No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AARON MICHAEL SHAMO

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

William D. Lunn
Oklahoma Bar Number 5566
Counsel of Record for Petitioner
320 S. Boston, Suite 1130
Tulsa, Oklahoma 74103
918/582-9977

QUESTIONS PRESENTED.

In 1986, Congress passed the Anti-Drug Abuse Act, which provided for a mandatory life without parole sentence for drug offenders who distributed very large quantities of specific drugs. At the time, 21 U.S.C. 812 listed Fentanyl as a Schedule II controlled substance. The word Fentanyl does not appear in the 1986 enhancement statute found at 21 U.S.C. 841(b)(1)(A), where some common drug names appear after their scientific names, such as phencyclidine (PCP) or lysergic acid diethylamide (LSD). Only the scientific chemical compound for fentanyl appears, which is N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide in subsection (vi), which also makes reference to analogues for N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide. This suggests Congressional intent in enacting 21 U.S.C. 812 was to make not only the chemical compound for fentanyl but all its analogues of varying potency fall under the broader term "Fentanyl." Petitioner was charged with distribution of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide under the first clause of 21 U.S.C. 841(b)(1)(A), which listed the chemical compound, but the government never introduced any evidence he had ever been in possession of that specific compound. Instead, the government referred only to Petitioner distributing Fentanyl throughout the trial, which presumably could have been any of the fentanyl-related compounds of different potencies. Petitioner's counsel did not base his motion for judgment of acquittal on the government's failure to prove that Petitioner had ever been in possession of or distributed N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide. Without consultation with his client, Petitioner's counsel agreed to an instruction from the district court that read "Fentanyl (also referred to as N-phenyl-N-[1-(2-phenylethyl)-4 piperidinyl] propanamide) is a controlled substance within the meaning of the law." The evidence at trial strongly suggested Petitioner had not distributed the potent opiate N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide at all. Did Petitioner's counsel's actions constitute a waiver of the argument that the Petitioner had not distributed the chemical compound N-phenyl-N-1-(2-phenylethyl)-4-piperidinyl] propanamide, or were his actions a forfeiture of the issue that the government had not proven an essential element of the crime Petitioner was charged with?

Does this Court's decision in *Harmelin v. Michigan* automatically preclude consideration of a cruel and unusual punishment argument for a first time 25-year-old drug distribution offender?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Aaron Michael Shamo, was a defendant in the district court and was the appellant in the Tenth Circuit. Mr. Shamo is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

The Respondent is the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

APPENDIX

PETITION FOR WRIT OF CERTIORARI

Aaron Michael Shamo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's controlling decision, see Appendix at page 31, is reported at *United States v. Shamo*, 36 F.4th 1067 (10th Cir. 2022).

JURISDICTION

The Tenth Circuit issued its decision on June 10, 2022. Mandate was issued in the case on July 5, 2022. This Court has jurisdiction under 28 U.S.C. Sect. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first question involves application of the Due Process Clause of the Fifth Amendment to the Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,…nor be deprived of life, liberty, or property, without due process of law…"

The second question involves application of the cruel and unusual punishment clause of the Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Petitioner was charged in the District Court of Utah in a second superseding indictment (CA 10, Vol. I: pg. 83) with thirteen felony counts: (1) continuing criminal enterprise to possess with intent to distribute and distribution of more than 12,000 grams of a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, under 21 U.S.C. 848, the first clause of 21 U.S.C. (b)(1)(A)(vi) and 21 U.S.C. 812; (2)(3) and (4) aiding and abetting the importation of a controlled substance under 21 U.S.C. 952; (5) possession of 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide with intent to distribute under 21 U.S.C. 841(a)(1), the first clause of 21 U.S.C. 841(b)(1)(A)(vi) and 21 U.S.C. 812; (6) aiding and abetting the distribution of a Schedule I or II substance that caused death by distributing N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide under 21 U.S.C. 841

(a)(1); (7) manufacture of alprazolam, a Schedule IV controlled substance under 21 U.S.C. 841(a)(1); (8) and (9) knowing and intentional adulteration of drugs while held for sale under 21 U.S.C. 331(k) and 333(b)(7); (10) aiding and abetting the use of the U.S. Mail in furtherance of a drug trafficking offense under 21 U.S.C. 843(b); (11) conspiracy to commit money laundering under 18 U.S.C. 1956(h); (12) money laundering promotion and concealment under 18 U.S.C. 1956 (a)(1)(B)(i); and (13) engaging in monetary transactions in property derived from specified unlawful activity under 18 U.S.C. 1957(a). Following a 15-day trial, the jury found him guilty on all counts except count six, causing the death of another. The district court, stating it had no discretion (III:1859), sentenced Petitioner to a mandatory life term under count one and ran all the other sentences, regardless of statutory maximums, concurrent to that sentence (see Judgment at I:2720). Several months later, when the district court sentenced the other co-defendants who had all been in involved in distribution of the same amount of fentanyl as the Petitioner to sentences none of which exceeded 54 months, the judge stated he

had no discretion in sentencing Petitioner to count one and, had he had discretion, would never have sentenced him to the life without parole term of imprisonment (CA10 Supp ROA Vol. III, pg. 5). Petitioner filed a timely notice of appeal (I:2726).

STATEMENT OF FACTS

This appeal initially addresses whether Petitioner's trial counsel deliberately waived the government's requirement to prove Petitioner had distributed the chemical compound N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, as required for mandatory sentencing enhancements under 21 U.S.C. 848 and 21 U.S.C. 841(b)(1)(A)(vi), or whether trial counsel acted negligently in failing to object to the government's failure to present any evidence about the compound because he mistakenly believed the statute applied to only one chemical compound of the drug commonly called Fentanyl.

In 1986, Congress enacted the Anti-Drug Abuse Act, which redefined the offense categories for many drug offenses, increased maximum penalties and set often severe mandatory minimum penalties for many offenders. See *Burrage v. United States,* 571 U.S. 204, 209 (2014). As originally enacted, the Controlled Substances Act, 21 U.S.C. 801 et. seq., tied penalties for drug offenses to both the type of drug and quantity involved with no provision for

mandatory sentences. *DePierre v. United States,* 564 U.S. 70, 75 (2011). One such drug covered in the Controlled Substances Act was "Fentanyl," where it was listed as a Schedule II drug in 21 U.S.C. 812 (1984). The word 'fentanyl' refers to a specific chemical compound known as N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide. But the *term* 'Fentanyl,' particularly as used in 21 U.S.C. 812 (1984), appears to refer to any one of some 1400 chemical compounds in the scientific and patent literature that include all analogues of 'fentanyl' that contain the term fentanyl in the scientific compound's name. See Petitioner's Opening Brief at page 30)(citing CA10, Supplemental Appendix filed 5/19/21 at page 67). Examples of the various analogues that include the 'fentanyl' name and are included as Schedule II controlled substances under 21 U.S.C. 812 are 3-allylfentanyl, 3-methybutyrfentanyl, 4-fleurofentanyl, or 4-phenylfentanyl. *Id.* These different Fentanyl compounds have different potencies, some much less severe than the actual chemical compound 'fentanyl.'

This broader application of multiple Fentanyl compounds appears most telling in how Congress constructed the mandatory criminal penalties when it enacted in Anti-Drug Abuse Act of 1986 found in 21 U.S.C. 841 and 21 U.S.C. 848. Under 21 U.S.C. 848's continuing criminal enterprise provision, which was the statute Petitioner was convicted under in count

one, a defendant could be subjected to a life without parole sentence based on the following pertinent provisions (Petitioner's charge in italics):

> Section 848 – Continuing criminal enterprise
> .
> .
> (b) any person who engages in a continuing criminal enterprise shall be imprisoned for life…if –
> (1) such person is the principal administrator, organizer or leader of the enterprise or is one of several such principal administrators, organizers or leaders; and
> (2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(A) of this title…

The "substances described in subsection (b)(1)(A)" are as follows:

> (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin…
> .
> .
> (iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
> (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
> (vi) *40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenyl)-4-piperidynyl] propanamide* or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenyl)-4-piperidynyl] propanamide…

There is no legislative history for Public Law 99-579, which is the Anti-Drug Abuse Act. It is noteworthy, however, that as Congress set out chemical compounds such as phencyclidine in subsection (iv) and lysergic acid diethylamide in subsection (v), it placed in parentheses the common

term for those compounds, "PCP" and "LSD." Congress did no such thing for N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide in subsection (vi), which would have limited the application of 21 U.S.C. 812's term "Fentanyl" to that singular chemical compound, and no other. Instead, by not writing the subsection as "N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide (Fentanyl)," Congress indicated that the term Fentanyl contained in 21 U.S.C. 812 applied to both N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide and *all* of the potential 1400+ analogues that have as a part of their chemical compounds the word "fentanyl."

In this case, Petitioner was not charged broadly under 21 U.S.C. 848 and 21 U.S.C. 841(b)(1)(A)(vi) with being a principal administrator, organizer, supervisor and leader of a criminal enterprise that distributed 12,000 grams or more of a mixture or substance containing fentanyl or *any of its analogues*. Instead, he was charged with distributing that amount of the fentanyl compound N-phenyl-N-[1-(2-phenylethyyl)-4-piperidinyl] propanamide (I:83). Proof that he distributed that compound was essential.

The evidence in the case strongly suggested that the "Fentanyl" controlled substance Petitioner distributed could not possibly have been the potent scientific fentanyl chemical compound N-phenyl-N-[1-(2-phenylethyl)-4 piperidinyl] propanamide. The government introduced Arthur

Simone, a senior medical advisor with the Food and Drug Administration, who described the use of the scientific fentanyl compound in hospital settings as "a potent opiod analgesic" (II:1359). "Dust in the medication can cause harm to whoever takes it," he testified (II:1363). The scientific fentanyl compound is used only for invasive procedures "like colonoscopy or labor and delivery or intensive care patients" where pain might be severe, he explained (II:1373). "You would not leave a fentanyl patient alone," Simone stated (II:1376). In his practice, "a tenth of a milligram would be a common dose to start with" (II:1382). Even if 1-4 milligrams were given to patients, Simone said, "in all likelihood if there is no intervention they would die" (II:1384).

The Fentanyl distributed by Petitioner had none of these characteristics. Petitioner, when he was only 24, and his co-defendant started out in 2014 selling their extra Adderall pills online (I:2135). The business quickly evolved to ordering powder from China said to be Alprazolam or Fentanyl (II:339). A pill press was acquired and soon pills were made containing the Alprazolam powder or the Fentanyl powder and were sold over the Internet as Xanax and Oxycodone (I:2175). The boxes of "Fentanyl" Petitioner ordered arrived from China in a corrugated box with "a generic label and a generic description" on the outside that held nothing but a clear plastic

package inside containing a white power but no labeling or any other sign of chemical authenticity (II:327-330). Although the government introduced chemical experts in its case who said the white powder and the pills later made by Petitioner and his codefendants contained "fentanyl," the government never produced any evidence through its chemists that the "fentanyl" they found was actually N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, the chemical compound that Petitioner was actually charged with, instead of any one of the other less-potent fentanyl analogues that would legally meet the definition of Fentanyl under 21 U.S.C. 812 (see CA10, Supplemental Appendix 5/19/22 at page 53).

The fact that petitioner could not have been distributing the scientific chemical compound described by Dr. Simone was underscored during Petitioner's cross-examination conducted by the government. When asked how much "Fentanyl" he had gotten from China and placed in each pill he pressed, Petitioner testified he "put about a milligram in each pill" (II:1649). But, according to Dr. Simone, if a person were to ingest such a quantity of the scientific compound fentanyl used in hospitals, "in all likelihood if there's no intervention they would die (II:1384)." No such dire consequences ever happened, however. The government introduced evidence that Petitioner's customers bought 458,946 "Fentanyl"-laced pills, which

the government claimed comprised 45 kilograms of a mixture or substance containing "Fentanyl" that Petitioner had distributed (II:960). But the government never proved *multiple deaths* occurred from the ingestion of so many pills, as Dr. Simone's testimony would suggest, much less that *even one death* had occurred. In count six, jurors found Petitioner not guilty of causing the death of someone who had taken a few of Petitioner's pills along with a bottle of vodka and cocaine, who had died, according to the coroner, from "multiple drug intoxication." II:1063, 1078, 1087, 2132. In fact, the government introduced hundreds of pages of customer responses to the pills bought by Petitioner's customers. There were 366 pages of positive feedback: "Awesome product" (II:956, Supp. Appx. filed 5/19/21 at 83). The government could produce only 9 pages of negative or neutral customer feedback (Supp.Appx at 103). Co-defendant Drew Crandall, who helped construct the pill press apparatus and set up the store that sold the illegal pills online, testified as a witness for the government: "No one ever mentioned an overdose," he said (I:2214).

The government never presented any evidence Petitioner had been in possession of N-phenyl-N-[1-(2-(phenylethyl)-4-piperidinyl] propanamide. No government or defense witness ever used the term and all of the laboratory reports analyzing substances seized by agents either at

Petitioner's house, the house of his co-defendant packagers, or from any of the co-defendant couriers, only refer to the chemical found in the seized substance as "Fentanyl." CA10, Supp Appx at 53. Petitioner moved for judgment of acquittal on count one based on insufficiency of the evidence: "The government has failed to present sufficient proof from which any rational juror could conclude beyond a reasonable doubt that Mr. Shamo knowingly and intelligently violated 21 U.S.C. 848" (I:955). The problem with the government's case was that "Fentanyl" based on 21 U.S.C. 812, which lists "Fentanyl" as a Schedule II controlled substance, and the construction of 21 U.S.C. 841(B)(1)(b)(vi), which does *not* place the chemical compound name "Fentanyl" after N-phenyl-N-[1-(2-phenylethyl)-piperidinyl) propanamide, indicates that the term "Fentanyl" listed in 21 U.S.C. 812 applies to both the chemical compound and any one of its analogues containing the term 'fentanyl.' A case based on the allegation under 21 U.S.C. 848 that a defendant violated the statute by distributing Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-piperidinyl] propenamide required proof that a defendant, and, in particular, this Petitioner, distributed that chemical compound exclusively and not just any one of the hundreds of other fentanyl analogues. The government failed to introduce such evidence.

Nothing in the record suggests that Petitioner's trial attorney, who admirably defended Petitioner on the other charge carrying a life without parole punishment in count six, ever understood the importance of the government proving that Petitioner possessed or distributed the specific fentanyl scientific compound N-phenyl-N-[1-(2-(phenylethyl)-4-piperidinyl] propanamide, even though the statute and the indictment specifically set out the compound as a basis for the enhanced life without parole sentence that Petitioner faced in count one, and another mandatory minimum he faced in count five. These enhanced punishment charges were different than those for illegal importation of controlled drugs in counts two and four, or adulteration in count nine, which only required proof that some Fentanyl compound was involved. Had Petitioner's trial counsel considered the issue, he would have obtained an independent drug test to see if the compound was present in either the powder seized coming from China or any of the fake "Fentanyl"-laced Oxycodone pills Petitioner distributed. But there is no indication he ever asked for such chemical tests. Even more obvious, he should have specifically mentioned the government's utter failure to introduce any evidence that Petitioner had obtained, possessed or distributed N-phenyl-N-[1-(2-phenylethyl)-piperidinyl] propanamide as a part of his motion for judgment of acquittal. If Petitioner's trial counsel had

understood the importance of the government introducing proof of the specific fentanyl compound, what possible purpose would be served in not raising the issue? The only reasonable conclusion one can reach is that Petitioner's counsel did not perceive the issue at all and that is why the issue was not raised.

The first issue in Petitioner's appeal before this Court is whether Petitioner waived the argument that the government failed to prove he distributed the specifically charged chemical compound or whether he forfeited it under the Court's holding in *United States v. Olano,* 507 U.S. 725, 733 (1993). *Olano* explains the difference. Wavier requires "an intentional relinquishment or abandonment of a known right." *Id.,* quoting *Johnston v. Zerbst,* 304 U.S. 458, 464 (1938). In contrast, "forfeiture is the failure to make the timely assertion of a right." *Olano,* 507 U.S. at 733. The evidence from the record indicates Petitioner's counsel forfeited the issue by negligently failing to raise it.

The Tenth Circuit Decision

The Tenth Circuit decision in Petitioner's case acknowledges that "the government does not dispute that the witnesses never mentioned the chemical name for fentanyl." Opinion at pg. 11. Nevertheless, the court agreed with the government on appeal and held that Petitioner "deliberately

waived" the requirement that evidence of the specific chemical compound listed in the indictment be proved "through his affirmative acceptance that the term fentanyl as used by the witnesses throughout trial was synonymous with its chemical name." *Id.*

The Tenth Circuit cited several examples of the Petitioner's actions to support its waiver finding. Opinion at 13. Prior to trial Petitioner's counsel submitted proposed jury instructions containing the following language:

DEFENDANT'S PROPOSED INSTRUCTION NO. 20

> "Fentanyl (also referred to as N-phenyl-N-[1-(2-phenylethyl)-4 piperidinyl] propanamide) is a controlled substance within the meaning of the law."
>
> "Likewise, Alprazolam is a controlled substance within the meaning of the law."

This proposed instruction was identical to the government's proposed instruction No. 23 submitted to the district court eight days earlier (CA10, #241 at pg. 29).

The Tenth Circuit noted that this instruction was similar to what the district court itself gave in Instruction No. 27:

INSTRUCTION NO. 27

> "Several of the following instructions will refer to controlled substance."
>
> "Fentanyl (also referred to as N-phenyl-N-[1-(2-phenylenthyl)-4 piperidinyl] propanamide) is a controlled substance within the meaning of the law."

"Likewise, Alprazolam is a controlled substance within the meaning of the law."

During the instruction conference, which followed denial of Petitioner's motion for judgment of acquittal, the district court discussed Instruction 27 with the parties. "Can't you just say Fentanyl is a controlled substance within the meaning of the law?" Petitioner's counsel stated at the conference (II:1624). The Government responded at the conference by stating, "The trouble that you run into with Fentanyl in particular is when you look at 21 U.S.C. 841, and as it's going through the types of drugs for which there are minimum mandatory sentences based on the quantity, it uses a chemical name" (II:1684).

The Tenth Circuit found that Petitioner's counsel's actions in not requiring the government to prove the specific chemical compound required by the statute and charged in the indictment was a "deliberate strategy," Opinion at 12, to forego proof of a compound that was almost certainly inconsistent with the potent scientific fentanyl compound used in hospitals described by the government's witness Dr. Simone. The Tenth Circuit said that Petitioner's counsel chose instead to focus on the other section of 21 U.S.C. 848 that required the government to prove that Petitioner had been

the "principal administrator, organizer, supervisor and leader of the criminal enterprise." Opinion at 12-13.

REASON FOR GRANTING THE WRIT AS TO THE FIRST QUESTION

NOTHING IN THE RECORD SUGGESTS THAT PETITIONER'S COUNSEL DELIBERATELY CONSIDERED 18 U.S.C. 841'S REQUIREMENT THAT THE GOVERNMENT PROVE DISTRIBUTION OF THE ACTUAL SCIENTIFIC COMPOUND LISTED IN THE STATUTE IN A CASE BASED ON THE FIRST CLAUSE OF SECTION (b)(1)(A)(vi). INSTEAD, PETITIONER'S COUNSEL NEGLIGENTLY OVERLOOKED THAT THE PROVISION APPLIED TO MANY DIFFERENT CHEMICAL ANALOGUES THAT HAVE THE FENTANYL COMPOUND IN THEM, MANY WITH DIFFERENT POTENCIES

Proof of an essential fact or element that provides for or increases a mandatory minimum in a criminal case is required beyond a reasonable doubt. *Alleyne v. United States,* 570 U.S. 99 (2013). In this case, the government admitted at the instruction conference it was aware it was required to prove Petitioner distributed N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide if it wished to convict him of 21 U.S.C. 848 and 21 U.S.C. 841(b)(1)(A)(vi) that mandated a life without parole sentence. The Tenth Circuit acknowledged the Government never proved this essential fact. Rather, the Tenth Circuit found that failure to prove its case was Petitioner's fault. By not objecting to the instruction offered by the government tendered by the court to the jury, the Tenth Circuit held Petitioner waived, rather than forfeited, the issue. Petition disagrees with the Tenth Circuit's finding that

"defendant's stipulation was not the product of carelessness by defense counsel in giving away a winning defense." Opinion at 12.

All of the Circuit Courts have addressed *Olano's* explanation that "waiver requires an intentional relinquishment of a known right" in a manner inconsistent with the Tenth Circuit's opinion. Waiver occurs only "when a party deliberately considers an issue and makes an intentional decision to forego it." *United States v. Cruz-Rodriguez,* 570 F.3d 1179, 1183 (10th Cir. 2009). A waiver is a deliberate decision not to present a ground for relief that might be available in the law. *United States v. Cook,* 406 F.3d 485, 487 (7th Cir. 2005). An explicit agreement or stipulation constitutes a waiver of rights only if a defendant was aware of those rights. *United States v. Brown,* 849 F.3d 87, 90 (3rd Cir. 2017). A party who identifies the issue, and then explicitly withdraws it, has waived the issue. *United States v. Robinson,* 744 F.3d 293, 298 (4th Cir. 2014). A waiver occurs by the affirmative choice of a defendant to forego any remedy available to him. *United States v. Andino-Ortega,* 608 F.3d 305, 308 (5th Cir. 2010). Waivers are strong medicine, and that medicine should not be dispensed in criminal cases where ambiguity lurks. *United States v. Alphas,* 785 F.3d 775, 785 (1st Cir. 2015). An appellate court will not enforce a waiver if doing so would work a miscarriage of justice. *United States v.*

Morales-Arroyo, 854 F.3d 118 121 (1st Cir. 2017). A waiver is neither informed nor voluntary where the defendant does not understand, or is not apprised of the operation of the waiver. *United States v. Gibney,* 519 F.3d 301, 306 (6th Cir. 2008). Waiver is the product of a free and deliberate choice. *United States v. Velez,* 354 F.3d 190, 196 (2d Cir. 2004). A district court must engage in a searching inquiry to determine whether a defendant has knowingly and intelligently waived fundamental rights. *United States v. Hung Thien Ly,* 646 F.3d 1307, 1316 (11th Cir. 2011). These cases all track language from this Court decided since *Olano. Iowa v. Tovar,* 541 U.S. 77 (2004) (defendant must fully understand); *Wood v. Milyard,* 566 U.S. 463, 474 (2012) (deliberate action required). The Circuit Courts hold that waiver principles must be construed liberally in favor of the defendant. *United States v. Cates,* 716 F.3d 445, 450 (7th Cir. 2013).

There is no indication Petitioner's counsel ever considered the framework of 21 U.S.C. 812 and 21 U.S.C. 848, which implicitly rejected finding that the Fentanyl referred to in 21 U.S.C. 812 could *only* apply to the chemical compound N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide. The structure of the enhancement provision at 21 U.S.C. 841(b)(1)(A)(vi) indicated that the term Fentanyl applied to any chemical analogue of fentanyl as well. The evidence presented at trial indicated Petitioner distributed some

other Fentanyl analogue, because the pills distributed were inconsistent with the potent N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propenamide compound Petitioner was accused of distributing described by Dr. Simone. Petitioner's counsel never argued his client could not have possibly distributed the charged compound. The fact that Petitioner's counsel argued a different defense does not mean he deliberately considered the argument and rejected it. The record indicates Petitioner's counsel never considered the argument at all. Had he done so, he would have raised it in his motion for judgment of acquittal. Petitioner's counsel never uttered the word "N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide" during the entire trial. It made no sense, after the parties had rested, for Petitioner's counsel to waive away his client's best defense at the instruction conference.

Nor could Petitioner's counsel, in not objecting to the government's instruction later tendered by the district court, be accused of "intentionally adopting a litigation position that was fundamentally inconsistent with" the argument that the government was required to prove Petitioner had distributed the specific compound N-phenyl-N-[1-(2-phenylethyl)-4 piperidinyl] propanamide. Opinion at 13. The instruction did *not* say that the terms were synonymous. It only said that one *type* of Fentanyl was referred to as N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide.

Under the construction the 21 U.S.C. 841(b)(1)(A)(vi), there were many more chemical compounds that fell under 21 U.S.C. 812's broad definition of Fentanyl. Petitioner did not lull the government into believing that use of the word "fentanyl" at trial only applied to the chemical compound Petitioner was charged with. The government's statement at the instruction conference made clear that the government knew it had to introduce evidence of the specific chemical compound Petitioner was charged with.

Most importantly, Petitioner himself was never brought into the discussion nor apprised of the consequences of allowing the government to forego proof of the specific chemical element charged in the case and the consequences of waiving such an important burden of proof. Petitioner was not present at the instruction conference, when the Tenth Circuit held his most valid defense was waived. There was no "searching inquiry" by the district court to ensure the Petitioner understood proof of an essential element in the case would not be required.

Just as all the Circuit Courts have elaborated on what conduct is required for a valid waiver under *Olano,* many have addressed what should qualify as a forfeiture. Forfeiture is characterized by a negligent or accidental omission. *United States v. Adigun,* 703 F.3d 1014, 1021 (7th Cir. 2012). Forfeiture is less deliberate than waiver, such as an oversight, an inadver-

tence, or neglect in asserting a potential right. *United States v. Eisom,* 585 F.3d 552, 566 (1st Cir. 2009). Forfeiture is an unexplained failure to make a timely assertion of a right. *United States v. Walker,* 665 F.3d 212, 227 (1st Cir. 2011). When an attorney or defendant negligently bypasses a valid argument, the argument is forfeited not waived and the court reviews it for plain error. *United States v. Thi,* 692 F. 3d 571, 573 (7th Cir. 2012). Each of these holdings apply to what occurred in Petitioner's case.

The Court should grant certiorari in this case, not only to clarify Congressional intent with regard to the application of the term Fentanyl contained in 21 U.S.C. 812, 21 U.S.C. 848 and 21 U.S.C. 841(b)(1)(A)(vi), but also to find that the record in this case under *Olano* only supports a forfeiture that the government failed to prove Petitioner distributed 12,000 grams of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide. This case should be remanded for consideration under plain error review.

THE EIGHTH AMENDMENT ISSUE

The second question Petitioner requests the Court to consider is whether the Court's ruling in *Harmelin v. Michigan,* 501 U.S. 957 (1991), automatically precludes consideration of factors set out in *Solem v. Helm,* 463 U.S. 277 (1983), *Graham v. Florida,* 560 U.S. 48 (2010) and *Miller v. Alabama,* 567 U.S. 460 (2012) for a first-time illegal drug distribution

offender who is young, but not a juvenile. The Tenth Circuit held that *Harmelin* still remained the law and that its ruling precluded any relief for Petitioner. Opinion at 28-29.

Petitioner presented facts to support a solid case under the *Solem, Graham* and *Miller* factors. Petitioner's case did not involve violence. The punishment was life without parole, which *Harmelin* acknowledged was "the second most severe sentence known to the law," *Harmelin,* 501 U.S. at 596, and which *Solem* noted was "qualitatively different from other life sentence cases." *Solem,* 463 U.S. at 283. Petitioner was a first-time felony offender. See *Ewing v. California,* 538 U.S. 11, 15-16 (2003) (life sentence appropriate after defendant had been sent to prison twice for serious and violent crimes.). Only one other state, similar to the situation in *Solem,* would have imposed a life without parole sentence based on the crime of conviction. In *Solem,* the only other state was Nevada, 463 U.S. at 299, whereas Florida is the only state that has a life without parole punishment for a first-time drug offender. See CA10, Supplemental Appendix filed 5/19/21 at 134 for a full text of states and their penalties for first-time drug distributors. Petitioner was only 25 when he committed his crime, which is admittedly not the youth in *Miller,* but nevertheless is an age that has been recognized by this Court as not fully matured. See *Gall v. United States,*

552 U.S. 38, 57-58 (2007) ("Immaturity at the time of the offense is not an inconsequential consideration…Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of 25." *Id.,* quoting the district court).

At the time Petitioner committed his crime, fentanyl was a relatively unknown drug, much different from the scourge the government improperly argued it later became ("He knew the nation was on fire with opiods, and he poured fuel on those flames over and over and over again" – II-1765-66). Although Petitioner was the one who ordered a white powder from China that the Internet ad said was "fentanyl," neither he nor any of the codefendants in the case were aware of the potentially severe consequences that could result if the actual chemical compound were used. Appellant's Opening Brief at pages 33-35. "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham,* 560 U.S. at 67.

Although there was a total of five co-defendants in Petitioner's case who left good jobs at eBay to join in the illegal day-to-day operation of the criminal enterprise, none of those other co-defendants received a sentence greater than 54 months, a sharp contrast to Petitioner's life without parole

sentence (CA10, Supp. Vol. II). Not only should "courts…find it useful to compare the sentence imposed for the commission of the same crime in other jurisdictions," *Solem,* 463 U.S. at 291, a court should compare sentences for the same or similar conduct committed by others in the same case. The district court in this case, at the time the judge sentenced the other defendants, did just that and found Petitioner's life without parole sentence unreasonable:

> "When I was talking about long sentences and shorter sentences and how long of sentences are needed, and I think I said when I sentenced Mr. Shamo that I had no discretion in the sentencing. He was convicted and one of the charges he was convicted of mandated a life sentence. I had no discretion whatsoever. I don't know what sentence I would have given him without that mandate, but it wouldn't have been a life sentence. I am sure of that.

CA 10, Supp. Vol. III, pg 5.

As a boy, not that many years before, Petitioner earned his Eagle Scout badge (CA 10, Supp Vol I:18). His mother and sister appeared at his trial in his support and it was more than obvious Petitioner came from a good family who would continue to support him (I:2646, 2666). By any measure that considered penological justification, a life without parole sentence, as the district court recognized, made no sense in Petitioner's case. "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham,* 560 U.S. at 71. "Incorrigibility is

inconsistent with youth." *Id.,* at 73. Nothing about the Petitioner suggested an "irretrievably depraved character" who required lifelong incarceration. *Id.* Petitioner testified in his own case and admitted to violation of many of the charges against him. Following a lengthy detention prior to the highly complex trial, he witnessed first hand the problems experienced by addicts. "I never was around addiction," he testified. "It's horrible" (II:1642-1643). Given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham,* 560 U.S. at 75, there is every reason to believe the Eagle Scout would become a productive citizen.

REASON FOR GRANTING THE WRIT ON THE EIGHTH AMENDMENT ISSUE

UNDER THIS COURT'S RECENT PRECEDENTS THAT REQUIRE CONSIDERATION OF A DEFENDANT INDIVIDUALLY, THE COURT SHOULD FIND THAT SUFFICIENT INFORMATION ABOUT PETITIONER JUSTIFIES A FINDING THAT A SENTENCE OF LIFE WITHOUT PAROLE IS CRUEL AND UNUSUAL. THE COURT'S DECISION IN *HARMELIN,* TO THE EXTENT THAT IT PRECLUDES CONSIDERATION OF AN EIGHTH AMENDMENT CHALLENGE OF A FIRST TIME ILLEGAL DRUG OFFENDER, SHOULD BE RECONSIDERED.

This Court has held that the "cruel and unusual punishment" language contained in the Eighth Amendment embodies "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). In *Gall,* the Court rejected the use of inflexible mandatory sentencing. "It has been uniform and constant in the federal

judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Gall,* 552 U.S. at 52 (quoting *Koon v. United States,* 518 U.S. 81, 98 (1996). The Tenth Circuit, understandably, could do little with Petitioner's Eighth Amendment argument because *Harmelin* stood in the way. Moreover, the Tenth Circuit noted that *Graham* and *Miller* have applied the Eighth Amendment only to juveniles. Opinion at 29. If, indeed, the Eighth Amendment evolves with the standards of decency in society, reconsideration by this Court of the *Harmelin* decision for a young man like Petitioner based on the factors set out in *Solem, Graham* and *Miller* should be appropriate.

CONCLUSION

For the reasons set forth above, Petitioner requests this Court to grant certiorari on either or both of the questions submitted.

Respectfully submitted,

_/s/_William D. Lunn_____
William D. Lunn
Oklahoma Bar Association #5566
320 S. Boston, Suite 1130
Tulsa, Oklahoma 74103
918/582-9977
wlunn@peoplepc.com