendment violation in this instance is the wrong entity judged the defendant guilty.

This petition is presented in good faith and not for delay.

QUESTION PRESENTED FOR REVIEW

Whether a constitutionally deficient knowledge requirement instruction may be harmless error when the district court directed a verdict for the prosecution?

PARTIES TO THE PROCEEDINGS

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This petition is presented in good faith and not for delay. Petitioner Rasheed Ali Muhammad prays that this Honorable Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above proceeding on September 16, 2021.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. An accused's right, under the Federal Constitution's Sixth Amendment, to a jury trial in a criminal prosecution includes, as the right's most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilty; what a fact-finder must determine in order to return a verdict of guilty in a criminal case is prescribed by the Constitution's due process clause, pursuant to which the prosecution (1) bears the burden of proving all elements of the offense charged and (2) must persuade the fact finder beyond a reasonable doubt of all facts necessary to establish each of those elements.

Under the Federal Constitution's Sixth Amendment guarantee to an accused of the right to a jury trial in a criminal prosecution, although a judge may direct a verdict for the accused if the evidence is legally insufficient to establish guilt, a judge may not direct a verdict for the prosecution, no matter how overwhelming the evidence.

Under the Federal Constitution's Sixth Amendment guarantee to an accused of the right to a jury trial in a criminal prosecution, a judge's directed verdict for the prosecution is not sustainable on appeal.

legal requirement was in fact, correct.

REASONS FOR GRANTING THE WRIT

In analyzing the complex issue in this case, there exist significant inconsistency in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime. This inconsistency exists within the circuits and the potentially unconstitutional application of *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999), that have resulted from it. Given that the Sixth Amendment right to a jury trial is at stake, the Petitioner urges this Court to clarify the line between an unconstitutional directed guilty verdict and a harmless failure to instruct on an element.

Safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. Where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding - it should not find the error harmless.

This Court explained that when the Sixth Amendment right to a jury trial in serious criminal cases "is altogether denied, the State cannot contend that the deprivation was harmless...; the error in such a case is that the wrong entity judged the defendant guilty." 12

ARGUMENTS AMPLIFYING REASONS FOR WRIT

The Fifth Circuit Court of Appeals erred when it assumed the Petitioner "Mr. Muhammad" invited the court to treat harmless error analysis as structural error. The district court erred when it directed the verdict of "knowledge for the government." This Court cautioned that a "harmless-error" analysis would not apply if a court directed a verdict for the prosecution.

A. Petitioner's Assertion

Mr. Muhammad contends instructional error is subject to harmless error analysis. *McFadden v. United States*, 135 S.Ct. 2298, 2304 (2015). The Supreme Court cautioned that a "harmless-error analysis, presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury." The error in Mr. Muhammad's case is not harmless beyond a reasonable doubt.

B. Standard of Review

This Court reviews petitions where its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

C. The Structural Error Framework

This Court observed that structural errors constitute only "a very limited class of fundamental constitutional errors." This Court had previously found an error to be structural... only in a "very limited class of cases," including: the complete denial of counsel, a biased trial judge, racial discrimination in the selection of the grand jury, the denial of self-representation at trial, the denial of a public trial and a defective reasonable-doubt instruction. *Id.* at 8 (quoting *Johnson*, 520 U.S. at 468). To be deemed structural errors, such defect must "infect the entire process, and necessarily render a trial fundamentally unfair." *Id.* (internal quotation marks omitted).

D. Harmless Error Framework

This Court's constitutional harmless-error test rule under the Federal Rules of Criminal Procedure, "any error, defect, irregularity, or variance, that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). In *Chapman v. California*, 386 U.S. at 24. To determine whether a constitutional error is

Harmless a reviewing court asks whether it appears "beyond a reasonable doubt" that the error complained of did not contribute to the verdict obtained. "Id. This Court repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."

E. Neder Harmless Framework

The Neder Court specified that reviewing courts should not find errors harmless when the defendant (1) contested the omitted element and (2) raised evidence to support a contrary finding. "Id. The Neder Court further instructed that, if, after conducting 'a thorough examination of the record,' a reviewing court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error - for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding - it should find the error harmless." "Id. at 19. The Court explained that such a reviewing court 'in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.' "Id.

F. Harmless Error Analysis in Directed Verdict Cases

Shortly after Van Arsdall was decided, in *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed. 2d 460 (1986), this Court cautioned that a "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury," reasoning that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict... regardless of how overwhelming the evidence may point in that direction." "Id. at 578 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S.Ct. 1349, 51

L. Ed. 2d 642 (1977)). The Court explained that when the Sixth Amendment right to a jury trial in serious criminal cases "is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judges the defendant guilty." Id.

G. The Government's Burden

[T]he government... must also prove, beyond a reasonable doubt the following two things: First, that the defendant, Rasheed Ali Muhammad, knew that the substance at issue was intended for human consumption; and second, that the defendant, Rasheed Ali Muhammad, knew that the substance at issue was 9-PVP, XLR-11, or 4-MEC. The defendant need not have known that the substance was an analogue. The government need only prove that defendant knew what the substance was, and the defendant possessed the substance or conspired to possess it with the intent to distribute it.

Prior to the instructions to the jury, the district court had entertained objections to the proposed instruction. The defense objected to instruction Number 22, noting that it failed to require the government to prove that the defendant intentionally possessed an analogue, and counsel stated that it was [the defense's] position that the government must prove beyond a reasonable doubt that [Muhammad] did in fact know it was an analogue. RGA. 1492.

The district court overruled the defense's objection, citing case law, including the Fourth Circuit Court of Appeals' decision in *McFadden* while it was on writ of certiorari to the Supreme Court. Ultimately, the district court instructed the jury need not have known that the controlled substance was an analogue.

H. Directed Verdict

In response to Muhammad's motion for directed verdict, the

government stated that "[The defense] has consistently gotten the legal standard for intent wrong. It's not that he willfully, knowingly, and intentionally intended to sell illegal drugs. That intent requirement under the statute is that he intended to sell the drug in question." ROA 1367. However, the defense's understanding of the legal requirement was, in fact, correct.

The Court of Appeals for the Fifth Circuit ordinarily presumes that jurors follow the instructions they are given. Conversely, absent an appropriate instruction, the court cannot presume that the jurors applied the correct standard of proof. Where the district court directs a verdict for the ~~government~~ ~~on an incorrect standard of proof~~ it ~~Ed. 2d 35 (1999)~~, that have resulted from it. Given that the Sixth Amendment right to a jury trial is at stake, the Petitioner urges this Court to clarify the line between an unconstitutional directed guilty verdict and a harmless failure to instruct on an element.

Safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. Where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding - it should not find the error harmless. This Court explained that when the Sixth Amendment right to a jury trial in serious criminal cases "is altogether denied, the State cannot contend that the deprivation was harmless...; the error in such a case is that the wrong entity judged the defendant guilty." 12.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

The Fifth Circuit Court of Appeals erred when it assumed the Petitioner "Mr. Muhammad" invited the court to treat harmless error analysis as structural error. The district court erred when it directed the verdict of "knowledge" for the government. This Court cautioned that a "harmless-error" analysis would not apply if a court directed a verdict for the prosecution.

A. Petitioner's Assertion

analogue the jury had no choice but to convict. See *Arizona v. Fulminate*, 499 U.S. 279, 306-07, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The Sixth Amendment required more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach v. United States*, 326 U.S. 607, 614, 90 L.Ed. 1360, 66 S.Ct. 402 (1946).

J. McFadden's Two-Part test for Knowledge

McFadden clarified the elements that the Government must prove to support a conviction for distribution of a controlled substance analogue. The Act defines an analogue in terms of its chemical structure, and its actual, claimed, or intended physiological effects. If a substance qualifies as an analogue, it is treated exactly like a schedule I controlled substance. McFadden, 135 S.Ct. at 2304-05 (quoting 21 U.S.C. § 813). The CSA contains a "knowingly or intentionally" mens rea requirement, 21 U.S.C. § 841(a)(6); the Analogue Act therefore also includes a knowledge element. McFadden, 135 S.Ct. at 2305. McFadden required that the Government prove the defendant: "(1) distributed a substance that had the chemical structure of an analogue and the actual, intended, or claimed physiological effects of an analogue; (2) intended that the substance be used for human consumption; and (3) knew either the substance's (a) regulatory and legal status under federal law or (b) chemical composition and physiological effects. *United States v. McFadden*, 823 F.3d 217, 223 (4th Cir. 2016).

The defense here limited its request for instruction based on the first method in McFadden. The trial court here erred in failing to limit its charge to the second alternative. Because the district court did not so restrict the charge, the charge applied equally to the first alternative—which, contrary to the court's instruction, **does** require proof of knowledge of law.

K. Harm Analysis

Unlike in *Neder*, Mr. Muhammad put on ample evidence to refute

the government's claim that he knew the substances he was selling were analogues. With each witness, the defense made a point to refute any claim that Mr. Muhammad knew the substances were illegal analogues. Further, defense counsel argued this lack of required knowledge when moving for directed verdict, ROA. 1366-1367, and again during closing argument, ROA. 1571-1572.

Unlike in Neder, the omitted element of the knowledge requirement was clearly a central argument to the defense and any evidence showing Mr. Muhammad knew the substances were illegal analogues was far from overwhelming. Therefore, when using the Neder test for harm analysis, the petitioner did present sufficient evidence regarding the omitted element, and that omission by the district court constituted harm.

All Neder-type errors may be harmless errors but not all harmless instructional errors must be Neder-type errors.

In Mr. Muhammad's trial the knowledge element was not omitted, the district court directed a verdict for the government based on that element. This reduced the government's burden and denied the jury a beyond a reasonable doubt instruction based on the required mens rea in McFadden. Where a district court rules that proof of a required element is not necessary, a claim that the defendant was denied the ability to present a complete defense is essentially the inverse of a claim that the jury instructions were inadequate. We have observed the close relationship between those two claims in the context of the refusal to deliver a defense-requested instruction "concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *United States v. John*, 309 F.3d 298, 304 (5th Cir. 2002) (quoting *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir. Unit A May 1981)). To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Id.* (quoting *Yates* 500 U.S. at 403).

Unlike an erroneous presumption regarding an element of the

offense. See *Sandstrom v. Montana*, 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450, a deficient, reasonable-doubt instruction vitiates all the jury's factual findings. A reviewing court in such a case can only engage in pure speculation - its view of what a reasonable jury would have done.

L. Right To A Jury Determination On Each Element

The right to have a jury rather than a judge, reach the requisite finding of guilt; what a fact finder must determine in order to return a verdict of guilty in a criminal case is prescribed by the Constitution due process clause.

Conference Arguments on Instructions (defense)

"to allow the omission of the requirement of the government to prove, beyond a reasonable doubt that he knowingly, willfully and intentionally possessed an analogue..." R.O.A. 1410.

"Now, I want to make sure that my original argument with respect to the requirement to prove the defendant knew that there was an analogue..." R.O.A. 1412.

(the government)

"... he says that the defense is somehow prejudiced because they based their entire defense on this willfully, and that the knowledge that they believe -- the knowledge requirement that was significantly greater... knowledge goes to the possession, not to the status of the particular substance..." R.O.A. 1413. R.O.A. 1414.

(the court)

"The defendant is arguing that the jury would have to prove beyond a reasonable doubt that the defendant knew he was possessing a controlled substance, analogue whereas the government takes the position that the defendant need only know what substance he was possessing, that he need not necessarily know it was an analogue..." R.O.A. 1418.

"... the Court is of the view that the instruction is

appropriate, and it will overrule the defendant's objection in that regard." RFA. 1422.

In order to sustain a conviction for any controlled substance analogue, the government must prove beyond a reasonable doubt that the defendant knew the substance he was dealing with was a controlled substance, and the jury must be instructed accordingly. Here, the jury was instructed incorrectly. RFA. 1526. Thus, the jury was instructed incorrectly with regard to controlled substance analogues when the district court directed a verdict for the prosecution. Since each of the six counts of conviction required proof of possession of a substance that was an analogue at some point relevant to Mr. Muhammad's case, the failure to properly instruct the jury requires that each conviction be reversed.

This instruction is inconsistent with the central holding of *McFadden*, "even in prosecutions involving an analogue, [i]f a controlled substance conviction must be supported by evidence that the defendant 'knew that the substance with which he was dealing was a 'controlled substance.'" *McFadden*, 576 U.S. at 194. Such knowledge is a necessary element of any conviction under § 841, so the jury instruction was erroneous, and that error was not harmless.

Under the Federal Constitution's Sixth Amendment guarantee to an accused of the right to a jury trial in a criminal prosecution, a judge's directed verdict is not sustainable on appeal.

CONCLUSION

Petitioner, Rasheed Ali Muhammad, has been deprived of basic fundamental rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution and seeks relief in this Court to restore those rights. Petitioner prays this Court will issue a writ of certiorari and reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted on this 21st day of April 2022.

Rasheed Ali Muhammad
PRO SE REPRESENTATION