No.

in the

Supreme Court

of the

United States

Term,

ADAM DEAN BROWN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

DEBORAH L. WILLIAMS
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

QUESTIONS PRESENTED

21U.S.C. § 841(A)(1) makes is a crime to "knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Does the term "knowingly or intentionally" require the Government to prove that the defendant knew what substance he or she was distributing in order to obtain enhanced penalties pursuant to subsection (b) of the statute?

21 U.S.C. § 851 provides that where a defendant has a prior "felony drug offense," and the distribution of a drug results in serious bodily injury, a life sentence must be imposed. Does the determination of whether a prior offense qualifies under the statute require that determination be made by the jury, or by a district court at sentencing?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

none

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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Supreme Court

of the

United States

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The Petitioner, Adam Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on February 9, 2023.

OPINION BELOW

The Sixth Circuit's opinion in this matter is unpublished and is attached hereto as Appendix 1.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on February 9, 2023. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

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

21 U.S.C. § 841 states in relevant part:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person **knowingly or intentionally**--
>
> (1) to **manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance**; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
>
> (b) Penalties
>
> ----
>
> (C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug

Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. **If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment**, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

STATEMENT OF THE CASE

Count Six of Petitioner Adam Brown's superseding indictment charged him with distributing a controlled substance containing fentanyl on January 24, 2018, which caused serious bodily injury to J.K. (Jeffery Keon). Brown was convicted of this offense (among others). Prior to sentencing, Brown objected to the imposition of a life sentence on this count, contending that he was entitled to a jury determination on whether he had a prior "felony drug offense" that qualified for enhancement. The court rejected this argument and imposed a mandatory life term.

The evidence supporting this count was sparse. On January 24, 2018, Jeffrey Keon overdosed and was taken to the hospital by EMTs. Hospital records produced showed only benzodiazepine in Keon's system. While he was at the hospital, Keon's mother found his drug stash, and hid it. However, when Keon returned from the hospital the next day, he asked for his drugs, and she gave them to him. Keon took them and died. The Government provided evidence that on January 24, 2018, Keon and Brown texted each other about a drug debt that Keon owed Brown. The Government also presented evidence that on the 24th, Keon's phone and Brown's phone were in the same general location. From that evidence, the Government argued that Brown delivered drugs to Keon on the 24th, that those drugs contained fentanyl, and that those drugs were what led to his overdose.

Brown was originally indicted in the Eastern District of Michigan on February 6, 2018. The indictment charged one count of distribution of a controlled substance, death resulting, in violation of 21 U.S.C. § 841, based upon a different overdose (Alex Brenner). Later, on May 15, 2018, a superseding indictment was filed charging Brown and others as follows: one count of conspiracy to distribute a controlled substance, death resulting, in violation of 21 U.S.C. § 846; distribution of a controlled substance, in violation of 21 U.S.C. § 841; two counts of possession with the intent to distribute a controlled substance, in violation of 21 U.S.C. § 841; distribution of a controlled substance (death resulting), in violation of 21 U.S.C. § 841; and distribution of a controlled substance (serious bodily injury resulting), in violation of 21 U.S.C. § 841. Prior to trial, Brown plead guilty to the two possession with the intent to distribute counts.

The Government was permitted to present text messages from Keon's phone. These messages included a request from Keon to Brown's phone asking if he had "that fire white shit." Brown responded with "I am back all the way good with the usual fire." The Government used these texts to attempt to show that the drugs ingested by Keon that caused his overdose on January 24, 2018 were from Brown.

Petitioner Brown testified in his own defense. Brown admitted to selling heroin, but indicated that he never sold fentanyl, because it would be horrible for business because it was too dangerous. He admitted that Keon was a customer of

his, but that he never distributed to him on January 24, as Keon still owed him money. Through Brown, the defense tried to introduce text messages Brown sent to Keon after his overdose (that were responded to by police pretending to be Keon), which confirmed that Brown never distributed to Keon, and that he still wanted his money owed. The jury was not permitted to hear this evidence.

During deliberations, the jury asked the court: "Under Count Six, question one, can you please clarify if we should be explicitly focusing on the word 'fentanyl' or if we should be using 'any controlled substance' in the place of 'fentanyl?" The defense requested that the court answer yes, it must be fentanyl. Instead, the court merely referred them back to the general jury instructions.

On September 5, 2019, the jury returned these verdicts: guilty as to Count 1, the conspiracy count, with a finding that "Alexander Brenner's death resulted from the distribution of heroin or fentanyl by a member of the conspiracy and during the conspiracy"; guilty as to Count 5, "distribution of a controlled substance", but not guilty of fentanyl causing the death of Alexander Brenner; and guilty of Count 6, "distribution of a controlled substance", with a finding that "Jeffery Keon would not have suffered serious bodily injury but for the use of the same fentanyl distributed by the defendant." Sentencing occurred on October 20, 2021. Counsel for Brown argued that because 21 U.S.C. § 851 required two steps to impose a life sentence,

that it required Sixth Amendment jury findings. The court rejected this argument, and imposed a life term of imprisonment, finding it was required.

Brown appealed his sentence and conviction to the Sixth Circuit, raising these issues:

1. The district court gave an erroneous instruction as to the conspiracy count which allowed the jury to convict Brown of "death results" merely on a *Pinkerton* theory of liability.

2. Brown was prevented from presenting his defense (as to Count 6) that he did not distribute the drugs which caused Keon's serious bodily injury on January 24, 2018, thus denying him due process.

3. The 21 U.S.C. § 851 enhancement requires a hybrid fact/legal determination which requires a jury finding; thus, the court's determination it could impose a mandatory life sentence on its own findings violated the Sixth Amendment.

4. The jury did not determine the type or quantity of drugs as to Count 5, thus limiting the district court to a sentencing range of 0-5 years incarceration.

5. The Government did not prove that any drug distributed by Brown was a but/for cause of Keon's overdose and bodily harm which occurred on January 24, 2018, thus requiring vacation of Count 6.

6. The Government erred in introducing a plea agreement of a co-defendant without a proper evidentiary foundation. Such admission was prejudicial.

7. Brown's prior Michigan cocaine convictions do not qualify as "controlled substance offenses," and thus Brown should be re-sentenced without the U.S.S.G. § 4B1.1 career offender adjustment.

The Sixth Circuit granted relief as to issue one, but denied relief on all other claims in a written decision filed on February 9, 2023. As to Brown's claim that the Government had not presented sufficient evidence on Count 6, the court determined "the government was not required to establish Brown *knew* that what he distributed had fentanyl; rather, all that was necessary is proof that he distributed a controlled substance. [ ] The government must also establish causation—that Keon's serious bodily injury 'result[ed] from' Brown's conduct." (Appendix 1, pp.3-4)

As to the § 851 enhancement, the court determined "Binding precedent forecloses Brown's claim. *Almendarez-Torres v. United States* expressly carved out an exception to this general jury-fact-finding rule for facts of prior convictions. See 523 U.S. 224, 226–29 (1998). Although *Almendarez-Torres* came before *Apprendi* and *Alleyne*, our caselaw makes clear that it remains good law. [ ] And we have said so in the face of a challenge to an enhancement under § 851 for a prior felony drug offense." (Appendix 1, pp.17-18)

REASONS FOR GRANTING THE WRIT

21 U.S.C. § 841 allows for imposition of a mandatory life sentence in situations where (1) a defendant knowingly or intentionally distributes a controlled substance, (2) "death or serious bodily injury results from the use of such substance", and (3) the defendant has "a prior conviction for a felony drug offense has become final." 21 U.S.C. § 841(b)(1)(C). A mandatory life sentence requires all three findings, otherwise, the statutory minimum sentence is less. The plain language of the statute requires that a defendant know what substance he or she is distributing in order to obtain an enhanced sentence. Further, the Sixth Amendment requires that a jury pass on each matter to allow the mandatory minimum sentence to be increased.

A. The term "knowingly or intentionally" requires the Government to prove that a defendant knew the type and quantity of drug he or she was distributing, in order to obtain the enhanced penalty provisions of 21 U.S.C. § 841(b)

"[O]ur criminal law seeks to punish the 'vicious will.' [ ] With few exceptions, 'wrongdoing must be conscious to be criminal.'" *Ruan v. United States*, 213 L. Ed. 2d 706, 142 S. Ct. 2370, 2376 (2022). 21 U.S.C. § 841 makes it a crime to "knowingly or intentionally" distribute controlled substances. Traditional criminal law principles therefore dictate that where the Government seeks an enhanced sentence of mandatory life imprisonment, they need to prove that the defendant knowingly and

intentionally committed each element of the offense. This includes the type of narcotic which resulted in the overdose of the victim.

In *Rehaif v. United States*, 204 L. Ed. 2d 594, 139 S. Ct. 2191 (2019), this Court held that 18 U.S.C. § 922's use of the word "knowingly" applied to each element of the offenses set forth in the statute. The Court began with the presumption that "Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct." 139 S.Ct. at 2195. The Court determined that, where Congress is otherwise silent as to scienter, this presumption applies. The Court noted that the only exceptions to this rule (other than when Congress specifically addresses scienter in the statutory language) are "in cases involving statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." *Id.* at 2197. But where, as in 18 U.S.C. § 922, the penalties range to 10 years incarceration, the exception cannot apply.

Here, the penalties are far greater than those faced by the defendant in *Rehaif*. Instead of 10 years possible incarceration, Brown was given a mandatory life sentence. Yet the Sixth Circuit held "the government was not required to establish Brown knew that what he distributed had fentanyl; rather, all that was necessary is proof that he distributed a controlled substance." (Appendix 1, pp.3-4)

In light of this Court's pronouncement in *Rehaif*, this lack of scienter requirement for 21 U.S.C. § 841(b)'s penalty provisions cannot stand.

Petitioner Brown would note that at least two circuits have determined that knowledge of the type of drug is necessary. In *United States v. Leal*, 32 F.4th 888 (10th Cir. 2022), the defendant argued that although he was involved in a drug transaction, he believed that he was dealing in marijuana, not methamphetamine. The Tenth Circuit determined there was sufficient evidence to support the conviction. The court did not rely on any argument that knowledge of type was immaterial, but determined that the Government had sufficiently proven defendant's knowledge of the substance. *Id.* at 895. In *United States v. Coby*, 65 F.4th 707 (4th Cir. 2023), the court determined that the Government "was required to show [the decedent] died from using a 'substance' containing fentanyl for whose distribution Coby was legally responsible." *Id.* at ---- Other circuits, in line with the Sixth, have determined that the Government need not prove such knowledge. See *United States v. Lara*, 23 F.4th 459, 470 (5th Cir. 2022) *United States v. Maxwell*, 61 F.4th 549, 558 (8th Cir. 2023); *United States v. Collazo*, 984 F.3d 1308, 1329 (9th Cir. 2021). Because of this clear circuit split, Petitioner Brown submits that this Court should grant certiorari on this issue and reverse the Sixth Circuit's determination that no scienter need be proven to increase the sentence to mandatory life.

Petitioner Brown would also note that this Court's determination in *Burrage v. United States*, 571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014) supports this scienter requirement. In *Burrage*, this Court held that the "death results" enhancement was an element which needed to be proven to a jury. The Court further determined that the Government must prove that the drug distributed by the defendant was the "but for" cause of the victim's death. The Court turned aside the Government's argument that the drug need only contribute to death: "in the interpretation of a criminal statute subject to the rule of lenity, [ ] we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." 134 S.Ct. at 891.

As applied to Petitioner Brown's case, it would be inconsistent for this Court to find that a jury must determine the "serious bodily injury" enhancement, while determining that a jury need not conclude that Brown knew the type or quantity of drug distributed. Given this Court's precedents, and the circuit split on this issue, certiorari review is warranted.

B. The Sixth Amendment applies to determinations regarding past convictions that require findings beyond the fact that the conviction occurred

21 U.S.C. § 841(b)(1)(C) provides that an enhanced sentence of life may be imposed if the defendant has qualifying prior "felony drug offenses." 21 U.S.C. § 802(44) defines this term as "an offense that is punishable by imprisonment for more

than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." Because determination of whether a prior conviction fits this definition requires more than the fact that the prior conviction exists, the Sixth Amendment requires a jury determination before an enhanced sentence may be imposed.

"Any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 n. 10 (2000)). In *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), this Court "recognized a narrow exception to this general rule for the fact of a prior conviction." But subsequent decisions of this Court have cast *Almendarez-Torres* in serious doubt, and that decision now stands as an outlier in the Fifth and Sixth Amendment jurisprudence. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring); *id.* at 619 (O'Connor, J., dissenting) (recognizing the rules of *Apprendi* and *Almendarez-Torres* are in direct conflict); *Shepard v. United States*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion) ("While the disputed fact here can be described as a

fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004) (concluding that the application of *Almendarez-Torres* to the sequence of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 2259, 195 L. Ed. 2d 604 (2016)("depending on judge-found facts in Armed Career Criminal Act (ACCA) cases violates the Sixth Amendment and is irreconcilable with *Apprendi*"), Kennedy concurring; *Descamps v. United States*, 570 U.S. 254, 281, 133 S. Ct. 2276, 2295, 186 L. Ed. 2d 438 (2013), Thomas concurring.

This Court has also repeatedly cited authorities as exemplary of the original meaning of the constitution that do not recognize a distinction between past convictions and facts about the instant offense. *See Blakely v. Washington*, 542 U.S. 296, 304 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769),1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862), 4 Blackstone 369-370)).

In *Alleyne*, this Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range – not just a

sentence above the mandatory maximum – must be proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162-63. In its opinion, this Court recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *Almendarez-Torres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n. 1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id.*

The Court's reasoning nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception should be overturned. *Alleyne* traced the treatment of the relationship between crime and punishment, beginning in the Eighteenth Century, repeatedly noting how "[the] linkage of facts with particular sentence ranges . . . reflects the intimate connection between crime and punishment." *Id.* at 2159 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes [ ] punishment ... include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *Id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). This Court concluded that, because "the whole of the" crime and its punishment cannot be separated, the

elements of a crime must include any facts that increase the penalty. The Court recognized no limitations or exceptions to this principle.

Alleyne's emphasis that the elements of a crime include the "whole" of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism differs from other sentencing facts. *See Almendarez-Torres*, 523 U.S. at 243-44; *see also Apprendi*, 530 U.S. at 490 ("Other than the fact of 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* tried to explain this difference by pointing out that, unlike other facts, recidivism "'does not relate to the commission of the offense' itself[.]" 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230). But this Court did not seem committed to that distinction; it acknowledged that *Almendarez-Torres* might have been "incorrectly decided." *Id.* at 489; *Cunningham v. California*, 549 U.S. 270, 291 n. 14 (2007) (rejecting invitation to distinguish between "facts concerning the offense, where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not," because "*Apprendi* itself ... leaves no room for the bifurcated approach").

Almendarez-Torres contradicts every other Sixth Amendment case to have been decided by the Supreme Court in the past 20 years. It is also worth noting that even in *Almendarez-Torres* itself, the Court noted "the risk of unfairness to a

particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue." 523 U.S. at 245. The Court left for another day "whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence." *Id.* at 248. That day is now.

Uncertainty in the circuits has shown the need for this Court to step in. Every circuit has recognized the tension between *Almendarez-Torres* and this Court's other Sixth Amendment jurisprudence but has held that they cannot act without this Court addressing the tension. See, for example, *United States v. Gonzalez*, 949 F.3d 30, 41 (1st Cir. 2020); *United States v. Murray*, 826 F. App'x 97, 101 (2d Cir. 2020); *United States v. Miller*, 645 F. App'x 211, 223 (3d Cir. 2016); *United States v. Torrez*, 869 F.3d 291, 309 (4th Cir. 2017); *United States v. Akins*, 746 F.3d 590, 613 (5th Cir. 2014); *United States v. Young*, 847 F.3d 328, 369 (6th Cir. 2017); *United States v. Hatley*, 61 F.4th 536, 542 (7th Cir. 2023); *United States v. Wyatt*, 853 F.3d 454, 459 (8th Cir. 2017); *United States v. Herrera*, 757 F. App'x 539, 542 (9th Cir. 2018); *United States v. Ridens*, 792 F.3d 1270, 1274 (10th Cir. 2015); *United States v. Talley*, 842 F. App'x 390,399 (11th Cir. 2021).

Therefore, Petitioner Brown seeks to revisit this Court's holding in *Almendarez-Torres*, and bring prior convictions in line with this Court's other Sixth Amendment jury trial jurisprudence. Brown's case presents an ideal vehicle to

resolve this question because the issue was preserved and presented at every stage of the case. Given that Brown is serving a mandatory life term based solely on judicial factfinding, certiorari grant and review are necessary.

The Court should also consider whether the First Step Act compels rejection of judicial fact finding under this recidivism statute.

Described as "the most substantial [criminal justice] changes in a generation," Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. Times (Dec. 18, 2018),[1] the First Step Act of 2018 aimed to lower the federal prison population and improve sentencing fairness by modifying some of the most draconian federal sentencing laws, including 21 U.S.C. § 841. *See id.*

The First Step Act amended 21 U.S.C. § 841 in several ways. First, it lowered the mandatory minimum penalties triggered by prior criminal convictions. *See* First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220 (Dec. 21, 2018) ("FSA"). Second, it amended the *types* of prior convictions that can trigger the enhanced mandatory penalties. *See id.* at § 401(a)(1) – (a)(2).

Before the First Step Act, mandatory minimum penalty enhancements could be triggered by any prior "felony drug offense." *See* 21 U.S.C. § 841 (2010). The definition of felony drug offense is exceedingly broad. It includes any prior drug

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1 *Accessed at*: https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html?referringSource=articleShare.

offense—including simple possession—so long as the offense is punishable by a term of imprisonment exceeding one year and "prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). With the First Step Act, Congress sought to "restrict" these easily triggered mandatory minimum sentences by replacing the all-inclusive "felony drug offense" with "serious drug felony" and "serious violent felony." FSA, § 401 (section entitled "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies").

"Serious drug felony" is much narrower than "felony drug offense." To constitute a "serious drug felony," an offense must have a maximum term of imprisonment of at least ten years. A person must also have served more than 12 months on the offense and must have been released from imprisonment for the prior conviction within 15 years of commencing the instant offense. *See* 21 U.S.C. § 802(57) (incorporating 18 U.S.C. § 924(e)(2)). To qualify as a "serious drug felony," simple possession is not enough—a prior state offense must "involve[ ] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii).

While Congress swapped out "felony drug offense" from the mandatory minimum penalties in 21 U.S.C. § 841(b)(1)(A) and (b)(1)(B) (the subsections applicable to the most serious trafficking offenses), it did not do the same in (b)(1)(C). *Compare* 21

U.S.C. §§ 841(b)(1)(A) & (b)(1)(B), *with* 21 U.S.C. § 841(b)(1)(C). There is no rational explanation for this omission. Unfortunately, the consequences of this apparent oversight are severe: if Brown has a prior conviction for simple possession, one with a maximum sentence of less than 10 years, that conviction will qualify as a "felony drug offense," even though it cannot qualify as a "serious drug offense." Since Petitioner Brown was convicted under § 841(b)(1)(C)—a subsection not amended by the First Step Act—causing serious bodily injury after sustaining a "felony drug offense" triggered mandatory life imprisonment. But assuming all facts of his offense remained the same, had Brown trafficked in *more* drugs, crossing the statutory threshold from § 841(b)(1)(C) to § 841(b)(1)(B), his prior conviction would not have triggered mandatory life and he would have been subject to a mandatory minimum of 20 years. *See* 21 U.S.C. § 841(b)(1)(B). Where—as here—a literal application of the text would produce absurd results demonstrably at odds with Congressional intent, this Court declines to apply the law literally.

All issues of statutory construction start with the text. Generally, when the statutory language is plain, "every clause and word of a statute should, if possible, be given effect." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (internal marks and citations omitted). However, this general rule is not absolute. The plain meaning of legislation is not conclusive if the literal application of the language would lead to absurd results. *See, e.g., id.* at 94; *Maryland State Dep't of Educ. v.*

U.S. Dep't of Veterans Affairs, 98 F.3d 165, 169 (4th Cir. 1996) (citing *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930)); *see also Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509-10 (1989) (declining to enforce plain text because "that literal reading would compel an odd result in a case like this").

Courts may also abandon statutory language "if literal application of the statutory language would produce a result demonstrably at odds with intent of Congress; in such cases the intent of Congress, rather than the strict language controls." *Maryland State Dep't of Educ.*, 98 F.3d at 169 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)); *see also Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S. Ct. 337, 339, 84 L. Ed. 340 (1940)("All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose"); *United States v. Ryan*, 284 U.S. 167, 175 (1931) ("A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.").

Both circumstances are present here. Imposing a more serious sentence for a less serious offense is an absurdity that "shock[s both] general moral [and] common sense." *Maryland State Dep't of Educ.*, 98 F.3d at 169 (quoting *Crooks*, 282 U.S. at 60). It has long been an "accepted principle[ ]" that the punishment should fit "the

magnitude of crime." *Solem v. Helm*, 463 U.S. 277, 293 (1983) (recognizing that "[s]tealing a million dollars is viewed as more serious than stealing one hundred dollars" and that armed robbery is more serious than robbery (internal citations omitted)). Our laws reflect this principle by "distribut[ing] punishments according to the gravity of crimes and punish[ing] more severely the crimes society regards as more serious." *Furman v. Georgia*, 408 U.S. 238, 303-04 (1972) (Brennan, J., concurring).

Section 841 has always been faithful to this principle. Its penalty structure originated out of the Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 5-2, 98 Stat. 1837 (Oct. 12, 1984), which "first made punishment dependent upon the quantity of the controlled substance involved." *Chapman v. United States*, 500 U.S. 453, 460 (1991). In 1986, Congress doubled down on this quantity-based scheme and created series of escalated mandatory minimums "graduated according to the weight of the drugs." *Id.* at 461. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (Oct. 27, 1986). These penalties reflect Congress's belief that the more drugs trafficked, the more serious the offense. *See Kimbrough v. United States*, 552 U.S. 85, 98 (2007); *see also* H.R. Rep. No. 99-845, 1986 WL 295596 (Sept. 19, 1986) (explaining that the government's "most intense focus ought to be on major traffickers" with a secondary focus on "serious traffickers because they keep the street markets going").

There is no reason to think Congress intended to repudiate § 841's graduated sentencing scheme after the FSA—its FSA legislation points to the contrary. First, Congress left § 841's quantity-based thresholds untouched: § 841(b)(1)(A) covers the most culpable offenses; (b)(1)(B) covers the mid-level offenses; and (b)(1)(C) covers the lower level offenses. *See* § 841(b)(1)(A) – (C).

Second, Congress continued to embrace § 841's graduated punishments based on quantity and prior convictions even while amending certain mandatory minimums. While Congress lowered some of the mandatory minimums in (b)(1)(A), it ensured those penalties remained more severe than the corresponding penalties in (b)(1)(B). *See, e.g.*, 21 U.S.C. § 841(b)(1) (directing a fifteen-year mandatory minimum for a (b)(1)(A) conviction with a "serious drug felony" and a ten-year mandatory minimum for a (b)(1)(B) conviction with the same prior record).

Third, the FSA amendments to (b)(1)(B) and (b)(1)(A) indicate Congress's intent to *restrict* the applicability of mandatory life to the most serious offenses.[2] For

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2 Congressional history also reflects this intent. *See, e.g.*, 164 Cong. Rec. H10346-04, 10361 (daily ed. Dec. 20, 2018) (statement of Rep. Goodlatte) ("[T]he bill reduces some of the harsher sentences for Federal drug offenders. . . We want to punish repeat offenders, but we do not want our Federal prisons to become nursing homes."); *id.* at 10362 (Statement of Rep. Nadler) ("these changes recognize the fundamental unfairness of a system that imposes lengthy imprisonment that is not based on the facts and circumstances of each offender and each case"); *see also* H.R. Rep. No. 114-888, at 13-14 (Dec. 23, 2016) ("Under current law a mandatory minimum sentence can apply to any repeat drug offense, whether the felony is serious or minor. The bill would change the criteria for the application of a mandatory minimum sentence to include only serious drug felonies and serious violent felonies."). *H.R. Rep. 114-888 addressed the "Sentencing Reform Act of 2015," a predecessor bill to the FSA, which proposed similar amendments* to those at issue

example, Congress reduced the life mandatory minimum in (b)(1)(A) for a conviction after two prior drug offenses to twenty-five years. *See* FSA, § 401(a)(2). It also lowered the mandatory minimum in (b)(1)(A) for a conviction after one prior drug offense from twenty years to fifteen years. *Id.* Congress restricted the types of drug priors that would trigger the life sentence by replacing the expansive "felony drug offense" with the much narrower "serious drug felony." *Id.* at § 401(a)(1) – (2). For both (b)(1)(A) and (b)(1)(B), Congress limited the mandatory life sentence for convictions resulting in death or injury after one prior drug offense by requiring the prior constitute a "serious drug offense," clarifying that it intended to narrow the types of prior drug convictions that trigger mandatory life. *Id.*

To be sure, Congress intended to punish those who committed drug offenses resulting in death or serious bodily injury severely. In 1986, Congress directed that all (b)(1)(A) – (b)(1)(C) convictions for drug trafficking resulting in death or serious bodily injury be punishable by a mandatory minimum of twenty years—and up to life—regardless of quantity. *See* Pub. L. No. 99-570, § 1002. Even after the FSA, this hefty mandatory range remains unchanged. But it defies reason to believe that Congress intends this penalty to increase to mandatory life imprisonment *only* for (b)(1)(C) convictions where no prior "serious drug felony" was sustained.

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here. *See id.* at 2.

Section 841(b)(1)(C) use of "felony drug offense" is an outlier and, "in context, common sense suggests that [Congress's failure to swap out this definition] is simply a drafting mistake." *Chickasaw Nation*, 534 U.S. at 91. Because the literal application of § 841(b)(1)(C)'s statutory language —directing a mandatory minimum life sentence when a 20-year mandatory minimum would apply to a higher-quantity offense—is both grossly absurd and demonstrably inconsistent with congressional intent, this language must be set aside.

CONCLUSION

Brown requests this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for further proceedings.

Respectfully submitted,

DEBORAH L. WILLIAMS
Federal Public Defender

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

APPENDIX

1. COURT OF APPEALS ORDER February 9, 2023

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0081n.06

No. 21-1663

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADAM DEAN BROWN, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN OPINION

Before: GILMAN, McKEAGUE, and GRIFFIN, Circuit Judges.

GRIFFIN, Circuit Judge.

A jury convicted defendant Adam Brown on three drug-trafficking charges. His prior felony drug offense and the jury's findings that the fentanyl he distributed resulted in serious bodily injury and death mandated an enhanced sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(C). On appeal, he raises several challenges to his convictions and sentence. Because intervening caselaw mandates reversal with respect to the enhanced sentence that he received for his conviction for conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846, with a death-resulting enhancement, we vacate his sentence with respect to count one. The remainder of his appeal is without merit. Accordingly, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I.

Brown's appeal involves several aspects of 21 U.S.C. § 841. Subsection (a) makes it unlawful for an individual to, among other things, distribute a controlled substance, and subsection (b) sets forth mandatory minimum and maximum sentences that depend upon the weight and type of controlled substance, the individual's criminal history, and whether the distributed substance resulted in serious bodily injury or death. Section 846 criminalizes attempt and conspiracy to commit the distribution of a controlled substance, and subjects those convicted "to the same penalties as those prescribed for the offense."

Section 841(b)(1)(C) is the applicable penalty provision for Brown, which applies to the distribution of "a controlled substance in schedule I or II" (including fentanyl). It has a few tiers. The lowest is a twenty-year maximum sentence, which increases to thirty if a defendant violates § 841(a) "after a prior conviction for a felony drug offense has become final." But if "death or serious bodily injury results from the use of such [controlled] substance," § 841(b)(1)(C) mandates a twenty-year minimum sentence. And as with Brown's case, that mandatory minimum increases to life imprisonment with the presence of a prior felony drug conviction.

Here, a grand jury indicted Brown and two others on various drug crimes for their role in distributing fentanyl that resulted in the overdoses of two individuals struggling with opioid addiction, Alexander Brenner and Jeffrey Keon. Relevant to this appeal are three charges: conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846, with a death-resulting enhancement (count one); distribution of a controlled substance, in violation of 21 U.S.C. § 841, with a death-resulting enhancement (count five); and

distribution of a controlled substance, in violation of 21 U.S.C. § 841, with a serious-bodily injury enhancement (count six).[1]

A jury convicted Brown on all three counts and found him responsible for Brenner's death and Keon's serious bodily injury. With those findings, and Brown's prior felony drug convictions, the district court imposed mandatory terms of life imprisonment on counts one and six under § 841(b)(1)(C), and three hundred sixty months on the remaining counts, all concurrent with each other.

With this background, we turn to defendant's numerous claims on appeal.

II.

Brown raises two issues concerning his conviction for distributing a controlled substance in violation of 21 U.S.C. § 841, that resulted in Jeffrey Keon's serious bodily injury (count six): (1) the sufficiency of the evidence supporting the conviction; and (2) whether the district court's evidentiary rulings concerning the admissibility of certain text messages post-Keon's death infringed upon Brown's right to present a defense.

A.

The crime of distributing a controlled substance resulting in serious bodily injury under § 841 requires a jury to find both (1) knowing or intentional distribution of a controlled substance, and (2) serious bodily injury caused by the use of that drug. *Burrage v. United States*, 571 U.S. 204, 210 (2014). The indictment here charged Brown with distributing a mixture and substance that contained a detectable amount of fentanyl. Importantly, the government was not required to establish Brown *knew* that what he distributed had fentanyl; rather, all that was necessary is proof

[1]The grand jury also charged Brown with two counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841, to which he pleaded guilty before trial. Brown does not raise any issues regarding these convictions in this appeal.

that he distributed a controlled substance. *See United States v. Mahaffey*, 983 F.3d 238, 242–43 (6th Cir. 2020). The government must also establish causation—that Keon's serious bodily injury "result[ed] from" Brown's conduct. § 841(b)(1)(C). Under *Burrage*, "where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." 571 U.S. at 218–19.

We must uphold a jury's conviction if, "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We can sustain a conviction based on circumstantial evidence alone, and the evidence need not disprove every hypothesis except that of guilt. *United States v. Lindo*, 18 F.3d 353, 357 (6th Cir. 1994). A sufficiency claim does not allow us to "weigh the evidence presented, consider the credibility of witnesses, or substitute our judgment for that of the jury." *United States v. Jackson*, 470 F.3d 299, 309 (6th Cir. 2006) (citation omitted). Rather, we "draw all available inferences and resolve all issues of credibility in favor of the jury's verdict." *Id.* (citation omitted).

This standard is a "high bar" to clear. *United States v. Persaud*, 866 F.3d 371, 379–80 (6th Cir. 2017). For Brown's appeal, it is even more so. At trial, he moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing that Keon sourced drugs from various dealers and that no eyewitness observed Brown give Keon a controlled substance. But his briefing here advances a different argument, contending that the evidence showed Keon overdosed not from fentanyl, but from benzodiazepine. Given the specificity of his Rule 29 motion, Brown

forfeited the new ground for appeal he now advances.[2] *See United States v. LaVictor*, 848 F.3d 428, 457 (6th Cir. 2017). So our review is even "more lenient." *United States v. Woods*, 14 F.4th 544, 555 (6th Cir. 2021). We apply the "manifest miscarriage of justice" standard, under which Brown can succeed only if the record is "devoid of evidence pointing to guilt." *Id.* (citations omitted).

Brown cannot make that showing. The record reveals that Keon was a regular customer of Brown's. The two had recently texted about Brown's access to "fire white"—which the jury heard means fentanyl (to which Brown was previously connected)—and eventually consummated a drug deal. Cell-phone records demonstrate that the two talked briefly on January 24, 2018, and met up shortly thereafter. The jury heard from Keon's mother describing Keon's awareness of the drug's potency—she witnessed him return home on that day, enter his bedroom, come out to say, "Whatever happens, don't call 911," and then collapse. It also learned that three doses of the opioid-overdose-countering Narcan were needed to revive Keon and that, while Keon was recovering at the hospital, his mother found a baggie with drugs wrapped in tinfoil. The jury was presented with heartbreaking evidence that Keon's mother told Keon where she had hidden those drugs after he persistently asked where they were, and that he died from a fentanyl overdose the following day. Finally, the jury heard from a medical expert that fentanyl toxicity caused the first overdose and Keon's death. In sum, the record here is nowhere close to being devoid of evidence pointing to guilt.

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[2]Brown disagrees. He contends that he "made a general Rule 29 motion at the close of the Government's case," which he renewed at the end of his proofs, preserving all grounds for appeal. But that is not what the record reflects. Rather, Brown's attorney asked the district court to "hold" presenting his Rule 29 motion pending his proofs, and then told the district court at the end of his proofs that he was renewing it and would be filing a written motion shortly. It was in that written motion that Brown made a specific, and not general, motion for a judgment of acquittal.

Brown resists this conclusion by noting that the hospital's drug screen was positive for benzodiazepine and negative for fentanyl, and thus suggests that the jury convicted Brown of distributing benzodiazepine (which was not charged in the indictment). But the jury was presented with an explanation for both—a benzodiazepine overdose differs from one induced by fentanyl (namely, an overdose of benzodiazepine cannot be reversed by Narcan), and the hospital's urinalysis test was not capable of detecting fentanyl. Indeed, it is not disputed that Keon died of a fentanyl overdose the very next day, and the record evidence suggests the source of those drugs (the bag hidden by his mother) was the same drugs he purchased from Brown that led to the first overdose.

For these reasons, defendant's sufficiency-of-the-evidence challenge is without merit.

B.

Brown's other challenge to his serious-bodily-injuring-distribution-of-fentanyl conviction for Keon is an evidentiary one packaged in constitutional terms. After Keon's death (but before Brown learned of it), Brown reached out to Keon, texting: "Damn, Bro. What happened to you . . . ?" Law enforcement officials investigating Keon's death decided to impersonate Keon and exchanged text messages with Brown. The gist of the exchange was Brown proclaiming that what he had delivered to Keon was not what had caused the overdose. The government objected to the introduction of these text messages on hearsay grounds. Brown responded that they were admissible under the rule of completeness or under Rule 803 as evidence of Brown's state of mind. The district court sustained the government's objection as inadmissible hearsay. Brown contends on appeal that the district court erroneously kept out of evidence these text messages, resulting in the denial of his right to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted). We do not agree.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane*, 476 U.S. at 690). However, "the Supreme Court has made it perfectly clear that the right to present a 'complete' defense is not an unlimited right to ride roughshod over reasonable evidentiary restrictions." *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003) (en banc). "A defendant 'does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)).

"[E]rroneous evidentiary rulings rarely constitute a violation of a defendant's right to present a defense." *United States v. Hardy*, 586 F.3d 1040, 1044 (6th Cir. 2014). The exclusion of defense evidence violates a defendant's constitutional right to present a defense only where it is "arbitrary" or "disproportionate"; that is, where "important defense evidence" is excluded without serving "any legitimate interests" or in a manner that is "disproportionate to the ends that [the rationale for exclusion is] asserted to promote." *Holmes*, 547 U.S. at 324–26 (internal quotation marks omitted). To prevail, a defendant must show that an arbitrary or disproportionate exclusion of evidence, "evaluated in the context of the entire record[,] creates a reasonable doubt that did not otherwise exist." *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006) (brackets and citation omitted).

Generally, "[w]here a defendant attacks an evidentiary ruling as violating the Sixth Amendment, review of the legal aspects of the constitutional violation is de novo." *United States v. Reichert*, 747 F.3d 445, 453 (6th Cir. 2014). But Brown has a forfeiture problem. Below, he neither challenged the district court's evidentiary rulings on a constitutional basis nor advanced the arguments supporting this claim—that the evidence was both exculpatory and represented

"a present sense impression of the events surrounding Keon's overdose." We must therefore view Brown's claim through the more demanding plain-error lens. *See United States v. Cromer*, 389 F.3d 662, 672 (6th Cir. 2004) ("Plain error review applies even if the forfeited assignment of error is a constitutional error."). Plain error means: "(1) an error occurred; (2) the error was obvious or clear; (3) the error affected [the defendant's] substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Mayberry*, 540 F.3d 506, 512 (6th Cir. 2008) (citation omitted).

Brown cannot satisfy these compounding, demanding standards. The district court correctly kept the messages out as inadmissible hearsay, and Brown makes no argument to the contrary here. He argues, rather, that the text messages he sent corroborate his story—that "Brown did not give Keon anything since 'last week,'" and "that the drugs Brown gave Keon were nothing different than he normally provided – i.e., heroin." Stated differently, Brown asks that we should take his text messages for the truth of the matter asserted because they support his claim of innocence.

"The principle that undergirds [Brown]'s right to present exculpatory evidence is also the source of essential limitations on the right." *Taylor*, 484 U.S. at 410. That includes the reasonable limitations set forth in the rules of evidence prohibiting the introduction of hearsay. No case permits a defendant to introduce anything he pleases, even if exculpatory. Rather, the caselaw has uniformly rejected such a broad view. *See Rockwell*, 341 F.3d at 512; *see also United States v. Kerley*, 784 F.3d 327, 342 (6th Cir. 2015) (finding no violation of a right to present a defense when the evidence was inadmissible hearsay). And regardless, Brown was still able to tell the jury his version of the facts, including that he did not deliver fentanyl to Keon.

Brown has not demonstrated any error, let alone plain error.

III.

Brown raises three issues concerning his two convictions stemming from the overdose death of Alexander Brenner—conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846, with a death-resulting enhancement (count one), and distribution of a controlled substance, in violation of 21 U.S.C. § 841, without a death-resulting enhancement (count five). He challenges (1) the district court's admission into evidence of a co-conspirator's plea agreement, (2) its jury instruction for count one, and (3) its interpretation of the jury's verdict form for count five.

A.

Count one of the first superseding indictment charged Brown, Terence Robinson, and one other for conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846, with a death-resulting enhancement. This charge arose from Alexander Brenner arranging with Robinson for the purchase of what they thought was heroin from Brown, as the pair had done previously. Brenner fatally overdosed on the substance, which turned out to be fentanyl.

Robinson pleaded guilty to this charge pursuant to a plea agreement and agreed to testify at Brown's trial. During Robinson's testimony, the district court received into evidence (over Brown's objection) copies of Robinson's plea and cooperation agreements. Specifically, the district court cited our decision in *United States v. Townsend*, which provides that the "introduction of the entire plea agreement [does not] improperly bolster [a witness]'s credibility"; rather, doing so "permits the jury to consider fully the possible conflicting motivations underlying the witness' testimony and, thus, enables the jury to more accurately assess the witness' credibility." 796 F.2d 158, 163 (6th Cir. 1986).

We review a district court's decision to admit evidence over a defendant's objection under the abuse-of-discretion standard. *See United States v. Mack*, 808 F.3d 1074, 1084 (6th Cir. 2015). "When reviewing for abuse of discretion, we view 'the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.'" *United States v. Deitz*, 577 F.3d 672, 688 (6th Cir. 2009) (citation omitted). The question is not whether the evidence is prejudicial, but whether it is unfairly so. Unfair prejudice "does not mean the damage to the defendant's case that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest decision on an improper basis." *United States v. Mendez–Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986). "We reverse only where the district court's erroneous admission of evidence affects a substantial right of the party." *United States v. White*, 492 F.3d 380, 398 (6th Cir. 2007) (citing Fed. R. Evid. 103(a)).

In Brown's view, the district court abused its discretion in admitting evidence of Robinson's plea agreement because the agreement was proof positive of a substantive element of the crime that both Robinson and Brown were charged—a conspiracy to deliver drugs. But our caselaw plainly permits the government to introduce such evidence to help the jury assess that witness's credibility. *See Townsend*, 796 F.2d at 163; *United States v. Tocco*, 200 F.3d 401, 416 (6th Cir. 2000). And it may do so prophylactically in order "to blunt defense efforts at impeachment and dispel the suggestion that the government or its witness has something to hide." *United Sates v. Christian*, 786 F.2d 203, 214 (6th Cir. 1986); *see also Tocco*, 200 F.3d at 416–17 ("The prosecutor may refer to such agreement in appropriate circumstances to deflect defendant's use of a plea agreement to *attack* the witness' credibility."). It was for this purpose that the government sought to introduce Robinson's plea agreement.

And our precedent tempers Brown's prejudice concerns. True, we have said, it can be prejudicial for a coconspirator who pleaded guilty to testify against another at trial, but "much of this potential for prejudice is negated when the pleading codefendant testifies regarding the specific facts underlying the crimes in issue." *United States v. Thornton*, 609 F.3d 373, 378 (6th Cir. 2010) (ellipsis and citation omitted); *see also United States v. Gray*, 87 F.3d 1315, at *3 (6th Cir. June 3, 1996) (table op); *United States v. Walker*, 871 F.2d 1298, 1303–04 (6th Cir. 1989). That is what happened here, as Robinson extensively testified about his role in helping Brenner secure the drugs from Brown. Moreover, the jury heard about Robinson's "motivation for testifying" and his "potential sentence, so [Brown] cannot legitimately claim this information prejudiced him." *Thornton*, 609 F.3d at 378.

Two more points cut against Brown. First, there is no evidence that the government used the plea agreement for any improper purpose, such as in its closing argument. *Id.*; *United States v. Carson*, 560 F.3d 566, 575 (6th Cir. 2009). Second, the district court here gave a jury instruction cautioning that "[t]he fact that Terence Robinson has pled guilty to a crime is not evidence that [Brown] is guilty, and [you] cannot consider this against [Brown] in anyway." These points further weaken Brown's "I was prejudiced" position. *See Thornton*, 609 F.3d at 378; *Walker*, 871 F.2d at 1304.

For these reasons, the district court did not abuse its discretion when it admitted into evidence Robinson's plea and cooperation agreements.

C.

Brown next contends that the district court erroneously instructed the jury regarding the death-resulting enhancement for count one—the conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846. It gave a *Pinkerton* instruction

on this issue, which "permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy." *United States v. Martin*, 920 F.2d 345, 348 (6th Cir. 1990). The instruction provided that the jury need consider only "whether Alexander Brenner's death resulted from the distribution of the heroin or fentanyl by a member of the conspiracy." Brown contends this misstated the law by failing to instruct the jury that it must find that Brown was in the chain of distribution that caused Brenner's death. Having not advanced that objection below, we review under the plain-error standard. *See United States v. Stewart*, 729 F.3d 517, 530 (6th Cir. 2013). This means that we must find that "taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *United States v. Newsom*, 452 F.3d 593, 605 (6th Cir. 2006) (citation omitted).

As the government correctly concedes, Brown has satisfied this standard. We recently reiterated (albeit after Brown's trial) that "[w]hen a defendant's underlying crime relies on a conspiracy theory of liability, then the district court cannot impose the enhanced sentence unless the jury finds that the defendant was part of the distribution chain that led to the victim's overdose." *United States v. Sadler*, 24 F.4th 515, 560 (6th Cir. 2022); *see also United States v. Williams*, 998 F.3d 716, 734 (6th Cir. 2021); *United States v. Hamm*, 952 F.3d 728, 747 (6th Cir. 2020); *United States v. Swiney*, 203 F.3d 397, 406 (6th Cir. 2000). Failing to give such an instruction constitutes plain error, *Sadler*, 24 F.4th at 561, which had a substantial effect on Brown's rights—here the jury found Brown guilty on count one for the distribution of the fentanyl that killed Brenner under the *Pinkerton* theory's "lower standard." *Id.*

As for a remedy, *Sadler* provides that we must vacate Brown's sentence for count one and "remand for a new trial on the sole question of whether [Brown] was within the chain of distribution as required before imposing an enhanced sentence under 21 U.S.C. § 841(b)(1)(C)."

Id. at 562, 564. The government asserts that it will not retry Brown on the chain-of-custody issue if we affirm his conviction for count six (which, as set forth above, we do) and thus requests that we just remand to correct the judgment for count one. We decline to do so, and will instead leave it to the district court to address on remand. Bound by *Sadler*, we therefore vacate Brown's sentence with respect to count one and remand for further proceedings consistent with this opinion.

D.

The last issue with respect to Brenner's overdose death involves an interpretation of the jury's verdict for count five.

Under *Alleyne v. United States*, the Sixth Amendment requires that "[a]ny fact that, by law, increases the penalty for a crime . . . must be submitted to the jury and found beyond a reasonable doubt." 570 U.S. 99, 103 (2013). This includes § 841(b)'s sentencing enhancements. *Burrage*, 571 U.S. at 210. And § 841(b)(1)(C) applies to convictions related to the distribution of "a controlled substance in schedule I or II," with fentanyl being a schedule II opioid. Unlike other portions of § 841(b), this provision does not have a drug-weight requirement.

The jury's verdict form found Brown guilty of distributing a controlled substance as set forth in count five of the indictment, but that the government failed to "prove[] beyond a reasonable doubt that Alexander Brenner would not have died but for the use of the same fentanyl distributed by [Brown]." The jury's findings here, combined with his prior felony drug convictions (more on this below), meant that his statutory range increased to not more than thirty years in prison. *See* § 841(b)(1)(C).

Brown contends the jury rendered a general verdict—that it found only that he distributed a "controlled substance" but did not find that the substance was fentanyl as required for the § 841(b)(1)(C) enhancement. So, he states, "[t]he jury's verdict only supports a conviction for an

unnamed amount of drugs, with no quantity," and therefore the statutory enhancement cannot apply. He thus suggests that, because the jury declined to impose the death-resulting enhancement, it necessarily rejected a finding that fentanyl was the controlled substance supporting his conviction. Brown having raised this issue below, our review is de novo. *United States v. Copeland*, 321 F.3d 582, 601 (6th Cir. 2003).

The applicable indictment charged Brown in count five with distributing a controlled substance, in violation of § 841(a)(1). And it sets forth that the controlled substance was fentanyl. The jury instructions also made this expressly clear, which emphasized that fentanyl was the charged controlled substance.

With this background, we can easily reject Brown's challenge to the jury verdict. Criminal trials and their resulting judgments flow from "the language of the indictment, the evidence presented at trial, the jury instructions and the verdict forms utilized by the jury." *United States v. Kuehne*, 547 F.3d 667, 683–84 (6th Cir. 2008). More to the point, we do not view verdict forms in isolation; rather, they come with "a user's manual: the jury instructions. So we evaluate the verdict form in the context of the instructions as a whole[.]" *Moody v. United States*, 958 F.3d 485, 491 (6th Cir. 2020); *see also Slaughter v. Parker*, 450 F.3d 224, 241 (6th Cir. 2006) ("We must consider the verdict form in conjunction with the jury instructions."). Here the indictment and the jury instructions "ensured that the jury knew" that fentanyl was the controlled substance charged in count five. *Woods*, 14 F.4th at 553. Nor does it matter that the jury made no factual findings concerning quantities—"when specific quantities are not alleged, . . . § 841(b)(1)(C) . . . establishes the default statutory maximum sentences and does not require as an element of the offense a specific quantity of drugs." *United States v. Stewart*, 306 F.3d 295, 310 (6th Cir. 2002). In sum, the jury returned a specific, not general, verdict.

Brown's argument to the contrary conflates the jury's two findings: that the government proved beyond a reasonable doubt that Brown distributed fentanyl, but that the government failed to prove beyond a reasonable doubt that the fentanyl was Brenner's but-for cause of death. Just because the jury found in the government's favor on one, but in Brown's favor on the other, cannot mean that the jury "rejected fentanyl."

For these reasons, defendant's claim of error here is without merit.

IV.

Finally, Brown raises a few issues concerning his sentence that are not tethered to his specific counts of conviction.

A.

First, Brown takes issue with the content of the 21 U.S.C. § 851 notice. That section sets forth the procedure required before a court may impose a conviction-based enhancement under § 841(b). It provides that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." § 851(a)(1). A district court must then—after conviction but before pronouncement of sentence—"inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." § 851(b). Section 851(c) then sets forth what a district court must do if a person denies or otherwise claims a conviction is invalid.

The government filed a § 851 sentencing enhancement notice. It identified four "prior felony drug convictions that the government [would] rely upon at sentencing": convictions in March 2001, January 2009, and March 2009 for "deliver/manufacture of a controlled substance," in violation of M.C.L. § 333.7401(a)(a)(iv), and a conviction in March 2009 for "imitation, manufacture or distribution" of a controlled substance, in violation of M.C.L. § 333.7341(3).

In this appeal, Brown argues the notice failed to inform him of the possibility of a mandatory life sentence. He does not draw this here-is-what-the-penalty-could-be requirement from the text of § 851. Nor could he, for the text does not mandate one—all it requires is that the government "stat[e] in writing the previous convictions to be relied upon." § 851(a)(1); *see also United States v. Vanness*, 85 F.3d 661, 663 (D.C. Cir. 1996) ("The statute does not burden the government with the duty of advising defendants of sentencing consequences."). Rather, Brown argues we should infer the requirement from the statute's "purpose": it "was designed to satisfy the requirements of due process and provide the defendant with reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism." *United States v. Pritchett*, 496 F.3d 537, 548 (6th Cir. 2007) (citation omitted). Brown having failed to object to the content of the notice below, we review for plain error. *See United States v. Gonzalez*, 512 F.3d 285, 288 (6th Cir. 2008).

There was no plain error here. Fatal to Brown's challenge is that no binding caselaw required the government to set forth such information in the § 851 notice. *See United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015). Given that the unambiguous language of the statute imposes no such requirement, it logically follows that there is no caselaw requiring such a command through purposivism. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Equally fatal for Brown is a lack of effect on his substantial rights—he twice acknowledged the possibility

of mandatory life sentences, he was present in court when the government set forth his exposure to mandatory life sentences if the government filed § 851 enhancements when the parties were engaged in plea bargaining, and his attorney acknowledged that possibility when responding to the government's § 851 notice. *Cf. United States v. King*, 127 F.3d 483, 489 (6th Cir. 1997) ("[I]t is undisputed that prior to trial the prosecuting attorney and defense counsel discussed the potential enhancement, including the offense upon which it would be based.").

B.

The next issue is a well-worn Sixth Amendment challenge. As set forth, the Supreme Court has interpreted the Sixth Amendment to require that a jury decide any fact that increases minimum and maximum sentences, including those set forth in § 841(b)'s sentencing enhancements. *Burrage*, 571 U.S. at 210 (citing *Alleyne*, 570 U.S. at 114–16; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). In Brown's view, his jury was required to find two facts supporting his § 841(b)(1)(C) enhancement: (1) that he had a "prior conviction for a felony drug offense [that] has become final"; *and* (2) the type and quantity of the drug he distributed that resulted in death or serious bodily injury. As to the latter, the jury made the requisite finding regarding his distribution of fentanyl resulting in Keon's serious bodily injury and was not required to make any quantity findings for that distribution. *See Stewart*, 306 F.3d at 310. So, although he couches his argument as this being a mandatory "dual finding," his objection here really just goes to the former—that the jury made no factual findings concerning his prior felony drug convictions supporting the enhancement. Brown raised this argument below, so we review de novo. *United States v. Moore*, 643 F.3d 451, 454 (6th Cir. 2011).

Binding precedent forecloses Brown's claim. *Almendarez-Torres v. United States* expressly carved out an exception to this general jury-fact-finding rule for facts of prior

convictions. *See* 523 U.S. 224, 226–29 (1998). Although *Almendarez-Torres* came before *Apprendi* and *Alleyne*, our caselaw makes clear that it remains good law. *See, e.g.*, *Moody*, 958 F.3d at 491; *United States v. Young*, 847 F.3d 328, 369 (6th Cir. 2017); *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014). And we have said so in the face of a challenge to an enhancement under § 851 for a prior felony drug offense. *Young*, 847 F.3d at 369.

Recent caselaw suggests that this exception might not apply to the First Step Act of 2018's revisions to § 851. *See United States v. Fields*, 53 F.4th 1027, 1036–38 (6th Cir. 2022). That matter addressed a § 841(b)(1)(A)(viii) enhancement, wherein the defendant received a twenty-five year mandatory minimum sentence for possessing 500 grams or more of methamphetamine with intent to distribute given his two prior convictions for "serious drug felon[ies]." *Id.* at 1031. In dicta, we commented that because a "serious drug felony" under the First Step Act is "(1) a 'serious drug offense' under 18 U.S.C. § 924(e)(2)(A), for which the defendant (2) served over a year in prison and (3) was released within fifteen years of the commencement of the instant offense," and because *Almendarez-Torres* is a "narrow exception to the general rule," that it makes "intuitive" sense "that the Sixth Amendment would require the jury to decide whether, for each prior conviction, [a defendant] was incarcerated for over a year and released within fifteen years of the instant offense." *Id.* at 1031, 1036–37. But we ultimately declined to decide the issue because, in that matter, "those facts were actually submitted to the jury." *Id.* at 1038.

Brown argues that "*Fields* requires this Court to remand for resentencing without the 21 U.S.C. § 851 enhancement." Not so. For one, *Fields* did not address the issue, and we are not bound by its dicta. And for another, and more importantly, *Fields* dealt with a different enhancement—one falling under § 841(b)(1)(A) for a "serious drug felony." Here, Brown received an enhancement under § 841(b)(1)(C)'s "felony drug offense." It is a different definition,

compare 21 U.S.C. § 802(44), *with* (57), and one that *used* to be applicable to §§ (b)(1)(A) and (B) until the First Step Act modified those subsections, *see Fields*, 53 F.4th at 1031; *see also* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5220–21.

For these reasons, Brown's claim of error on this issue is meritless.

C.

Brown also takes issue with the district court's conclusion that his various Michigan convictions for cocaine distribution qualified as a "prior conviction for a felony drug offense" for purposes of § 841(b)(1)(C)'s enhancement.

A "felony drug offense" is "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts *conduct relating to narcotic drugs*, marihuana, anabolic steroids, or depressant or stimulant substances." § 802(44) (emphasis added). Because of the "relating to" language, we have commented that this definition is expansive, and necessarily includes more conduct than the Guideline's narrower definition of "controlled substance offense." *United States v. Spikes*, 158 F.3d 913, 932 (6th Cir. 1998) (discussing U.S.S.G. § 4B1.2(2)).

Our focus is on Brown's three prior convictions for cocaine distribution under M.C.L. § 333.7401(a)(2)(a)(iv). Before the district court, Brown acknowledged that our existing, albeit unpublished, caselaw provided that we do not employ the categorical approach when determining whether a prior conviction constitutes a "felony drug offense" for § 841(b) purposes. *See United States v. Soto*, 8 F. App'x 535, 541 (6th Cir. 2001). But he argued that if we were to do so (like other circuits), his convictions for distributing cocaine under Michigan law swept

"broader than the federal definition."[3] Although not the model of clarity, his overbreadth argument below was that Michigan's substantive definition of cocaine as set forth in its statutory schedules is broader than the federal schedules. *Compare* 21 U.S.C. § 802(17), *with* M.C.L. § 333.7214(a)(iv).

Brown abandoned that specific, cocaine-based overbreadth argument and instead presses a newer, broader one on appeal. He asserts that Michigan's drug-distribution statute criminalizes a broader swath of conduct than the federal definition of "conduct relating to narcotic drugs" because Michigan law defines "controlled substance" as not just "a drug," but also a "substance, or immediate precursor." M.C.L. § 333.7104(3). So plain-error review applies again.

That demanding standard mandates Brown's loss on this issue. There is no binding circuit precedent holding that Michigan's controlled-substances statute prohibits more conduct than § 841's definition of a "felony drug offense" on the basis that M.C.L. § 333.7401(2)(a)(iv) also criminalizes substances and immediate precursors. *See Al-Maliki*, 787 F.3d at 794. Indeed, our caselaw seemingly points in the opposite direction, for we have said that M.C.L. § 333.7401 falls within the even narrower definition of the Guidelines. *See, e.g.*, *United States v. Gardner*, 32 F.4th 504, 529 (2022). And our caselaw notes that, under Michigan law, "the specific substance a

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[3]We are apparently on one side of a lopsided circuit split on the issue of whether courts must employ the "categorical approach" as we do for other statutes, like the Armed Career Criminal Act, when evaluating § 841(b) predicate offenses. *See generally Mathis v. United States*, 579 U.S. 500 (2016). We said in *Soto*, without any analysis or citation, that "this court does not employ a categorical approach to determining whether a prior conviction constitutes a 'felony drug offense' for purposes of section 841(b)(1)." 8 F. App'x at 541. We have relied on this language to reject similar arguments to those advanced by Brown here, *see, e.g.*, *Meeks v. Kizziah*, 2020 WL 9396243, at *2 (6th Cir. Dec. 15, 2020) (order), as have the district courts within our circuit, *see, e.g.*, *United States v. Chappell*, 2020 WL 5064656, at *3–4 (E.D. Mich. Aug. 27, 2020). But it appears that we are the sole outlier. The First, Second, Third, Seventh, Eighth, and Ninth Circuits have all concluded that courts must use the categorical approach to determine whether a particular prior felony drug offense qualifies for purposes of § 841(b)'s statutory enhancement. *See United States v. Thompson*, 961 F.3d 545, 551 (2d Cir. 2020) (collecting cases).

defendant is charged with possessing or delivering is one of the elements of a § 333.7401 violation." *United States v. Pittman*, 736 F. App'x 551, 555 (6th Cir. 2018) (collecting cases). Accordingly, "[b]ecause Michigan courts treat the specific substance as an element of the offense, § 333.7401(2)(a)(iv) is divisible," *id.*, and therefore it apparently matters not whether § 333.7401 also covers substances and immediate precursors given Brown's *cocaine*-distribution convictions. *See also United States v. House*, 872 F.3d 748, 753 (6th Cir. 2017) ("Michigan's controlled-substance statute is divisible.").

D.

Finally, Brown asserted initially that the district court erroneously calculated his Guidelines range by concluding that his prior drug-distribution convictions rendered him a career offender under U.S.S.G. § 4B1.1. The government responded that there is no reason to address this challenge because Brown's life sentence was statutorily required, and thus the Guidelines played no role in his sentence and would be a factor only if we vacated both counts that mandated the § 841(b) life-in-prison enhancement. Brown then waived this issue in his reply, conceding that, "if the career offender adjustment becomes relevant upon resentencing, that it should be decided by the district court in the first instance." That waiver aside, his statutory enhancement stands with respect to count six, so this issue is without merit.

V.

For these reasons, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.