No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JAMES RANDOLPH SHERMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

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Under Appointment by the Criminal Justice Act

QUESTION PRESENTED

The government's theory in this case was that petitioner Mr. James Randolph Sherman was the supplier of heroin and cocaine and co-defendant Mr. Lindsey Mills was the seller. Mr. Sherman was never seen with Mr. Mills during the drug sales. The government presented evidence that these two men met at each other's respective homes after the drug deals. However, law enforcement watched these meetings and did not see any exchange of drugs or money between these two friends. The government also presented evidence of unrecorded telephone calls between Mr. Sherman and Mr. Mills. No one knows what was said during these calls. Mr. Mills did not testify against Mr. Sherman and no other eyewitness implicated Mr. Sherman. Based on this speculative evidence, the jury convicted Mr. Sherman of drug conspiracy.

The question presented is:

Does the U.S. Constitution embrace a criminal conspiracy conviction when the government presents non-incriminating evidence of innocent conduct regarding what an individual may have known or intended causing the jury to speculate guilt or innocence creating unfairness to a defendant and that this "loose practice" as to conspiracy offenses "constitutes a serious

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threat to fairness in our administration of justice" and that "the minimum of proof required to establish conspiracy is extremely low" as articulated by Justice Jackson in his concurrence in Krulewitch v. United States, 336 U.S. 440 (1949)? Or should the government be required to prove each element of conspiracy beyond a reasonable doubt?

OPINION BELOW

On December 15, 2022, the United States Court of Appeals for the Ninth Circuit affirmed Mr. Sherman's appeal in United States v. James Randolph Sherman, No. 21-10167. A copy of this decision is attached hereto as Appendix "A".

JURISDICTION

On December 15, 2022, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On September 5, 2013, Mr. Sherman and his co-defendant Lindsey Mills were charged by Indictment in count one with conspiracy to distribute and possess with intent to distribute heroin and crack cocaine in violation of 21

U.S.C. §§ 846, 841(a)(1). (3 ER 443-444.)[1] In counts 2 and 3, Mr. Sherman was charged distribution of heroin in violation of Title 21 United States Code § 841(a)(1). (3 ER 443-444.)

In counts 4 and 5, Mr. Sherman was charged with distribution of cocaine base in violation of 21 United States Code § 841(a)(1). (3 ER 445.) In count 6, Mr. Sherman was charged with possession with intent to distribute cocaine base in violation of Title 21 United States Code § 841(a)(1). (3 ER 445-446.) In count 7, Mr. Sherman was charged with possession with intent to distribute heroin in violation of Title 21 United States Code § 841(a)(1). (3 ER 446.) In count 8, Mr. Sherman was charged with possession with intent to distribute marijuana in violation of Title 21 United States Code § 841(a)(1). (3 ER 446.) In count 9, Mr. Sherman was charged with manufacture of marijuana in violation of Title 21 United States Code § 841(a)(1). (3 ER 446.) The Indictment alleged a criminal forfeiture allegation pursuant to Title 21 U.S.C. § 853(a). (3 ER 447.) On September 18, 2019, count 7 was dismissed. (3 ER 362.)

On September 19, 2019, a jury found Mr. Sherman guilty on counts 1,

[1] "ER" refers to the Excerpts of Record filed in United States Court of Appeals, for the Ninth Circuit in U.S. v. Sherman, 21-10167.

2, 3, 4, 5, 6, 8 and 9 of the Indictment. (CR 195.) On May 27, 2021, the district court sentenced Mr. Sherman to a total term of 120 months. This term consists of 120 months on each of counts 1 through 6, and 8, and 9 to be served concurrently. (2 ER 22-23.)

Mr. Sherman filed his timely Notice of Appeal on June 3, 2021. (3 ER 452.) On December 15, 2022, the Ninth Circuit affirmed the decision of the district court. (App. A.)

STATEMENT OF FACTS

Mr. James Sherman and co-defendant Mr. Lindsey Mills were friends. Mr. Mills sold heroin and cocaine. The government's theory was that Mr. Sherman was the supplier of drugs to Mr. Mills. On March 14, 2012, April 26, 2012, and on June 26, 2012, Mr. Mills sold heroin or cocaine to a confidential source.

After these sales, Mr. Mills met with his friend Mr. Sherman. Law enforcement set up surveillance and watched these meetings. At no time, did agents see any exchange of money or drugs between the two men during these meetings. The government also presented evidence of unrecorded phone calls between Mr. Sherman and Mr. Mills around the time of the drug

sales, however, no one knows what they discussed.

A year later, on June 27, 2013, Mr. Mills sold cocaine to the confidential source. There was no meeting between Mr. Mills and Mr. Sherman. On July 15, 2013, the government set up a buy/bust operation arranging that the confidential source pay $31,500 for drugs. Mr. Mills was arrested. Mr. Mills did not testify against Mr. Sherman.

REASONS FOR GRANTING THE WRIT

This petition raises the question: In a conspiracy offense case, can a conviction stand when the evidence presented by the government suggests innocent conduct which would cause a jury to speculate the meaning of the innocent conduct to reach a criminal verdict? Thus, demonstrating that the minimum of proof to establish conspiracy is extremely low and the rigid standards of proof are relaxed. Krulewitch v. United States, 336 U.S. 440, 452, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

In this case, the government's theory was that Mr. Sherman was the supplier of drugs and co-defendant Mr. Lindsey Mills was the seller. Mr. Sherman argues that the government failed to present sufficient evidence to prove beyond a reasonable doubt that Mr. Sherman had knowledge that Mr.

Mills was selling drugs or that he had intent to sell drugs. The only evidence the government presented against Mr. Sherman was the following:

- Mr. Sherman and Mr. Mills met at their respective homes in cars after Mr. Mills sold cocaine or heroin. Law enforcement set up surveillance to watch these two friends meet and the agents did not see any exchange of money or drugs between these two men. (2 ER 209-218, 3 ER 335-344.)
- Unrecorded telephone calls between the two men around the time of the drug deals, but no one knows what was said. (2 ER 167-168, 209-218, 3 ER 336-344.)
- No evidence of cocaine or heroin found at Mr. Sherman's house after a search. (3 ER 300-305.)
- There was no eyewitness testimony implicating Mr. Sherman. Mr. Mills did not testify against Mr. Sherman about their meetings or phone calls.

Based on these facts, the jury convicted Mr. Sherman of serious drug charges giving him a lengthy prison sentence. This loss of liberty was based on speculation and conjecture by the finder of fact. The only evidence presented was that these two men, who are friends, met and talked on the

phone around the time of Mr. Mills' drug deals. No one saw Mr. Sherman or Mr. Mills exchange drugs or money. No one heard what Mr. Sherman or Mr. Mills said on the phone. The law is abundantly clear that "it is not a crime to be acquainted with criminals or to be physically present when they are committing crimes." U.S. v. Esquivel-Ortega, 484 F. 3d 1221, 1229 (9th Cir. 2007)

Mr. Sherman's mere presence in a car with Mr. Mills at their respective residences after Mr. Mills' drug deals and unrecorded phone calls is insufficient to show that Mr. Sherman had knowledge of the drugs Mr. Mills was selling or that he was the supplier. The jury had to strain to find Mr. Sherman had knowledge of the drugs based on speculative facts. Justice Jackson found that this type of evidence to attempt to prove conspiracy is lowering rigid standards of proof beyond a reasonable doubt to get an easy conviction:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be *no straining* to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems *chiefly*

> *to get procedural advantages to ease the way to conviction*." (Emphasis added.) Krulewitch v. United States, supra, 336 U.S. at 457.

Our Constitution's requirement that the government prove each element of the offense beyond a reasonable doubt cannot be lowered in conspiracy cases in order for the government to obtain an easy conviction. Krulewitch v. United States, supra, 336 U.S. at 457. The Fourth Circuit in United States v. Giunta, 925 F.2d 758, 765 (4th Cir. 1991) agreed with Justice Jackson: "In expounding on Justice Jackson's reservation, the Giunta court observed that a conspiracy charge was a 'potent and oft-used weapon in the prosecutorial arsenal', particularly in connection with the drug trafficking prosecutions that increasingly dominate federal criminal dockets." United States v. Burgos, 94 F. 3d 849, 859, (4th Cir. 1996) citing to United States v. Giunta, supra, 925 F. 3d at 766.

"In this connection, Giunta suggested that affirming a conspiracy conviction could act as an obfuscation lending credence to 'slippery facts and the speculations necessary to uphold the conspiracy conviction, often resulting in special risks of unfairness. Given Giunta's skepticism regarding conspiracy, the court announced that 'heightened vigilance to guard against the increased risks of speculation, though not a heightened standard, is

warranted in conspiracy prosecutions.'" United States v. Burgos, supra, 94 F. 3d at 859.

Mr. Sherman argues that a heightened vigilance to guard against increased risks of speculation should be applied in conspiracy cases. This is to avoid convictions from jurors "who are ready to believe that birds of a feather are flocked together". Krulewitch v. United States, supra, 336 U.S. at 454. Here, the prosecution was allowed to incriminate Mr. Sherman as a conspirator with Mr. Mills through meetings with each other in which no one observed any drugs or money exchange hands between the two men and unrecorded telephone calls in which no one knows what was discussed. In order to convict Mr. Sherman on this slim evidence, the jurors would have to have to rely on "slippery facts and speculation" to convict him of conspiracy. United States v. Burgos, supra, 94 F. 3d at 859.

The Ninth Circuit in this case found that the circumstantial evidence was sufficient to support the jury's convictions: "This court has long held that a defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions." (App. "A", p. 4.) Convictions based on speculative evidence in conspiracy cases should no longer be tolerated and the government should

be required to prove each element of drug conspiracy cases with proof beyond a reasonable doubt, just as our Constitution mandates.

Based on the foregoing, Mr. Sherman respectfully requests that this Court grant certiorari in this case to answer the question of whether the government's burden of proof in conspiracy cases can be lowered to allow jurors to rely on speculative facts or should the government's burden of proof in conspiracy should be "beyond a reasonable doubt."

This petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Mr. Sherman respectfully submits that the petition for writ of certiorari should be granted.

Dated: February 14, 2023

Respectfully Submitted,

Karyn H. Bucur

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Attorney for Petitioner

FILED

DEC 15 2022

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES RANDOLPH SHERMAN, Defendant-Appellant.	No. 21-10167 D.C. Nos. 2:13-cr-00302-MCE-1 2:13-cr-00302-MCE MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted November 18, 2022
San Francisco, California

Before: TASHIMA and PAEZ, Circuit Judges, and SESSIONS,** District Judge.

James Sherman ("Sherman") appeals his jury conviction for conspiracy to distribute and to possess with intent to distribute heroin and crack cocaine; two counts of distribution of heroin; two counts of distribution of crack cocaine; and possession of crack cocaine with intent to distribute in violation of 21 U.S.C.

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

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

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§§ 841(a)(1), 846. At trial, the government presented evidence showing that Sherman supplied heroin and crack cocaine to a co-conspirator ("the dealer") who then sold those drugs to a confidential government source on four occasions between March 2012 and July 2013.

On appeal, Sherman argues that: (1) the evidence at trial tended to show multiple conspiracies between himself and the dealer rather than the single, overarching conspiracy with which he was charged; and (2) the evidence was insufficient to support his convictions for conspiracy and the counts related to heroin and crack cocaine. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. *Single Versus Multiple Conspiracies.* Because Sherman did not move for judgment of acquittal as to his conspiracy conviction, *see* Fed. R. Crim. Pro. 29, we review his challenge to this count for plain error. *United States v. King*, 735 F.3d 1098, 1106 (9th Cir. 2013). "Under plain-error review, reversal is permitted only when there is (1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011) (citations omitted). "We invoke plain error in our discretion to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process." *United States v. Garcia-Guizar*, 160 F.3d 511, 516 (9th Cir. 1998).

Factors that distinguish a single conspiracy from multiple conspiracies are "the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." *United States v. Duran*, 189 F.3d 1071, 1080 (9th Cir. 1999) (citing *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984)). "A single conspiracy may involve several subagreements or subgroups of conspirators." *United States v. Hopper*, 177 F.3d 824 (1999) (citing *Bibbero*, 749 F.2d at 587).

The jury did not plainly err in convicting Sherman of a single overall conspiracy with the dealer between March 14, 2012 and July 15, 2013. At trial, the government established a pattern of communication and meetings between these same two "key participants" that the jury could reasonably have found amounted to a "method of operation [that] remained constant" across the multiple drug deals. *Duran*, 189 F.3d at 1080. Because the jury could have rationally found that the evidence in the record regarding the relevant timeframe was consistent with an overarching, ongoing agreement to supply and deal drugs, the conviction for a single conspiracy is not plainly erroneous.

2. *Sufficiency of Evidence.* Sherman also challenges the sufficiency of evidence for his convictions for conspiracy and for the offenses related to heroin and crack cocaine. At trial, Sherman moved for Rule 29 judgment of acquittal only as to count six for possession with intent to distribute crack cocaine. We

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therefore review the conviction for count six under the *Jackson v. Virginia* standard to decide whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319 (1979). We review the remaining convictions for plain error. *See King*, 735 F.3d at 1106; *see also Flyer*, 633 F.3d at 917 (explaining that, when reviewing an insufficiency claim, "it is difficult to conceive of a different result occurring from the application of plain-error review and the application of the standard test for insufficiency of the evidence").

No formal agreement is required for a conspiracy; an agreement may be inferred from the participants' acts pursuant to the scheme or other circumstantial evidence. *Hopper*, 177 F.3d at 829. Evidence is sufficient to connect a defendant to a conspiracy if it shows that the defendant had knowledge of and participated in the conspiracy. *See United States v. Vizcarra-Martinez,* 66 F.3d 1006, 1010 (9th Cir. 1995). "This court has long held that [a] defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions." *Garcia-Guizar*, 160 F.3d at 517–18 (internal quotations omitted).

The government proffered corroborative circumstantial evidence of the conspiracy from the time of each drug deal. The evidence was sufficient for a jury

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to reasonably convict Sherman of conspiracy; therefore, the conviction withstands plain-error review.

A defendant who participates in a conspiracy "may be subject to liability for offenses committed as part of that conspiracy, even if the defendant did not directly participate in each offense." *United States v. Grasso*, 724 F.3d 1077, 1089 (9th Cir. 2013) (describing liability under *Pinkerton v. United States*, 328 U.S. 640, 647 (1946)). *Pinkerton* "renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not." *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008). Distribution of heroin and crack cocaine and possession with intent to distribute crack cocaine are all foreseeable felonies in a conspiracy to distribute and possess with intent to distribute those drugs. Because the government sufficiently proved a conspiracy between Sherman and the dealer, the jury did not plainly err in finding Sherman guilty of these "reasonably foreseeable" substantive felonies resulting from that conspiracy. *Id.*

AFFIRMED.

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