No.

IN THE SUPREME COURT OF THE UNITED STATES

DARNELL PEARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a charge of drug distribution resulting in "death or serious bodily injury" under 21 U.S.C. §§ 841(a)(1) and (b)(1)(c) requires the government to prove that (1) the defendant knew the type of drug at issue, and (2) the death or serious bodily injury were reasonably foreseeable?

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OPINION BELOW

The court of appeals issued a memorandum disposition at —Fed. Appx.—, 2022 WL 807411 (9th Cir. 2022).

JURISDICTION

The court of appeals filed its decision on March 16, 2022. App. 1.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL AUTHORITIES

21 U.S.C. § 841(a)(1) provides that "it shall be unlawful for any person knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]"

21 U.S.C. § 841(b)(1)(C) provides that when a defendant violates section 841(a)(1) and "death or serious bodily injury results from the use of such substance[,]" the person "shall be sentenced to a term of imprisonment of not less than twenty years or more than life[.]"

[1]As used herein, "App." refers to Mr. Pearson's consecutively-paginated Appendix; "ER" to his Excerpts of Record before the Ninth Circuit; and "ECF No." to the Ninth Circuit's docket report.

STATEMENT OF THE CASE

This tragic case arises out of four fentanyl overdoses on January 7, 2019, two of which resulted in death. ER 146-151.

At issue in Count One are three young men who were celebrating a birthday. ER 345, 358-59. To liven up the party, one man obtained what he thought was cocaine, but upon snorting the powder, all three men overdosed on fentanyl. ER 166-68, 360-64. One of the men died. ER 166-68.

At issue in Count Two is a 35-year-old mother of two who struggled with cocaine addiction: she passed away at her mother's home after ingesting a white powder that also turned out to be fentanyl. ER 166-68, 446, 448, 454-55, 482, 699.

The government accused Darnell Pearson—purportedly a low level cocaine dealer at the time—of distributing powder at issue, and it thus charged him with two counts of fentanyl distribution resulting in death and serious bodily injury under 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). ER 146-51, 759, 794. Based on the government's "death results" accusation, both counts carried an enhanced mandatory minimum sentence of 20 years. 21 U.S.C. § 841(b)(1)(C).

At trial, there was no dispute that all the primary (and alleged) actors wrongly believed they were involved with cocaine rather than fentanyl—a far more dangerous substance—and thus that all four overdoses resulted from a mistake. *See* ER 539, 758, 773, 791.

The jury instructions, however, did not require the jurors to find that Mr. Pearson knew he was dealing fentanyl. Instead, the district court only required the jury to find that Mr. Pearson "knew that it was fentanyl *or some other federally controlled substance*[.]" ER 31 (emphases added). Similarly, the instructions did not require the jurors to find that death or serious bodily injury were foreseeable to Mr. Pearson. Instead, the court instructed the jurors that "the government need not prove that the" deaths and serious bodily injury were "a foreseeable result of the fentanyl distribution[.]" ER 31-32.

After the jury returned guilty verdicts (ER 121-22), Mr. Pearson appealed. As pertinent here, he argued that under section 841, the jury should have been required to find that (1) he knew the type of drug at issue, and (2) death or serious bodily injury were reasonably foreseeable to him. ECF No. 9 at 57-58. The court of appeals rejected Mr. Pearson's arguments based on existing circuit precedent. App. 3.

ARGUMENT

Drug cases are the most common type of prosecution in federal court. *See* United States Sentencing Commission, *2021 Sourcebook*, *Federal Offenders by Type of Crime*.[2] In this case, Mr. Pearson asks the Court to construe two important features of the Controlled Substances Act ("CSA"), both of which the courts of appeals have gotten wrong over compelling dissents. *See* Sup. Ct. R. 10(c).

A. SECTION 841'S *MENS REA* REQUIREMENT APPLIES TO DRUG TYPE.

The first question is whether section 841 applies its *mens rea* requirement—"knowingly or intentionally"—to the *type* of drug at issue, particularly where, as here, the nature of the drug ultimately leads to an enhanced penalty under section 841(b). *See* 21 U.S.C. §§ 841(a)(1) & (b)(1)(C). As indicated, the courts of appeals have answered this question in the negative, *viz.*, that the defendant is not required to know precisely what controlled substance is involved. *See United States v. Collazo-Aponte*, 281 F.3d 320, 326 (1st Cir. 2002); *United States v. King*, 345 F.3d 149, 152-53 (2nd Cir. 2003); *United States v. Barbosa*, 271 F.3d

[2]https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Figure02.pdf (last visited June 10, 2022).

438, 458 (3rd Cir. 2001); *United States v. Brower*, 336 F.3d 274, 276-77 (4th Cir. 2003); *United States v. Betancourt*, 586 F.3d 303, 309 (5th Cir. 2009); *United States v. Dado*, 759 F.3d 550, 570-71 (6th Cir. 2014); *United States v. Barlow*, 310 F.3d 1007, 1012 (7th Cir. 2002); *United States v. Ramos*, 814 F.3d 910, 915 (8th Cir. 2016); *United States v. Collazo*, 984 F.3d 1308, 1333 (9th Cir. 2021) (*en banc*); *United States v. De La Torre*, 599 F.3d 1198, 1204-05 (10th Cir. 2010); *United States v. Colston*, 4 F.4th 1179, 1187 (11th Cir. 2021); *United States v. Branham*, 515 F.3d 1268, 1275-76 (D.C. Cir. 2008).

These holdings, however, are incorrect. As Judge Fletcher recently explained in *Collazo*, *supra*—joined by four dissenting colleagues—the government should be required to "prove the defendant 'knowingly or intentionally' distributed the actual controlled substance . . . charged" if it "seeks enhanced penalties" under section 841(b). *Collazo*, 984 F.3d at 1337-38 (Fletcher, J., dissenting). Judge Fletcher's conclusion flows from two primary considerations.

One is this Court's longstanding presumption of *mens rea* for all elements of a crime, a doctrine that both (i) gives room for mitigation based on mistakes of fact, and (ii) provides fair notice to defendants even if

Congress fails to "clearly state its intention to require *mens rea* as part of the definition of a crime." *Id.* at 1338-39, *citing inter alia United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978); *Morissette v. United States*, 342 U.S. 246, 251 (1952); *Staples v. United States*, 511 U.S. 600, 619 (1994). Second is this Court's holding in *Alleyne v. United States*, 570 U.S. 99 (2013), under which "the specific controlled substance" at issue should be deemed an element of the "aggravated" crime that results from the combined effect of sections 841(a)(1) and 841(b). *See id.* at 1340-43. Applying this two-step analysis, Judge Fletcher found it "easy" to conclude that "the *mens rea* requirement specified in § 841(a)(1) applies to the acts and mandatory penalties specified in" section 841(b), since "Congress did not intend in § 841 to impose mandatory sentences of five, ten and twenty years, and maximum sentences of life, based on mistakes of fact and unintentional acts." *Id.* at 1341-43.

In recent years, this Court's cases have continued to emphasize the importance of *mens rea* requirements, which "protect criminal defendants against arbitrary or vague federal criminal statutes[.]" *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring), *citing Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) *and*

Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009). In this case, —which involves accidental harm based on an undisputed mistake of fact—the Court should seize the opportunity to do so again.

B. SECTION 841 REQUIRES REASONABLE FORESEEABILITY FOR "DEATH RESULTS" ENHANCEMENTS.

The second question is whether the CSA mandates a reasonable foreseeabilty requirement—*i.e.*, proximate causation—for "death results" offenses. The Court granted certiorari on this issue in *Burrage v. United States*, 571 U.S. 204, 209-10 (2014), but ultimately decided *Burrage* on other grounds, thus leaving the issue unresolved.

Much like the *mens rea* requirement just described, the courts of appeals have answered this question "no," *viz.*, that a "death results" offense does not require the death (or injury) to be foreseeable. *See United States v. Soler*, 275 F.3d 146, 152-53 (1st Cir. 2002); *United States v. Robinson*, 167 F.3d 824, 830-31 (3rd Cir. 1999); *United States v. Patterson*, 38 F.3d 139, 144-45 (4th Cir. 1994); *United States v. Jeffries*, 958 F.3d 517, 520-24 (6th Cir. 2020); *United States v. Harden*, 893 F.3d 434, 447-49 (7th Cir. 2019); *United States v. McIntosh*, 236 F.3d 968, 971-73 (8th Cir. 2001), *abrogated on other grounds* by *Burrage*, 571 U.S.; *United States v. Houston*, 406 F.3d 1121, 1123-25 (9th Cir. 2005); *United States v.*

Burkholder, 816 F3d 607, 621 (10th Cir. 2016); *United States v. Webb*, 655 F.3d 1238, 1250 (11th Cir. 2011).

As above, however, these holdings are incorrect, as the dissenting jurists in *Jeffries* and *Burkholder* persuasively explained. In their respective dissents, Judges Donald and Briscoe both began from the premise that this Court's grant of certiorari in *Burrage*, in and of itself, suggests ambiguity in the language of section 841(b). *Jeffries*, 958 F.3d at 525-26 (Donald, J., dissenting); *Burkholder*, 816 F.3d at 622-23 (Briscoe, J., dissenting). Proceeding from that premise, Judge Donald then found a reasonable foreseeability requirement contained in section 841 by, *inter alia*, (1) observing that proximate cause is a fundamental concept in the criminal law, (2) noting, by contrast, that strict liability is disfavored in the criminal law, (3) opining that no sound policy exists for eliminating a proximate cause requirement from section 841(b), and finally (4) that the rule of lenity mandates a defense-favorable interpretation. *Jeffries*, 958 F.3d at 530-32 (Donald, J., dissenting). In pertinent part, Judge Briscoe's dissent adopted a similar analysis. *Burkholder*, 816 F.3d at 623-28 (Briscoe, J., dissenting).

In Mr. Pearson's case—where everyone involved believed the powder was cocaine rather than fentanyl—a reasonable foreseeability requirement could have made a significant difference at trial. The Court should use this case as an opportunity to provide the much-needed guidance it omitted from *Burrage*.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Dated: June 14, 2022

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APPENDIX

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DARNELL PEARSON, Defendant-Appellant.	No. 20-10239 D.C. Nos. 1:19-cr-00013-DAD-SKO-1 1:19-cr-00013-DAD-SKO MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted February 10, 2022
Pasadena, California

Before: CLIFTON and M. SMITH, Circuit Judges, and S. MURPHY III,** District Judge.

Defendant Darnell Pearson asks this court to vacate his conviction on two counts of fentanyl distribution resulting in death, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and remand his case for a new trial, or to vacate his sentence

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

and remand for resentencing. The parties are familiar with the facts, and so we do not recount them here. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We affirm.

Mr. Pearson challenges the admission of some of the evidence used against him at trial: text messages between him and one of the deceased, Lakenya Carter, and a photograph from the night of his arrest. Any error in the admission of this evidence was harmless because it is more probable than not that the disputed evidence did not materially affect the verdict. *See United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002). The other, unchallenged evidence on the record, including cellphone location data and consciousness of guilt evidence, is overwhelmingly incriminating. *See United States v. Carpenter*, 923 F.3d 1172, 1183 (9th Cir. 2019). Other text messages were admitted establishing drug distribution and the specifics of the relationship between Mr. Pearson and Ms. Carter. The district court gave limiting instructions to the jury on the use of evidence. The challenged evidence would not have had a material effect on a reasonable juror. Further, we review the admission of the testimony identifying Mr. Pearson as the source of the drugs for plain error, and we find no plain error affecting substantial rights.

Mr. Pearson also challenges his restitution order on appeal, but made no timely objection, so we review for plain error. *See United States v. Fu Sheng Kuo*,

620 F.3d 1158, 1163 (9th Cir. 2010). Under plain-error review, if we find an error, that is plain, and affects substantial rights, we can exercise our discretion and notice the forfeited error when it seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 1163-64. Here, the presentencing report (PSR) wrongly advised the district court that restitution was required pursuant to the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A. The district court adopted the recommendations of the PSR and did not announce its own statutory basis for the restitution order. This was erroneous because the MVRA does not apply to this offense. However, Mr. Pearson is not prejudiced by the restitution order. Another statute, the Victim Witness Protection Act (VWPA), 18 U.S.C. § 3663(a)(1)(A), authorizes restitution for this offense, and the district court did consider Mr. Pearson's financial condition in the PSR, as required under the VWPA. *See* 18 U.S.C. § 3663(a)(1)(B)(i)(II). The error does not affect the fairness, integrity, or public reputation of judicial proceedings and so we do not exercise our discretion to reverse and remand on this issue.

Mr. Pearson's argument that the district court wrongly instructed the jury on the elements of the charged offenses is foreclosed by current circuit precedent. *See United States v. Collazo*, 984 F.3d 1308, 1315 (9th Cir. 2021) (en banc); *United States v. Houston,* 406 F.3d 1121, 1122-23 (9th Cir. 2005).

AFFIRMED.