NO. 23-___

IN THE
Supreme Court of the United States

MANTELL ALABI STEVENS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Mantell Alabi Stevens was convicted of offenses relating to a death allegedly caused by fentanyl-laced heroin. Stevens did not sell directly to the decedent; instead, the decedent received the fatal substance from an individual who had purchased heroin from Stevens and had cut the heroin with another substance. Despite changes in the amount and color of the heroin as it moved from Stevens to another to the decedent, Stevens was held responsible for the death. Then the sentencing court effectively added more than a decade to Stevens's sentence based on a decade old conviction for possession of a controlled substance.

The questions presented are thus:

1. Can a court send a case to the jury when the evidence is only sufficient to give them a choice between probabilities instead of being sufficient to prove guilt beyond a reasonable doubt?

2. Can a court increase a base offense level by deeming controlled substance offenses similar even when one is a distribution offense and the other is for mere possession?

PARTIES TO PROCEEDINGS

Mantell Alabi Stevens and the United States of America are the only parties to this proceeding and the proceedings before the United States Court of Appeals for the Sixth Circuit. In addition to Stevens and the United States, Ashley Nicole Markham was a party to the proceedings before the United States District Court for the Eastern District of Kentucky.

RELATED PROCEEDINGS

United States v. Stevens, No. 22-5410 (6th Cir.)

United States v. Stevens, No. 5:20-cr-00143 (E.D. Ky.)

Date of Final Opinion: May 2, 2023

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The Sixth Circuit opinion affirming the district court's judgment is attached as Appendix 1. The district court order overruling Stevens's objections to the presentence investigation report is attached as Appendix 2. The district court's Final Judgment is attached as Appendix 3.

This case involves a distribution resulting in death conviction under 18 U.S.C. § 841 and application of section 2D1.1(a)(1) of the U.S. Sentencing Guidelines. The texts of these provisions are contained in Appendix 4.

TABLE OF AUTHORITIES

Cases

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PETITION FOR WRIT OF CERTIORARI

Mantell Alabi Stevens petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion affirming the district court's judgment is unpublished but electronically reported and available at 2023 WL 3200322 (6th Cir. May 2, 2023). The district court order overruling Stevens's objections to the presentence investigation report is unpublished but electronically reported at 2022 WL 1297091 (E.D. Ky. Apr. 29, 2022). The district court's final judgment is neither reported nor electronically reported. Each is reproduced in the Appendix.

JURISDICTION

The Sixth Circuit issued its decision affirming Stevens's convictions and sentence May 2, 2023. This Court's jurisdiction is thus timely invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a distribution resulting in death conviction under 18 U.S.C. § 841 and application of section 2D1.1(a)(1) of the U.S. Sentencing Guidelines. Each is reproduced in the Appendix.

STATEMENT OF THE CASE

On May 30, 2018, Officer Michael Rittenhouse found Nicholas Adams dead on a basement floor near "some white powdery substance." ECF No. 116, PageID 520 (Trial Tr. (Day 1)). The Kentucky State Police Lab later described the substance as "white and green" and determined that it contained fentanyl, which caused Adams's death. ECF No. 118, PageID 847 (Trial Tr. (Day 3)). Data from Adams's cell phone revealed that he had purchased that substance from Ashley Markham. Markham named Stevens as her connect for "the light gray stuff"—that is, heroin. ECF No. 117, PageID 728 (Trial Tr. (Day 2)). Stevens did not deny that he provided heroin to Markham.

The United States brought federal drug charges against Markham and Stevens. In a December 2020 indictment, the United States charged Markham with distribution of a substance containing fentanyl resulting in death under 28 U.S.C. § 841. *See* ECF No. 1 (Indictment). Then, in an April 2021 superseding indictment, the United States charged Markham and Stevens with distribution of a substance containing fentanyl resulting in death under 28 U.S.C. § 841 *and* conspiracy to distribute fentanyl and heroin under 28 U.S.C. § 846. *See* ECF No. 23 (Superseding Indictment). Accordingly, the district court had jurisdiction under 18 U.S.C. § 3231. Markham pleaded guilty to both counts. *See* ECF No. 102 (Markham Judgment). Stevens proceeded to trial.

At trial, witness testimony, text messages, and social media messages detailed Markham's drug dealings and dealers. Markham purchased heroin from Stevens and other unnamed distributors, and she would occasionally mix controlled substances bought from others with what she bought from Stevens. ECF No. 117, PageID 625, 639–42, 776–77 (Trial Tr. (Day 2)). While messages between Stevens and Markham discussed only heroin, other distributors provided Markham with fentanyl. ECF No. 116, PageID 568–71, 576, 590–92 (Trial Tr. (Day 1));

ECF No. 117, PageID 776, 781 (Trial Tr. (Day 2)). Markham's customers would complain about the weak potency of heroin supplied by Stevens. ECF No. 117, PageID 635–638, 681 (Trial Tr. (Day 2)). Relatedly, one witness explained that heroin can be made more potent by cutting it with fentanyl. ECF No. 118, PageID 878 (Trial Tr. (Day 3)).

The evidence also traced color and quantity changes of the heroin Markham purchased from Stevens on May 28, 2018. Around 6 p.m. that day, Markham purchased 1.5 grams of "light gray" heroin from Stevens. ECF No. 116, PageID 564 (Trial Tr. (Day 1)); ECF No. 117, PageID 728 (Trial Tr. (Day 2)). She then sold $50 worth of that heroin, gave a gram to her boyfriend, and took a bump in the early hours of May 29. ECF No. 116, PageID 548–50, 554, 556, 559, 564 (Trial Tr. (Day 1)); ECF No. 117, PageID 661, 779 (Trial Tr. (Day 2)). Meanwhile, she cut the remaining heroin with an unknown substance. ECF No. 116, PageID 564 (Trial Tr. (Day 1)). Then around 4 p.m., Markham sold 1.2 grams of the cut heroin to Adams. *Id.* at PageID 564. The next day, Rittenhouse found Adams with "white and light gray" cut heroin. ECF No. 116, PageID 565 (Trial Tr. (Day 1)).

The trial also revealed gaps in Rittenhouse's investigation. For example, although Rittenhouse found a text exchange in which Adams was trying to score from another individual, Rittenhouse never followed up with that individual. ECF No. 116, PageID 610 (Trial Tr. (Day 1)). Rittenhouse did not recover a phone from either Markham or Stevens, nor did he order an analysis of the laptop found near Adams. ECF No. 116, PageID 603 (Trial Tr. (Day 1)).

Based on the questionable evidence presented and investigative shortcomings, Stevens moved for acquittal under Rule 29 of the Federal Rules of Criminal Procedure. *See* ECF No. 118, PageID 882–83 (Trial Tr. (Day 3)). The district court denied that motion, and the jury found Stevens guilty of both counts charged. *Id.* at PageID 886 (denying Rule 29 motion); ECF No. 90 (Jury Verdict).

The district court then proceeded to sentencing. In advance of the sentencing hearing, a probation officer prepared a presentence investigation report. That report recommended a base offense level of 43 pursuant to section 2D1.1(a)(1) of the Guidelines because Stevens "committed the offense after one or more prior convictions for a similar offense." PSR 5. Stevens objected to that determination, arguing that his

2000 conviction for possession of crack cocaine did not qualify as a "similar offense" for purposes of section 2D1.1(a)(1). *See* ECF No. 103, PageID 321–22 (Order). The district court overruled that objection and sentenced Stevens to 480 months in prison. *See id.* at PageID 325; ECF No. 108 (Stevens Judgment).

Stevens appealed his convictions and sentence, taking issue with the sufficiency of the evidence and the application of section 2D1.1(a)(1), among other things. *United States v. Stevens*, 2023 WL 3200322, at *1 (6th Cir. May 2, 2023). The Sixth Circuit rejected the sufficiency argument by deferring to the jury. *Id.* at *3–4. It also summarily rejected the sentencing challenge because any felony drug offense is a "similar offense" for purposes of section 2D1.1(a)(1). *Id.* at *4. The Sixth Circuit thus affirmed Stevens's convictions and sentence.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision is the product of inconsistent interpretations untethered from the Guidelines language *and* of evidence that could do no more than present probabilities and that was insufficient to prove anything beyond a reasonable doubt. This Court should grant

the petition to correct the course of Guidelines interpretation *and* to fulfil the promise that a conviction can only stand if based on evidence proving the offense beyond a reasonable doubt.

1. This Court should grant the petition to resolve circuit inconsistencies and clarify the proper interpretation of the applicable Guideline.

Courts have continuously wrestled with interpreting section 2D1.1(a)(1). That Guideline prescribes a base offense level of 43 when the "offense of conviction establishes" two conditions: "that death or serious bodily injury resulted from the use of the substances" *and* "that the defendant committed the offense after one or more prior convictions for a similar offense." USSG § 2D1.1(a)(1). The results of those wrestling matches have, however, been inconsistent and contradictory, and this case is an ideal vehicle to resolve the issue.

a. This case highlights the inconsistent interpretation employed by courts.

Courts have employed an inconsistent structural interpretation of the Guideline that ignores the ties between the offence of conviction and the "similar offense" condition.

When applying the Guideline, courts have explained that the "death or injury" condition is tied to the offense of conviction, which is

distinct from just "offense." *See, e.g.*, *United States v. Greenough*, 669 F.3d 567, 573 (5th Cir. 2012) (while "offense" means "offense of conviction and all relevant conduct," "offense of conviction includes only the substantive crime for which a particular defendant was convicted" (cleaned up)). In other words, section 2D12.1(a)(1) "applies only when the second prong of the statute"—that is, the "death or injury" condition—"is also part of the crime of conviction." *Id.* at 575; *see also, e.g.*, *United States v. Lawler*, 818 F.3d 281, 285 (7th Cir. 2016) (joining Third, Fifth, and Sixth Circuits on that matter).

That interpretation makes sense based on the structure of section 2D1.1(a)(1). It has two major conditions:

> (1) "the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 906(b)(1), (b)(2), or (b)(3)" *and*
>
> (2) "the offense of conviction establishes that the death or serious bodily injury resulted form the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense."

USSG § 2D1.1(a)(1). The second major condition contains its own minor conditions—the "death or injury" and "similar offense" conditions. Those minor conditions are both tied to the "offence of conviction" based on the parallel structure created by using "that" before each minor condition.

That's why courts have recognized that the death or injury must have resulted from the offense of conviction. Shouldn't they also see that the prior conviction needs to be similar to the offense of conviction?

That should, but they all haven't. Take the Sixth Circuit for example. It has ignored structure and decided "similar offense" is "synonymous with the term 'felony drug offense.'" *United States v. Johnson*, 706 F.3d 728, 731 (6th Cir. 2013); *accord United States v. Sica*, 676 F. App'x 81, 86 (2d Cir. 2017). Yet "felony drug offense" does not appear in the Guideline, showing up instead in the statutes mentioned in the first major condition.

As the same time, some courts have stayed away from using "similar offense" and "felony drug offense" interchangeably. But not always, as the Fourth Circuit has shown. Sometimes the Fourth Circuit follows the Sixth Circuit's approach. *See Young v. Antonelli*, 982 F.3d 914, 919 (4th Cir. 2020). Other times it considers the similarities between the offense of conviction and the prior conviction. *See*, *e.g.*, *United States v. Carrington*, 2023 WL 1990529, at *4 (4th Cir. 2023) (citing *Johnson* but finding similarity because statutes both "prohibit the distribution of illegal drugs"); *United States v. Fisher*, 683 F. App'x 214, 215 (4th Cir.

2017) (per curiam) (citing *Johnson* but finding similarity because offense "both involved distribution of a controlled substance").

Inconsistent statutory interpretation demands correction. This is especially true when—as is the case with section 2D1.1(a)(1)—courts conflict with one another and even with their own decisions.

b. This case is an ideal vehicle to resolve the interpretative issue.

This case supplies this Court the opportunity to clean up the circuit confusion just discussed. In fact, this case is an ideal vehicle for doing so for three reasons.

First, the difference between the base offense level assigned and the base offense level that should have been assigned is substantial, justifying an exercise of this Court's supervisory power. Stevens's total offense level was 43—that same as his base offense level—and he had a criminal history category of II. PSR 15. As a result, the Guidelines provided for life imprisonment, and Stevens received a 480-month sentence on the 21 U.S.C. § 841(a)(1) conviction. PSR 15; *see also* ECF No. 108, PageID 351 (Judgment). If he had been assigned the proper base offense level under section 2D1.1(a)(1), his total offense level would have been 38, resulting in a sentence range of 262 to 327 months. *See* USSG

Sent'g Table. Even if given a high-end sentence, Stevens's sentence would have been 153 months—more than 12 years—shorter. Stevens should not have to spend more than an additional decade in prison for a miscalculation.

Second, the prior conviction and the offense of conviction here are meaningfully dissimilar, making this a preferred vehicle for deciding the issues presented. Stevens's relevant offense of conviction is for distributing a substance containing fentanyl resulting in death, while his relevant prior conviction was for possession of crack cocaine. Two differences stand out. For one, common sense says mere possession of a controlled substance is not as serious as distribution. *See, e.g.*, *Terry v. United States*, 141 S. Ct. 1858, 1864 (2021) (acknowledging "simple possession" is lesser offense of "possession with intent to distribute"). For another, as borne out by the drug conversion tables and converted drug weights, fentanyl-related offenses are more serious than those involving crack cocaine. USSG § 2D1.1 app. note 8(D) (1 gram of fentanyl has converted drug weight of 2.5 kilograms, while 1 gram of crack cocaine has converted drug weight of 0.003571 kilograms).

Third, and related to both prior points, this case reveals the inequity that results when a mere possession offense is used to justify application of section 2D1.1(a)(1). As happened here, a single, decades-old conviction for a less serious drug offense can return from the past to significantly increase a sentence. When he was 21 years old, Stevens was sentenced to one year in prison for possession of crack cocaine. Now at 42 years old, Stevens is haunted by that conviction—a conviction that justified only a one-year sentence that is now being used to justify a decade sentence increase.

2. This Court should grant the petition to exercise its supervisory power to reverse a conviction based on less than proof beyond a reasonable doubt.

Constitutionally speaking, a criminal conviction can stand only on "proof beyond a reasonable doubt of every fact necessary to constitute the crime" charged. *In re Winship*, 397 U.S. 358, 364 (1970). Ergo, court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). When considering a Rule 29 motion, a court doesn't weigh evidence or question credibility. *United States v. Welch*, 97 F.2d 840, 843 (6th Cir. 1964). But it must ensure that the evidence does more than provide "a choice of

reasonable probabilities," which is not enough "to sustain a criminal conviction." *United States v. Saunders*, 325 F.2d 840, 843 (6th Cir. 1964).

Because it charged Stevens with distribution of a substance containing fentanyl resulting in death under 28 U.S.C. § 814, the United States had to put on evidence sufficient to show that Stevens sold fentanyl to Markham *and* that Markham sold that fentanyl to Adams. Yet the district court relieved the United States of that burden, allowing it to secure a conviction based on evidence that Stevens sold heroin to Markham *and* without evidence that the heroin sold to Markham contained fentanyl.

At best, the evidence made Stevens's guilt probable, but that was only one of several probabilities and one of the less likely probabilities. For example, the evidence established that Markham acquired heroin—not fentanyl—from Stevens and that she got fentanyl from other distributors. *See, e.g.*, ECF No. 116, PageID 568–71, 576, 590–92 (Trial Tr. (Day 1)); ECF No. 117, PageID 776, 781 (Trial Tr. (Day 2)). It also highlighted that Stevens was selling a weak product, suggesting it had not been enhanced with fentanyl. ECF No. 117, PageID 635–638, 681 (Trial Tr. (Day 2)). In fact, the evidence established that Markham would

cut the heroin from Stevens with products from others, permitting the inference that she was increasing its potency with fentanyl. ECF No. 117, PageID 625, 639–42, 776–77 (Trial Tr. (Day 2)); ECF No. 118, PageID 878 (Trial Tr. (Day 3)).

From those facts, there are two probabilities leading to Adams' death—Stevens sold inexplicably weak fentanyl-laced heroin *or* Markham cut the Stevens-sourced heroin with fentanyl. The chain of events leading to Adams's death makes one of those probabilities (i.e., Stevens provided fentanyl-laced heroin) far more plausible than the other. Consider the fluctuating stash. Markham began with 1.5 grams of heroin, yet even after selling $50 worth, giving away a gram, and using some of her stash, Markham was still able to sell the fatal 1.2 grams to Adams. Considering Markham admitted to cutting the stash with a mystery substance, the evidence provided two probabilities: Stevens provided weak fentanyl-laced heroin that did not affect three users but could, after being weakened by an innocuous substance, kill a fourth user *or*, consistent with the evidence, Markham cut her depleted stash with fentanyl from another source.

Consider, too, the changing color—Stevens sold Markham "light gray" heroin and Adams was found with "white and gray" cut heroin that the lab later identified as "white and green" fentanyl-laced heroin. ECF No. 116, PageID 564–65 (Trial Tr. (Day 1)); ECF No. 117, PageID 728 (Trial Tr. (Day 2)); ECF No. 118, PageID 847 (Trial Tr. (Day 3)). One probability is that heroin magically changes color when moving in chains of commerce and custody; the other is that something was added between the initial sale and the deadly sale. Regardless of which probability is more likely than the other, the evidence offer up only those probabilities, mere possibilities.

Considering the possibilities, the district court should have granted Stevens's Rule 29 motion. When it decided against do so, the district court relieved the United States of its burden of proving Stevens's guilt beyond a reasonable doubt. It then sent a case brimming with reasonable doubts to a jury that credited a far-fetched probability over others, resulting in a finding of guilt. By sanctioning that constitutional error, the Sixth Circuit diluted the "beyond a reasonable doubt" standard.

That standard—rooted in Blackstone's ratio—is an evergreen facet of the criminal justice system. It is, therefore, incumbent upon this Court

to exercise its supervisory power to protect that principle and thus grant the petition.

CONCLUSION

This Court should grant the petition for a writ of certiorari and *either* reverse the denial of Stevens's motion for acquittal *or* vacate Stevens's sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 31, 2023, the foregoing was served via e-mail upon the following:

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