No. _____

In the
Supreme Court of the United States

DEMARCO TEMPO, Petitioner-Appellant

v

UNITED STATES OF AMERICA, Respondent-Appellee.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

I. Should the government be required to prove proximate cause in addition to but-for causation for the "death results" enhancement in 21 U.S.C. § 841?

II. Is the death-or-injury enhancement pursuant to 21 U.S.C. § 841(b)(1)(C) unconstitutionally vague?

III. Did the district court judge improperly and inaccurately state the law in its jury instructions when it permitted the jury to utilize the *Pinkerton* theory of liability to apply the death-or-injury enhancement pursuant to 21 U.S.C. § 841(b)(1)(C)?

PARTIES TO THE PROCEEDINGS

Demarco Tempo is the Petitioner in this cause, as he was the defendant in the District Court for the Eastern District of Michigan, Southern Division, wherein the Respondent was the United States of America. On appeal to the Sixth Circuit Court of Appeals Mr. Tempo was the appellant and the United States of America was the appellee.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States of America v Demarco Tempo, Case No. 2:16-cr-20414

Judgment entered on February 19, 2020

United States of America v Demarco Tempo, Case No. 20-1177

Judgment affirmed on January 21, 2022

Rehearing en banc denied on March 11, 2022

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Petitioner Demarco Tempo respectfully prays that a Writ of Certiorari issue to the State of Michigan to review the judgment of the Federal District Court for the Eastern District of Michigan in Case No. 2:16-cr-20414, the and the Sixth Circuit Court of Appeals in Docket No. 20-1177. Petitioner Tempo was convicted of Conspiracy to Distribute and Possess With Intent to Distribute a Kilogram or More of Heroin; Death or Serious Bodily Injury Resulting From Use of Controlled Substance, in violation of 21 U.S.C. § 846; Conspiracy to Possess Firearms in Furtherance of a Drug-Trafficking Crime, in violation of 18 U.S.C. § 924(o); Possession of a Controlled Substance, Serious Bodily Injury Resulting, in violation of 21 U.S.C. § 841(a)(1); Possession of a Controlled Substance, Serious Bodily Injury Resulting, in violation of 21 U.S.C. § 841(a)(1); Distribution of a Controlled Substance, Death Resulting, in violation of 21 U.S.C. § 841(a)(1); and Possession of a Controlled Substance With Intent to Distribute, Near a School, in violation of 21 U.S.C. § 841(a)(1).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The instant Petition is timely filed within 90 days of March 11, 2022, the date of the Sixth Circuit Court's Order denying Petitioner's Petition for Rehearing *en banc*.

OPINIONS AND ORDERS BELOW

The Judgment of the Federal District Court for the Eastern District of Michigan is included as App. 56. The Opinion of the Sixth Circuit Court of Appeals denying Petitioner's appeal from the United States District Court for the Eastern District of

Michigan is included as App. 1, and the Sixth Circuit Court's Order denying Petitioner's Petition for Rehearing en banc is included as App. 64.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 841 (b)(1)(C)

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of

such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Demarco Tempo was convicted in federal court and a judgment of sentence was entered on February 19, 2020 (Case No. 2:16-cr-20414) (App. 56-62). The Sixth Circuit Court of Appeals affirmed the convictions on January 21, 2022 (App. 1-55), and also denied a Petition for Rehearing *en banc* was on March 11, 2022 (Case No. 20-1177) (App. 64).

B. Statement of Relevant Facts

Detective Craig Bankowski, a task force officer with the DEA, testified that an investigation into heroin and fentanyl began in January of 2016, and the name "Polo"

and two identifiable phone numbers related to the purchases, associated with the name Demarco Tempo, kept coming up (Transcript, RE 708, Page ID # 4353-4355). He tracked a Dodge Durango driven by Mr. Tempo, and associated the name "Polo" with Mr. Tempo (Transcript, RE 708, Page ID # 4366-4368). The Warren police department and DEA executed search warrants for several vehicles and dwellings (Transcript, RE 708, Page ID # 4377-4378; 4388). Mr. Tempo was observed driving a Dodge Durango, a white Dodge Challenger that he would park in the garage of 3858 Martin, and was observed going to a house on Strasburg "at least once a day" with multiple phones in his hand (Transcript, RE 708, Page ID # 4402-4403; 4405-4406; 4427; 4413-4414).

Warren Police Officer David Villerot worked undercover and purchased heroin from a group known as "Polo", called number (248) 688-3399, and claimed to speak to Mr. Tempo (Transcript, RE 709, Page ID # 4526-4530; RE 710, Page ID # 4673). Warren Police Officer Nicholas Lienman recorded pictures and videos of the purported "Polo" organization, and observed Mr. Tempo drive a white Challenger (Transcript, RE 710, Page ID # 4718-4724; 4759-4760).

Special Agent Louis Scirri executed a search warrant at 12634 Hamburg, and recovered narcotics trafficking items (Transcript, RE 708, Page ID # 4778-4786).

Detective Kevin Dailey searched the residence on 24343 Flower Avenue in Eastpointe, and he maintained surveillance of a white Challenger (Transcript, RE 711, Page ID # 4865-4869). He found suspected narcotics at the residence, and the parties stipulated that the substance weighed 379.8 grams and contained cocaine (Transcript, RE 711, Page ID # 4874-4876). He also claimed that he found documents addressed to

Mr. Tempo in a closet of the residence, and in a closet in the basement (Transcript, RE 711, Page ID # 4879-4885).

Sgt. Dean Caldwell searched19504 Strasburg, and the parties stipulated that 16.7 grams of a substance containing cocaine and 138.3 grams of a substance containing crack cocaine were recovered from the residence, while a handgun was recovered from the garage (Transcript, RE 711, Page ID # 4905-4906, 4912-4915, 4921-4922). Warren Police Lt. Matthew Dillenbeck searched 15652 Eastburn, and seized $1,900 (Transcript, RE 711, Page ID # 4973-4979). Special Agent Brandon Kushel searched 3858 Martin Street, and found two cell phones on a bedroom windowsill (Transcript, RE 711, Page ID # 4985-4991). Special Agent Scott Smith indicated that the K-9 dog "alerted" to areas inside (Transcript, RE 711, Page ID # 5000-5012).

Task Force Officer Eric Lindblade and assisted in numerous arrests and obtained fingerprints from Mr. Tempo (Transcript, RE 713, Page ID # 5017-5051). Anastasia Petruncio, a latent print examiner, tested a Hefty Ziplock bag and eight sandwich bags, and indicated that 9 of the 11 latent prints tested "favorably" to the card of Mr. Tempo (Transcript, RE 713, Page ID # 5061-5069).

William Dennis testified that he knew Mr. Tempo and Sadler as half-brothers of his son, claimed he observed Mr. Tempo cut heroin for sale in 2009, and claimed that he showed him how to turn powder cocaine into crack cocaine in 2014 (Transcript, RE 713, Page ID # 5130-5140, 5143). He claimed that Mr. Tempo's phone was used for the drug sales (Transcript, RE 713, Page ID # 5142-5145). He bought a house on 15431

Spring Garden and sold it to Mr. Tempo (Transcript, RE 713, Page ID # 5149-5153). He observed Mr. Tempo answering phones while at Strasburg in 2016, and then have other people deliver drugs (Transcript, RE 713, Page ID # 5157-5158). He denied seeing anybody bring money back to Mr. Tempo, but then later "remembered" observing people bring money back to Mr. Tempo (Transcript, RE 713, Page ID # 5158-5162). He never heard anyone call themselves "Polo" or "Polo Group" (Transcript, RE 713, Page ID # 5165). He also claimed that one of the "workers" tasted some of the substance at the Strasburg location in 2016 and stated, "that's that fentanyl"; and Mr. Tempo allegedly stated "That's what everyone wants" (Transcript, RE 713, Page ID # 5168-5171). He claimed that Mr. Tempo always had large amounts of cash (Transcript, RE 713, Page ID # 5173-5174). Although customers would call and ask for "Polo", he never heard Mr. Tempo use the name "Polo" (Transcript, RE 713, Page ID # 5179-5180).

Forensic scientist Miranda Comsa retrieved Mr. Sadler's DNA via buccal swabs, as well as samples from the firearm recovered from the Eastburn address (Transcript, RE 706, Page ID # 4230-4234), and forensic scientist Andrea Young indicated that, along with other contributors, DNA was found on the firearm that was recovered from Eastburn (Transcript, RE 706, Page ID # 4244).

Warren Officer Brandon Bradshaw recovered a round of ammunition from the Eastburn residence, and heard Mr. Sadler state that the guns and drugs found at the address belonged to him, and that he could provide information on high lever narcotics traffickers (Transcript, RE 706, Page ID # 4252-4257). He claimed that Sadler spoke

to Mr. Tempo in an adjoining cell, but couldn't make out what Mr. Tempo said in response (Transcript, RE 706, Page ID # 4261-4263).

Forensic scientist Jodi Corsi swabbed the firearms for potential skin cells (Transcript, RE 715, Page ID # 5231-5234), and forensic scientist Erica Anderson was unable to extract DNA profiles from the firearms that were swabbed (Transcript, RE 715, Page ID # 5238-5240). Forensic scientist Jennifer Jones testified that codefendant Sadler's DNA was not on the Smith & Wesson trigger swabs (Transcript, RE 715, Page ID # 5248).

Hannah Fenn testified that from December of 2015 through June of 2016, she had a dealer known by the name of "Polo", who she would contact through a number that she "thought" ended in 3399 (Transcript, RE 715, Page ID # 5264-5272). After she was arrested in 2016, she identified individuals who had sold her heroin through the 3399 number, including an individual who described white heroin as "kill shit" (Transcript, RE 715, Page ID # 5275-5295).

Olivia Palazzola purchased from the "Polo" organization in 2015 through number (248) 640-3399 (Transcript, RE 715, Page ID # 5336-5340). She indicated that the heroin was "really good" when it was a light off-white color (Transcript, RE 715, Page ID # 5359).

Jamie Dabish purchased heroin from the "Polo" organization before and after overdosing (Transcript, RE 705, Page ID # 3943-3944, 3970). She contacted the "Polo" organization through number (248) 640-3399 (Transcript, RE 705, Page ID # 3947; 3968).

Amacio Alexander pleaded guilty in this case, worked for an individual named G.T., who G.T. worked for Mr. Tempo (Transcript, RE 705, Page ID # 4028-4030, 4032-4040). He received the drugs from G.T., and would give the money to G.T. (Transcript, RE 705, Page ID # 4042-4047).

Randy Odish, a "Polo" customer, called through number (248) 640-3399 (Transcript, RE 717, Page ID # 5414-5418). The heroin he received was brown in color, but his friend overdosed from heroin that was white (Transcript, RE 717, Page ID # 5429-5430, 5436-5445).

Jennifer Pointer purchased from the "Polo" organization until March 31, 2016, using number (248) 640-3399 (Transcript, RE 717, Page ID # 5526-5528). Heroin was seized from her, which contained detectable amounts of fentanyl (Transcript, RE 721, Page ID # 5583-5584).

Marko Tomic obtained heroin from the "Polo" organization, and that he would get high with Jamie and Anoosh (Transcript, RE 721, Page ID # 5662-5669). Anoosh Baghdassarian purchased heroin that he noticed was white (Transcript, RE 721, Page ID # 5677). His heroin was seized, and it contained detectable amounts of fentanyl (Transcript, RE 721, Page ID # 5678-5681).

Matthew Haggart bought heroin from the "Polo" organization, and used two numbers -- one ending in 5598, and one ending in 3399 (Transcript, RE 722, Page ID # 5769-5774, 5783). The color of the heroin changed to white, which felt stronger (Transcript, RE 722, Page ID # 5785-5786). He was with Dave Grzywacz, who appeared to overdose after they had purchased heroin from the "Polo" organization (Transcript,

RE 722, Page ID # 5796-5800). He was also with Grzywacz on March 13, 2016, when the police seized heroin (Transcript, RE 722, Page ID # 5803-5808).

Dave Grzywacz bought heroin from the "Polo" organization, and he used two numbers -- (248) 640-3399 and (248) 688-5598 (Transcript, RE 722, Page ID # 5855-5858). He stated that the color of the heroin changed on the day that he overdosed (Transcript, RE 722, Page ID # 5862).

Dan Magda purchased heroin from the "Polo" organization, using number (248) 640-3399 (Transcript, RE 722, Page ID # 5894-5896). The color of the heroin changed to a white color, and he was told that it had been cut with fentanyl (Transcript, RE 722, Page ID # 5907-5910).

Christina Yako purchased heroin from the "Polo" organization (Transcript, RE 723, Page ID # 5960-5968, 5974). The heroin looked different when she overdosed on February 20, 2016 (Transcript, RE 723, Page ID # 5976-5977, 5983).

Dr. Bernardino Pacris, an Oakland County Medical Examiner, conducted an autopsy and investigation into the death of an Anoosh Baghdassarian, and indicated that cause of death was drug abuse related to the high fentanyl levels, and that the manner of death was "undeterminable" (Transcript, RE 723, Page ID # 6041-6047).

As the coordinator of the investigation, Special Agent Christopher Hess focused on an individual named "Demarco Temple" (Transcript, RE 723, Page ID # 6054-5916). He was involved with a controlled purchase on January 29, 2013, by calling the phone number ending in 3399 and using a confidential informant (Transcript, RE 723, Page ID # 6058-6069).

Special Agent Michael Stepp collected the phone number (248) 640-3399 as the number for the "Polo" organization (Transcript, RE 723, Page ID # 6077-6078). Sgt. Scott Herzog conducted surveillance of the controlled purchase (Transcript, RE 724, Page ID # 6111-6114). Officer Villerot identified the voice that spoke to the informant as Mr. Tempo (Transcript, RE 724, Page ID # 6129).

Monica Ramirez, a probation officer, interviewed Mr. Tempo in 2009, and he supplied the number (248) 688-5598 as his cell phone number (Transcript, RE 724, Page ID # 6136-6139).

Francine Leatherwood testified that Mr. Tempo and codefendant Sadler are half-brothers to her son, William Dennis Jr. (Transcript, RE 791, Page ID # 7868-7870). Sadler purportedly called her in March of 2018, and stated that her son was testifying against him and Mr. Tempo (Transcript, RE 791, Page ID # 7870-7873). Someone called later and threatened her, but she insisted that the caller was not Mr. Tempo or Sadler (Transcript, RE 791, Page ID # 7875-7876).

Det. Eric Lindblade gave cell phone records to a DEA analyst for numbers 3399 and 5598, and indicated that a forensic scope of each phone was not done due to the age of the phone (Transcript, RE 791, Page ID # 7902-7907). Det. Lindblade interpreted language as references to drug transactions in text messages purportedly sent from Mr. Tempo's and Sadler's phones (Transcript, RE 791, Page ID # 7912-7966).

Robert Witt, intelligence analyst for the DEA, analyzed cell phone toll records and cell tower data for phone numbers (248) 640-3399 and (248) 688-5598 (Transcript, RE 791, Page ID # 7998-7999). He detailed when the phones were moved, at rest, and

their locations from March 25, 2015 to June 21, 2016 (Transcript, RE 791, Page ID # 7803-7832; RE 726, Page ID # 6375-6406).

Mr. Tempo was convicted as charged, except for possession of a firearm in of a drug trafficking crime, for which he was acquitted (Transcript, RE 736, Page ID # 6847-6851). The Court imposed concurrent 360-month terms of imprisonment on all counts (Transcript, RE 774, Page ID # 7664). Notice of Appeal was timely filed (Notice of Appeal, RE 764, Page ID # 7568).

The Sixth Circuit Court of Appeals affirmed the convictions on January 21, 2022 (App 1-55), and denied a Petition for Rehearing *en banc* was on March 11, 2022 (Case No. 20-1177) (App 64).[1]

REASONS FOR GRANTING THE WRIT

The Sixth Circuit majority opinion addressed issued of national significance: When a district court fails to instruct the jury that it must also determine whether a defendant was in the chain of distribution, if it found the defendant liable of the death-or-injury-results enhancement under a *Pinkerton* theory, is the error subject to harmless error analysis? Although the Sixth Circuit panel agreed that the district court plainly erred in this omission, it reviewed the issue for "plain error" because this panel claimed that Mr. Tempo lodged his objection to *Pinkerton* on different grounds in the district court than what was presented on appeal. In doing so, the Sixth Circuit majority opinion, ignored intra-circuit stare decisis, which holds that the death-or-injury-results enhancement cannot apply if the defendant is convicted on a

[1] The Record Entry Numbers (RE) are from the District Court for the Eastern District of Michigan.

Pinkerton theory unless the jury also finds that the defendant was in the chain of distribution. This Court should exercise its discretionary appellate jurisdiction and supervisory power to resolve the conflicting decisions on this important issue of federal law. Sup. Ct. R. 10(a).

In addition, the language on all of the elements of § 841(b)(1)(C) charged in this case is an unconstitutional expansion by allowing for a conviction based on language that is unconstitutionally vague, in that it fails to provide adequate notice of the specific conduct that is proscribed and because it permits arbitrary enforcement by government officials.

Finally, this case presents an ideal vehicle to address the question that is still left open by this Court in *Burrage v United States*, 134 S. Ct. 881, 887 (2014): whether proximate causation, or the foreseeability of the resulting death, need also be proven under 21 U.S.C. § 841(b)(1)(C), where death or serious injury "results from" the use of a controlled substance, a defendant charged with drug trafficking faces a significantly enhanced penalty.

I. THE GOVERNMENT SHOULD BE REQUIRED TO PROVE PROXIMATE CAUSE IN ADDITION TO BUT-FOR CAUSATION FOR THE DEATH-OR-INJURY ENHANCEMENT PURSUANT TO 21 U.S.C. § 841(b)(1)(C)

Mr. Tempo's counsel filed a pretrial motion that in part argued that the a violation of 21 U.S.C. § 841(b)(1)(C) requires a showing of proximate cause (Pretrial Motion, RE 220, Page ID # 1041-1085). The judge ruled that the statute did not require a showing of proximate cause, while acknowledging that the Sixth Circuit had not yet ruled on the issue (Order denying Pretrial Motion, RE 270, Page ID # 1295). At the

jury instruction conference Tempo objected to a proposed instruction requesting that the Court so instruct, citing this Court's decision in *Burrage v United States*, 571 US 204 (2014). The Court overruled the objection, stating that the instruction setting forth "but for" was accurate based upon the law and the evidence presented (Transcript, RE 727, PAGE ID # 6624-6625).

In a motion for new trial, Mr. Tempo cited the case of *United States v Jeffries*, Case No. 5:16-cr-180 (N.D. Ohio Oct. 1, 2018), where U.S. District Judge Solomon Oliver, Jr., granted a new trial on the basis of the failure to give a jury instruction that required a showing of proximate in a death enhancement case under 21 U.S.C. § 841(b)(1)(C), reasoning that in *United States v Martinez*, 588 F3d 301, 318 (CA6, 2009), the Sixth Circuit found that the nearly identical language of 18 U.S.C. § 1347(a), a health care fraud statute punishing conduct that "result[ed] in death," required proximate cause as a "fundamental principle of criminal law." *Jeffries*, Order, p. 13. Although the Sixth Circuit reversed that holding in *United States v Jeffries*, 958 F3d 517 (CA6, 2020), that decision was a 2-1 decision, and the dissenting opinion focused on the fact that the language of the statute is ambiguous. While this Court denied certiorari in that case in 2020, this issue should be reviewed since this issue of federal law has not yet been settled by this Court.

In *Burrage*, while this Court held that § 841(b)(1)(C) requires the jury be instructed on but-for causation, *Burrage v United States*, 571 US at 211, this Court left open the question of whether proximate causation, or the foreseeability of the resulting death, need also be proven. As the dissenting judge noted in *Jeffries*, proximate cause

"is a long-established and familiar principle in criminal law." *United States v Jeffries*, 958 at 530 (Donald, J., dissenting).

The statutory language of § 841(b)(1)(C) is ambiguous, as it does not specify the level of causation required. In this regard, Judge Donald noted that, "because the language is ambiguous and Congress did not reveal a statutory purpose to the contrary, the Court should follow the common law and the dicta of the Supreme Court and require proof of proximate cause when applying the "death results" enhancement in § 841." *United States v Jeffries*, 958 at 531 (Donald, J., dissenting). The rule of lenity should apply in this case and requires an interpretation of § 841 which favors a proximate cause requirement. Without this Court's intervention in Mr. Tempo's case, the result is that Mr. Tempo stands convicted pursuant to a strict liability enhancement, which is generally disfavored in criminal law.

Such a result will affect not only Mr. Tempo, but the many other defendants charged under this statute being tried without holding the government to the proper burden of proof as to proximate cause. Therefore, review by this Court is appropriate.

II. THE DEATH-OR-INJURY ENHANCEMENT PURSUANT TO 21 U.S.C. § 841(b)(1)(C) IS UNCONSTITUTIONALLY VAGUE.

Criminal statutes must have set standards for enforcement so that basic policy decisions are not delegated to the police, judges or juries for resolution on an *ad hoc* basis. Mr. Tempo contended that 21 U.S.C. § 841(b)(1)(C) is unconstitutional as being vague, and the District Judge denied a motion to dismiss on this basis (Order denying Pretrial Motion, RE 270, Page ID # 1295). Contrary to this ruling, Mr. Tempo maintains that the statute is unconstitutionally vague both because it fails to provide

adequate notice of the specific conduct that is proscribed and because it permits arbitrary enforcement by government officials.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v City of Rockford*, 408 US 104, 108 (1972). To determine whether a statute is unconstitutionally vague, courts employ a two-part test. The test requires courts to ask, first, whether the statute provides adequate notice of the prohibited conduct, and, second, whether the statute lends itself to arbitrary enforcement. *Kolender v Lawson*, 461 US 352, 357-358 (1983). When a statute lacks even minimal guidelines for what constitutes the forbidden criminal activity, it is unconstitutionally vague, since criminal statutes cannot leave "judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v Pennsylvania*, 382 US 399, 402-403 (1966).

In order to avoid convictions for constitutionally protected conduct, "[c]rimes must be defined with appropriate definiteness", *Pierce v United States*, 314 US 306, 311 (1941), and must provide "ascertainable standards of guilt", because "[m]en of common intelligence cannot be required to guess at the meaning of the enactment." *Winters v New York*, 333 US 507, 515 (1948). Mr. Tempo's argument is that the statute as applied to him gave the trier of fact unstructured and unlimited discretion to determine whether he committed the offense. As stated, the statute fails to specify an *actus reus*, or what physical acts constitute "distribution of a controlled substance." Although the statute contains the language, "knowing or intentional", it fails to specify a *mens rea*, or whether an actual mental intent is required, and is devoid of any

definitions for the terms. The language of the statue also describes two penalty schemes that are directly contradictory. Given the "or both" language contained in the first sentence, the penalty provision would appear to allow a court to consider the imposition of a prison term or a fine to be alternatives: "such person shall be sentenced to a term of imprisonment . . . a fine . . . or both." The language that concludes the subparagraph, however, is a strong indication that the statute calls for a mandatory term of imprisonment: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein." The language is directly contradictory, and this lack of clarity on the face of 841(b)(1)(C) constitutes a notice deficiency, raising serious due process concerns.

Mr. Tempo also argues that the statute is facially overbroad. The statute on its face continues to leave our courts guessing as to what Congress intended, so surely it cannot be held to provide fair notice to a person of ordinary intelligence. This is especially true since § 841(b)(1)(C) is unclear as to what conduct is prohibited and what consequences will be applied for violating the statute.

Accordingly, 21 U.S.C. § 841(b)(1)(C) must be found unconstitutional and the convictions for counts one, and three through seven, must be vacated.

III. THE DISTRICT COURT JUDGE IMPROPERLY AND INACCURATELY STATED THE LAW IN ITS JURY INSTRUCTIONS WHEN IT PERMITTED THE JURY TO UTILIZE THE *PINKERTON* THEORY OF LIABILITY TO APPLY THE DEATH-OR-INJURY ENHANCEMENT PURSUANT TO § 841(b)(1)(C).

The District Court Judge instructed the jury that Mr. Tempo could be found guilty under any of the three alternative theories of liability: (1) as a principal, (2) as an aider and abettor, or (3) as a co-conspirator under the *Pinkerton* theory[2] (Transcript, RE 753, Page ID # 7346; 7349; 7355). Prior to trial, counsel for Mr. Tempo repeatedly objected to this instruction as being applied to a drug conspiracy under § 846 that is subject to the mandatory minimum penalty set forth in § 841(b)(1)(C). *See*, (Pretrial Transcript, RE 279, Page ID # 1335-1346); (Transcript, RE 727, Page ID # 6625-6627). Because *Pinkerton* does not apply to death enhancements on substantive distribution counts, and can only apply to defendants who were "part of the distribution chain" to the victim, the jury instructions alleging otherwise constituted harmful, reversible error.

In its Published Opinion, this panel appeared to agree that that the district court plainly erred when it gave this instruction to the jury: "Here, the district court gave a *Pinkerton* instruction but not a chain-of-distribution instruction on Tempo's substantive charges. Because the district court failed to instruct the jury that, ***if it found Tempo liable under a Pinkerton theory***, it must also determine whether he was in the chain of distribution, the district court plainly erred." (*United States v Kevin*

[2] This refers to the doctrine whereby a person may be held liable for crimes committed by a co-conspirator if those crimes are within the scope of the conspiracy, committed in furtherance of the conspiracy, and are reasonably foreseeable as a consequence of the conspiracy. *Pinkerton v United States*, 328 US 640, 647-648 (1946).

Sadler and Demarco Tempo, Doc No. 61-2, p 52)(emphasis in original).

However, the panel went on to hold that, "[u]nlike Sadler's conspiracy conviction—and unlike the defendants in *Hamm* who could be found liable only on a *Pinkerton* theory—a rational jury could have found, beyond a reasonable doubt, that Tempo was a principal in the crime ***and/or*** an aider and abettor." *(United States v Kevin Sadler and Demarco Tempo*, Doc No. 61-2, p 52)(emphasis in original). The conclusion of the panel simply does address Mr. Tempo's argument the district court's omission of a chain-of-distribution instruction is on all fours with *Hamm and Shields*, and that the result of a remand is dictated by that authority. As *Hamm and Shields* made clear, the death-or-injury-results enhancement cannot apply if the defendant is convicted on a *Pinkerton* theory ***unless*** the jury also finds that the defendant was in the chain of distribution. In this case, the jury was never instructed that it had to find that Mr. Tempo was in the chain of distribution, because no such instruction was given. The district court simply rejected the contention that a *Pinkerton* instruction was inapplicable. Because it is certainly probable that some (if not all) of the jurors erroneously applied the *Pinkerton* theory of liability to the sentence enhancement, the panel was required to reverse under the authority of *Hamm and Shields.* By refusing to do so, the panel improperly overruled existing settled precedent, and review by this Court is appropriate.

Mr. Tempo argued that the district court improperly omitted a chain-of-distribution instruction, which was necessary because the jury may have convicted him of substantive offenses under § 841 solely under a *Pinkerton* conspiracy

theory. Mr. Tempo was deprived of Due Process by the District Court's erroneous instruction when it failed to instruct the jury that, if it found Mr. Tempo liable under a *Pinkerton* theory, it must also determine whether he was in the chain of distribution. Both defendants argued that the district court's jury instructions regarding the enhancement charge was legally incorrect because it omitted a chain-of-distribution instruction.

In its decision, the majority of the panel vacated codefendant Sadler's sentence and held: "[h]ere, the jury found that Sadler was part of the "Polo" conspiracy, but the jury did not consider whether Sadler was "part of the chain of distribution" of the drugs that killed or injured the victims . . . [h]e is entitled to have a jury decide whether he was in the chain of distribution. Therefore, we vacate his sentence and remand on this question." (*United States v Kevin Sadler and Demarco Tempo*, Doc No. 61-2, p 51). The panel chose not to apply the same remedy to Mr. Tempo, holding: "Because Tempo lodged his objection to *Pinkerton* on different grounds than he now presents, we review the district court's omission of a chain-of-distribution instruction for plain error. (*United States v Kevin Sadler and Demarco Tempo*, Doc No. 61-2, p 52). This led to codefendant Sadler being granted relief, while Mr. Tempo was denied relief. The panel's Opinion in this regard sets a dangerous precedent, in that it substantially diminishes a defendant's proper standard of review.

The government focused on the *Pinkerton* theory of liability during its closing arguments, when arguing for convictions as to all the offenses charged (Transcript, RE 730, Page ID # 6704-6717; 6782-6784), even though the Sixth Circuit has held that a

jury may not use a *Pinkerton* theory of liability to apply a death-or-injury sentencing enhancement under § 841(b)(1)(C). *See*, *United States v Hamm and Shields*, 952 F3d 728 (CA6, 2020). In that case, the lower court had allowed the jury to apply the enhancement under the theory of *Pinkerton* liability, which allows members of a conspiracy to be held liable for foreseeable acts committed by other members. The Court held on appeal that *Pinkerton* does not apply to death enhancements on substantive distribution counts, and that the death enhancement can only apply to defendants who were "part of the distribution chain" to the victim, as the Sixth Circuit held in *United States v Swiney*, 203 F3d 397 (CA6, 2000). The *Pinkerton* theory of liability can be used to convict a defendant for substantive offenses related to the conspiracy, but it does not extend to allowing the jury to apply sentencing enhancements. The jury instructions alleging otherwise constitutes harmful, reversible error. *United States v Hamm and Shields*, 952 F3d at 744-748.

In this case, there was no showing that Mr. Tempo played any part in the distribution chain that led to an overdose victim's death. Mr. Tempo's alleged actions (answering telephone calls in a drug conspiracy and occasionally driving around with actual street-level drug dealers) were so far removed from the death and injuries in the instant case, the instruction was improper. As a result, the Jury Instruction improperly and inaccurately stated the law on when a defendant convicted of a drug conspiracy under § 846 is subject to the mandatory minimum penalty set forth in § 841(b)(1)(c), as held by *United States v Swiney*, 203 F3d at 399.

The district court erred by giving the *Pinkerton* liability instruction, and this

Court must, therefore, vacate Mr. Tempo's convictions and remand the question of whether to apply the 21 U.S.C. § 841(b)(1)(C) sentencing enhancement. Therefore, review by this Court is appropriate.

CONCLUSION

For all of the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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