_____

No.

_____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

_____

Jeffrey J. Levine
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(312) 372-4600

CERTIFICATE OF INTEREST

The undersigned counsel of record furnishes the following Certificate of Interest:

1. The full name of every party or amicus each attorney represented in this case:

Jeffrey Johnson - Represented by Jeffrey J. Levine

2. If such party or amicus is a corporation:

(i) It's parent corporation, if any: N/A

(ii) A list of its stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus: N/A

3. The names of all law firms whose partners or associates have appeared for the party in the District Court, Circuit Court or are expected to appear for the party in this Court:

District Court: 17 CR 770	Jeffrey J. Levine North & Sedgwick, LLC. Paul Camarena Syed Hussain
Circuit Court: 21-1277	Jeffrey J. Levine
Supreme Court:	Jeffrey J. Levine

QUESTIONS PRESENTED

I. Whether the Seventh Circuit Court of Appeals incorrectly allowed the District Court's Determination that Furanyl fentanyl was a "controlled substance analogue" as the substance is classified as a Schedule 1 controlled substance pursuant to 21 C.F.R. § 1308.11(42).

II. Whether the Seventh Circuit Court of Appeals incorrectly allowed the District Court's determination that Petitioner was a career offender where Petitioner's prior "controlled substance offenses" covered a broader range of drugs than those covered by federal law.

III. Whether the Seventh Circuit Court of Appeals incorrectly allowed the District Court's failure to grant Petitioner's motion to suppress narcotics where the officers exceeded the authority granted by the search warrant.

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PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Jeffrey Johnson, respectfully prays that a writ of certiorari issue to review the August 26, 2022 decision of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, reported as *United States of America v. Jeffrey Johson*, No. 21-1277, appears in the Appendix as Appendix A.

JURISDICTION

Petitioner appealed to the Circuit Court directly from a criminal sentence of the Federal District Court. The criminal prosecution (17 CR 770) was brought pursuant to Title 21, U.S.C. § 851(a)(1) (Possession with Intent to Distribute Controlled Substances). The District Court's jurisdiction was authorized pursuant to 18 U.S.C. §3231.

The Circuit Court had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742 which confers jurisdiction from all final sentences of the United States District Courts. The Seventh Circuit decided the case (21-1277) on August 26, 2022 and the judgment was entered on August 26, 2022.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(l).

RELEVANT STATUTES AND COURT RULES

UNITED STATES SENTENCING GUIDELINE §4B1.1(a)(3)

CAREER OFFENDER

(a) A defendant is a career offender if (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense

STATEMENT OF THE CASE

A. Procedural Statement

Petitioner Jeffrey Johnson was arrested and subsequently indicted in the Northern District of Illinois, Eastern Division, in case number 17 CR 770 on November 21, 2017. The indictment alleged violations of 21 U.S.C. 841(a)(1), possession with intent to distribute controlled substance, namely, 100 grams or more of a mixture and substance containing a detectable amount of an analog of fentanyl and 100 grams or more of a mixture and substance containing a detectable amount of heroin, both being Schedule 1 Controlled Substances. A Superseding Indictment was filed on September 3, 2019. Petitioner exercised his right to trial, which was conducted from September 13, 2019, to September 20, 2019. Petitioner was found guilty.

Subsequent to the entry of the jury verdict, on July 6, 2020, based upon a *pro se* argument made by the Petitioner, the District Court relieved Petitioner's trial counsel of his representation and on July 8, 2020, appointed new counsel. Said counsel, noticing that the search conducted by the police officers was outside the limitations of the search warrant filed an Amended Motion to Quash Evidence from the Search. Petitioner argued that there was no strategic reason for Petitioner's trial counsel not to raise the issue of the scope of the search and that any mistake made at the trial level could be cured by the District Court.

The government did not address the substance of the argument but instead argued that the motion contesting the search was untimely. On December 11, 2020, the District Court denied Petitioner's arguments as untimely. Petitioner also filed an Amended Motion for a New Trial.

Petitioner argued at sentencing that, as the fentanyl analogue was a Schedule 1 controlled substance and as the prior Illinois convictions criminalized a broader category of drug than federal

statutes, the 10 year mandatory minimum sentence was not applicable.

The Court held protracted sentencing hearings on January 12, 2021 and January 26, 2021. On January 26, 2021, the Court ruled that Petitioner was a career offender and applied the 10-year mandatory minimum, pursuant to §4B1.1(a)(3). The District Court subsequently sentenced Petitioner to 132 months incarceration on February 4, 2021. Thereafter, Petitioner timely filed a notice of appeal on February 6, 2021.

After considering the written briefs and oral arguments of counsel, the Seventh Circuit Court of Appeals, in case No. 21-1277 denied Petitioner's appeal and affirmed the sentence in an opinion dated August 26, 2022. *See*: Appendix A.

B. Factual Statement

Pursuant to an application made by Chicago Police officers seeking evidence of unlawful use of a weapon by a felon, a state court judge issued a search warrant for the residence of Petitioner. The search warrant issued granted the officers' authority to search the premises for:

> Firearms, short barreled, ammunition, paraphernalia for maintaining firearms, any photographs of individuals with firearms, any records of firearm transactions which have been used in the commission of, or which constitute evidence of the offense of: Unlawful Use of a Weapon by a Felon

The warrant did not authorize the search for narcotics.

Based upon the warrant, police officers executed a search warrant at Petitioner's residence. The officers searched the residence and back porch area of the apartment. When the officers' search did not locate any firearms or ammunition, the officers expanded their search.

The officers conducting the search did not limit their search to the limitations of the search warrant. They searched automobile titles and automobile keys in the apartment in an effort to

determine whether the vehicles were stolen. Numerous officer's body cams specifically show the officers reviewing out of State automobile titles and keys. The officers discuss "running" the license plates to determine whether the vehicles were stolen, believing that the out-of state vehicle titles could be counterfeit. The officers also discuss sending out the titles to determine whether the vehicles were obtained by theft or hijacking. Other officer's body cams also record the officers searching the vehicle title and keys. The officers' approach is documented by the body cam footage which demonstrate the shift from the search for firearms and ammunition to a targeted search for narcotics. The officer's actions demonstrates that the search changed from a search for firearms pursuant to the warrant to a search for narcotics. One officer determined that drugs were being "bagged" and located what he believed was a "cooking area." Another officer stated that "this has gotta be the room for processing drugs." Thereafter, the officers are observed engaged in a general search for drugs. The target of the officers' search is demonstrated when they search the interior of ceramic liquid soap pump bottle with a small opening, open a box of tissue, use their knife to cut open small fabric packets and pick up a sock and dump out its contents.

The change the object of the search continued with the officers looking for additional narcotics. The officers then found another sock, which could not be confused for a weapon or other items listed in the warrant. The contents of the second sock was soft and weighed merely 152.6 grams. The officers then pulled down drywall and insulation from inside the wall of a back porch. As a result of the expanded unwarranted search, the officers subsequently located narcotics behind drywall in the back porch area of the residence.

On March 12, 2018, the government filed an information stating its intent to use Petitioner's prior drug convictions as the basis for increased punishment and on September 3, 2019, the

government filed a Superseding Information stating its intent to use the prior drug convictions as a basis for increased punishment.

At trial, a government witness testified that, in searching a sock, a small bag of what appeared to be narcotics fell out. It was at this time, the officer's search for drugs came to fruition. The officer testified that he believed that a table on the back porch was the "mixing area." The officer also searched of the inside of a toy truck. Another officer testified that the officers searched for anything illegal, drugs, guns etc. Petitioner's trial counsel did not cross-examine any officer regarding the limitations of the search warrant or otherwise raise the issue that the officers actions exceeded the specific parameters of the search warrant.

Government counsel, aware that the officers had exceeded the directives of the warrant, requested a jury instruction stating that the "search was legally authorized." In response to the government's request, Petitioner's counsel stipulated to giving the jury instruction. The defense offered no response to the charged crime. On September 20, 2019, the jury returned a guilty verdict.

Petitioner waived his right to a jury and agreed to a bench trial in the matter of the increased punishment pursuant to 21 U.S.C. §841(a)(1). The District Court found that Petitioner had prior final convictions for serious drug felonies for which he served more than 12 months imprisonment.

Subsequent to the entry of the jury verdict, on July 6, 2020, based upon a *pro se* argument made by Petitioner, the District Court relieved Petitioner's trial counsel of his representation and on July 8, 2020, appointed substitute counsel for Petitioner. New counsel immediately noticed that the search conducted by the police officers was outside the limitations of the search warrant and on September 30, 2020, filed an Amended Motion to Quash Evidence from the Search. Counsel argued that there was no strategic reason not to raise the issue of the scope of the search and that any

mistake made at the trial level could be cured by the District Court.

Responding, the government did not address the substance of the argument with regard to the scope of the search but instead argued that the motion contesting the search was untimely. On December 11, 2020, the District Court denied Petitioner's motion and ruled that Petitioner's arguments were untimely. Petitioner also filed an Amended Motion for a New Trial.

Thereafter, Petitioner raised numerous issues at sentencing. Specifically Petitioner's counsel argued that, as the fentanyl analogue was a Schedule 1 controlled substance and as the prior Illinois convictions criminalized a broader category of drug than federal statutes, the 10 year mandatory minimum sentence was not applicable.

The Court held protracted sentencing hearings on January 12, 2021 and January 26, 2021. On January 26, 2021, the Court ruled that Petitioner was a career offender and applied the 10-year mandatory minimum, pursuant to §4B1.1(a)(3). The Court subsequently sentenced Petitioner to 132 months incarceration on February 4, 2021. Petitioner thereafter timely filed a notice of appeal on February 6, 2021.

C. Post-Trial Proceedings

On appeal, Petitioner argued that the District Court erred when it sentenced Petitioner for an analog of fentanyl when the substance was classified as a controlled substance as 21 U.S.C. § 802(32)(A) clearly states that the definition of "controlled substance analogue" does not include " a controlled substance." Id. at § (32)(C)(I). Furanyl fentanyl is classified as a Schedule 1 controlled substance. *See*: 21 C.F.R. § 1308.11(42).

Petitioner further argued that the District Court incorrectly imposed a mandatory minimum based on prior offenses which criminalized a broader category of drugs then defined by 21 U.S.C.

§ 802(44).

Finally Petitioner argued on appeal that the District Court erred when it failed to grant Petitioner's motion to suppress the narcotics where the officers exceeded the authority granted in the search warrant. The appeal was argued before the United States Court of Appeals for the Seventh Circuit on January13, 2022 and decided on August 26, 2022. The decision upheld the District Court's decisions. *See*: App. 1.

REASON FOR GRANTING WRIT OF CERTIORARI

I. The Seventh Circuit Court of Appeals incorrectly allowed the District Court's Determination that Furanyl fentanyl was a "controlled substance analogue" as the substance is classified as a Schedule 1 controlled substance pursuant to 21 C.F.R. § 1308.11(42).

The government's indictment charged Mr. Johnson with possession with intent to distribute controlled substances. The government prosecuted the violation and the District Court sentenced Petitioner to a ten year mandatory minimum sentence on the basis that the controlled substance involved was an analog of fentanyl. However Furanyl fentanyl, the drug involved, was a Schedule I controlled substance which does not require a 10 year mandatory minium sentence.

Under the Controlled Substance Analog Act, Congress defined a controlled substance analog as a "substance that [the Food and Drug Administration] has not approved *and that is not specifically scheduled under the Act*, but that has (1) a chemical structure substantially similar to that of a controlled substance in [S]chedule I or II, or (2) an actual or intended effect is that 'substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in [S]chedule I or II.'" Joanna R. Lampe, Cong. Research Serv., R45948, *The Controlled Substance Act* (CSA)*: A Legal Overview for the 116th Congress*

(2019)(emphasis added).

Although Furanyl fentanyl may be chemically analogous to fentanyl, as of November 29, 2016 it has been a Schedule 1 controlled substance. Controlled substances are categorically *not* analogues under §802(32). Schedules of Controlled Substances: Temporary Placement of Furanyl Fentanyl into Schedule I, 81 Fed. Reg. 85873 (Nov. 29, 2016).

The fact that Furanyl fentanyl, as a controlled substance, is excluded as an analogue, was noted by government counsel in correspondence to the Illinois State Police Division of Forensic Sciences, dated October 24, 2017 stating that, with regard to this prosecution:

> ...Section 841 does not define the term [analouge], and other statutory sections in Title 21, as well as certain portions of the United States Sentencing Guidelines, exclude from the definition of an "analouge" any scheduled controlled substance. Furanyl fentanyl is formally scheduled on Schedule 1.

Furanyl fentanyl cannot be both an analog of fentanyl, and a Schedule 1 controlled substance. Defining Furanyl fentanyl as an analogue, contradicts the purpose of the analogue statute, as it was a Schedule I controlled substance at the time the offense was charged.

The definitions listed in § 802 apply to the entire sub-chapter, which includes § 841. *See*: 21 U.S.C. § 802(32) (West 2020). The statute specifically states "...as used in *this sub-chapter*... the term 'controlled substance analogue' does not include... a controlled substance." *See*: *Id.* § 802(32)(C)(i).(emphasis added). Courts have consistently applied the definitions in § 802 to all the provisions under Title 21, Chapter 13, Subchapter I - Control and Enforcement, including § 841. *See*: *Burgess v. United States*, 553 U.S. 124, 129 (2008).

When a statute includes an explicit definition, the court must follow that definition, "even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914,942 (2000). The

definition of a controlled substance analogue does not include any substance already scheduled as a controlled substance. 21 U.S.C. §802(32)(C) ("[a]s used in this subchapter... the term 'controlled substance analog'...does not include... a controlled substance.").

The government indicted the charge as a violation of the law with regard to controlled substances and has conceded, in sentencing pleadings, that "analogues are Schedule I controlled substances under federal law." Based upon the statutory definition and the fact that Furanyl fentanyl was a Schedule I controlled substance at the time Petitioner was charged, tried and sentenced, it cannot also be an defined as an analogue.

Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Any drug type and quantity that requires an enhanced sentence, must be charged and proven beyond a reasonable doubt. *United States v. Nance*, 236 F.3d 820, 825-25 (7th Cir. 2000). In this instance, the mandatory minimum enhancement was an element that was required to be demonstrated to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 113 S.Ct. 2151, 186 L.Ed.2d314 (2013).

As there is no specific guideline for furanyl fentanyl, the sentence for controlled substances should be limited to five years. 21 U.S.C. § 841(b)(1)(B)(viii). The District Court is required to make an explicit finding of the calculation of drug quantity and the offense level and how it arrived at the sentence. *Cox v. United States*, 118 S.Ct. 898 (1998). In this instance, no such determination was made by the District court. Petitioner contended on appeal, that the District Court erred in determining that Furanyl fentanyl was analogue of fentanyl, thereby subjecting him to a mandatory minimum sentence.

II. As Seventh Circuit Court of Appeals incorrectly allowed the District Court's determination that Petitioner was a career offender where Petitioner's prior "controlled substance offenses" where the state statutes cover a broader range of drugs than those covered by federal law.

Because Illinois criminalizes a broader category of drugs then that defined at 21 U.S.C. § 802(44), Petitioner's past drug convictions cannot be a basis for a statutory minimum. *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

A state crime may qualify as a predicate conviction only if the elements of the state crime mirror, or are narrower than, the elements of the generic crime. *United States v. Zuniga-Galeana*, 799 F.3d 831, 833 (7th Cir. 2016). If the state law defines an offense more broadly than the federal statute, the prior conviction cannot qualify as a predicate offense. *United States v. Edwards*, 836 F.3d 831, 833 (7th Cir. 2016).

Elements of the state criminal statutes are broader than the federal statute. In Illinois, the statute prohibits distribution of 1 to 15 grams of "heroin or an analog thereof." Illinois defines "analog" as a substance that has a chemical structure substantially similar to that of a controlled substance *or* that was specifically designed to produce an effect substantially similar to that of controlled substance. 21 U.S.C. § 802(32)(A) defines an "analogue" as a substance having a chemical structure substantially similar to a controlled substance *and* either has a substantially similar effect on the central nervous system or be purported or intended to have such an effect. *United States v. Turcotte*, 405 F.3d 515, 521 (7th Cir. 2005). Therefore, the Illinois statute criminalizes a substance designed to produce effects similar to that of a controlled substance where federal law requires more, a similar chemical structure. As the elements for the Illinois statute are more expansive than the federal statute, the Illinois statute cannot be utilized for the purposes of

enhancing a sentence pursuant to 21 U.S.C. § 841(b)(1).

Sentencing Guideline § 4B1.2(b) defines a "controlled substance offense" as an offense under state law that prohibits the possession of a controlled substance (or a counterfeit substance) with intent. The Illinois state statute addressed controlled substances, counterfeit substances and controlled substance analogues. As Petitioner could have distributed a heroin analogue thereby violating the Illinois statute, and still not have been convicted of a "controlled substance offense" pursuant to the sentencing guidelines, his prior convictions cannot be deemed a serious drug felony.

The Sentencing Commission, on its own volition, added state offenses, punishable by more than one year, to drug trafficking offenses specified in § 994(h). *See*: U.S.S.G. § 4B1.2, Comment., note 1 (2009). This was done without explanation or any empirical study establishing why such severe punishment is warranted for offenders not covered by §944(h)'s plain terms. The only explanation provided, was the *post hoc* claim, inserted in the Commentary in response to court decisions holding that the Commission had exceeded its authority and that the Commission acted pursuant to its broader authority under 28 U.S.C. § 994(a) - (f), (b), (o) and (p).
See: U.S.S.G., App. C, Amend. 528 (Nov. 1, 1995).

Petitioner presented numerous objections to the government's claim (and to the PSI Report's assertion) that Petitioner was subject to a mandatory sentence due to a prior "serious drug felony."

The government argued that Petitioner's prior conviction should result in a mandatory sentence pursuant to Title 21, U.S.C. § 841(a)(1). The government contended that this was triggered by Petitioner's state convictions for manufacture/delivery of heroin.

The PSI Report indicated that Petitioner pled guilty to two cases and was sentenced concurrently, to six years in the Illinois Department of Corrections.

Allowing the use of prior offenses not prohibited under federal law subjects individuals to higher terms of imprisonment compared to similarly situated defendants.

III. The Seventh Circuit Court of Appeals incorrectly allowed the District Court's failure to grant petitioner's motion to suppress narcotics where the officers exceeded the authority granted by the search warrant.

Based upon a search warrant issued by a state judge, the police officers executed a search warrant at Petitioner's residence. The search warrant allowed a search for short barreled firearms, ammunition, paraphernalia for maintaining firearms and records of firearm transactions in connection of the offense of: Unauthorized Use of a Weapon by a Felon. The search warrant did not authorize the search for narcotics.

The officers conducting the search did not limit their search to the search warrant issued. Unable to locate weapons or ammunition as specified in the warrant, the officers instead searched for anything illegal. This is demonstrated not only by the officers' body cams, but by the trial testimony of an officer who admitted at trial that the officers searched for anything illegal, drugs, guns etc.

At the close of the evidence, government counsel requested a jury instruction to attempt to cure the fact that, not only had the officers exceeded the scope of the search warrant, but that an officer acknowledged that the officers searched for "anything." The instruction requested stated that the "search was legally authorized."

Subsequent to the trial, based upon *pro se* arguments made by the Petitioner, the District Court relieved trial counsel and appointed new counsel on July 8, 2020.

The new counsel immediately noticed that the search conducted by the police officers was outside the limitations of the search warrant and on September 30, 2020, filed a Motion to Quash

Evidence from the Search arguing that there was no strategic reason Petitioner's trial counsel did not to raise the issue of the search. Said counsel argued that any mistake made at the trial level could be cured by the District Court. That motion noted that weapons made of steel and ammunition made of brass casings and lead bullets are hard, heavy items and that the average weight of the six most popular handguns the United States is 1.5 pounds compared to the weight of the drugs found.

In responding, the government did not address the substance of Petitioner's argument but instead argued that the motion contesting the search was untimely.

The due process clause requires that proceedings be fundamentally fair. *United States v. Wicks*, 132 F.3d 383, 388 (7th Cir. 1997). Where evidence is obtained outside the specific dictates of the warrant requirement, the remedy is to exclude that evidence. The exclusionary rule requires that evidence, tainted by official wrongdoing, be suppressed. *United States v. Gravens*, 129 F.3d 974, 979 (7th Cir. 1997).

In the instant case, the search by the officers exceeded the specific dictates of the warrant issued and the officers executed the search proceeded as though they had a general warrant to search for any type of contraband. One of the officers admitted in trial testimony that the officers had not limited their search for the items listed on the search warrant but rather, searched for anything.

Rather than cure the defect, on December 11, 2020, the District Court denied Petitioner's motion with regard to the search, holding that the motion was untimely.

The adversarial nature of a trial does not relieve a trial judge of an obligation to safeguard the rights of the accused in the administration of criminal justice. Petitioner contends that the District Court erred when it failed ailing to grant the Amended Motion to Quash Evidence from the Search resulting in an unfair trial and a denial of Petitioner's Fifth Amendment right to due process.

CONCLUSION

FOR THE FORGOING REASONS, Petitioner prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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