

No. **23 - 6394**

FILED

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

Andrew Tablack,
Petitioner.

v.

United States of America

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI

Andrew Tablack
Victorville USP
PO BOX 3900
Adelanto, CA 92301

Pro Se'

QUESTIONS PRESENTED

- 1.) Is there a legal element in 21 U.S.C. 841(a)(1) that requires the drug named in the indictment to be listed on the controlled substance schedules?
- 2.) At the time of the alleged offenses, is the omission of a "controlled substance" from 21 U.S.C. 841(a)(1) a fatal defect in the indictment?
- 3.) Does the term "controlled substance analogue" legally exclude a drug that became scheduled as a controlled substance following the period of alleged activity?

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CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Third Circuit is reported in: 2023 U.S. App. LEXIS 1727. (App. A, pp. A-1 to A-3.)

The opinions of the United States District Court for the District of New Jersey are reported in: 2020 U.S. Dist. LEXIS 166662 (App. B, pp. B-1 to B-5); 2021 U.S. Dist. LEXIS 193261 (App. B, pp. B-6 to B-8); 2022 U.S. Dist. LEXIS 1479 (App. B, pp. B-9 to B-11).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals was originally entered on January 24, 2023. The Third Circuit vacated, and then re-entered the same judgment on October 6, 2023. (App. A, p. A-4.) A rehearing in the Court of Appeals was not sought. Petitioner timely filed this petition for certiorari within 90 days from the Third Circuit's re-entry of its judgment on October 6, 2023. Therefore, this Court has jurisdiction of the matter under 28 U.S.C. 1254(1).

STATUTES INVOLVED IN THE CASE

The provisions of the Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., are too lengthy to be set forth in verbatim, but are set forth in Appendix C.

STATEMENT OF THE CASE

In May 2019, Andrew Tablack was indicted by a grand jury on two counts, which allege that he knowingly conspired to manufacture and distribute a controlled substance-analogue, namely "Cyclopropyl fentanyl," from March 2017 to December 20, 2017, contrary to 21 U.S.C. 841(a)(1), (b)(1)(C), and §813, in violation of §846; and that he knowingly manufactured and distributed a controlled substance-analogue, namely "Cyclopropyl fentanyl," on September 13, 2017, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and §813. The Controlled Substances Act ("CSA"), 21 U.S.C. 841(a)(1), makes it unlawful for any person knowingly . . . to manufacture and distribute . . . a controlled substance. The Act defines "controlled substance" in 21 U.S.C. 802(6) as a drug included in schedule I-V of part B of this title [21 U.S.C. 812].

The indictment fails to allege that cyclopropyl fentanyl was a controlled substance. The indictment alleges that cyclopropyl fentanyl was a controlled substance-analogue, which is not the unlawful legal element included in the definition of Section 841(a)(1)-that the drug be listed as a "controlled substance." §802(6) *supra*. In 2017, Cyclopropyl fentanyl was not listed on any Schedule in §812, which also provides the amended

Controlled substance schedules are codified in 21 CFR Part 1308. Therefore, since Cyclopropyl fentanyl was not listed as a controlled substance in 21 CFR 1308(2017), the omitted legal element in the indictment from the federal offense in Section 841(a)(1) is a fatal defect. Tablack contends the indictment fails to state an offense because "there is arguably a legal element in Section 841(a)(1)-that the substance be 'controlled.'" McFadden v. United States, 576 U.S. 186, 199 (2015) (Roberts, C.J., concurring in part and concurring in judgment).

Tablack argued the indictment fails to state an offense in a pre-trial motion to dismiss and a motion for a judgment of acquittal. See United States v. Tablack, 2020 U.S. Dist. LEXIS 166662, at 2-6 (D.N.J. Sept. 11, 2020); Tablack, 2021 U.S. Dist. LEXIS 193261, at 2 (D.N.J. Oct. 6, 2021) (stating "the fact that Cyclopropyl fentanyl was not a scheduled controlled substance during the relevant period is irrelevant because the charged offenses involved a controlled substance analogue"). Then Tablack filed a motion for reconsideration arguing the court omitted a legal element from the jury charge. See Tablack, 2022 U.S. Dist. LEXIS 1479, at 3 (D.N.J. Jan. 4, 2022). The District Court denied the motions and the Court of Appeals affirmed the judgment of conviction. See Tablack, 2023 U.S. App. LEXIS 1727, at 2 (CA3 2023) ("It is enough that he dealt a drug analogue that mimics a scheduled drug.").

EXISTENCE OF JURISDICTION

The District Court of New Jersey had jurisdiction over the matter pursuant to 18 U.S.C. 3231. The final judgment was entered on February 16, 2022. A timely appeal was filed to the United States Court of Appeals for the Third Circuit, who had jurisdiction over the matter under 28 U.S.C. 1291.

ARGUMENT

I. THE INDICTMENT LEGALLY FAILS TO STATE AN OFFENSE

Federal Rules of Criminal Procedure 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." The Supreme Court has "emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is measured." Russell v. United States, 369 U.S. 749, 763 (1962). "These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, secondly, 'in case any other proceedings are taken against him for

a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Id., at 763-764. See also Hamling v. United States, 418 U.S. 87, 117 (1974) ("It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'"); United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) (the first constitutional requirement for an indictment is that it must contain the elements of the offense charged); Ruan v. United States, 142 S.Ct. 2370, 2385 (2022) (Alito, J., concurring) (stating "it is black-letter law that an indictment must allege the elements of the offense charged"); Russell, 369 U.S., at 768 n.15 (every ingredient of the offense must be clearly and accurately alleged in the indictment to enable the court to decide whether the facts alleged are sufficient in law).

Between March 2017 and December 20, 2017: Count one of the indictment alleges Tablack did knowingly and intentionally conspire and agree with others to manufacture, distribute, and possess with intent to manufacture and

distribute . . . a Schedule I controlled substance-analogue, as defined in Title 21, United States Code, Section 802(32)(A), namely "Cyclopropyl fentanyl," knowing that the substance was intended for human consumption, contrary to Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(c), and 813. In violation of Title 21, United States Code, Section 846.

(App. D, p. D-1)

On or about September 13, 2017: Count two alleges Tablack did knowingly and intentionally manufacture, distribute and possess with intent to manufacture and distribute . . . a Schedule I controlled substance-analogue, as defined in Title 21, United States Code, Section 802(32)(A), namely "Cyclopropyl fentanyl," knowing that the substance was intended for human consumption.

In violation of Sections 841(a)(1), 841(b)(1)(c), and 813, and Title 18, United States Code, Section 2.

(App. D, p. D-2)

The Controlled Substances Act ("CSA"), codified at 21 U.S.C. 841(a)(1) provides: Except as authorized

by this title, it shall be unlawful for any person knowingly or intentionally -- to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

The indictment alleges Tablack knowingly . . . manufacture[ed] and distribute[d] . . . a controlled substance-analogue, which is not a controlled-substance in Section 841(c)(1). Thus, both courts fail to charge a legal element included in the definition of Section 841(c)(1), which requires the substance involved to be listed as a controlled substance in the U.S. Code or Code of Federal Regulations, 21 U.S.C. 812(c); 21 CFR Part 1308. Because "Cyclopropyl fentanyl" was not listed as a controlled substance during the charged timeframe, the substance was not illegal at the time under the law. See e.g., United States v. Mire, 725 F.3d 665, 667 (CA7 2013) (That "the plant" is not illegal in the United States. It is not listed in the U.S. Code or Code of Federal Regulations (CFR) controlled substances schedules.).

"We start, as always, with the language of the statute." Dean v. United States, 556 U.S. 568, 572 (2009). The Court noted, "we ordinarily resist reading words or elements into a statute that do not appear on its face." Ibid. "Because federal courts interpret, rather than author, the

federal criminal code, we are not at liberty to rewrite it." United States v. Oakland Cannabis, 532 U.S. 483, 494 n.7 (2001); Dixon v. United States, 548 U.S. 1, 7 (2006) (As we have observed that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

The CSA makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." McFadden v. United States, 576 U.S. 186, 191 (2015) (citing 84 Stat. 1260, 21 U.S.C. 841(a)(1)). Under the most natural reading of this provision, the word "knowingly" applies not just to the statute's verbs but also to the object of those verbs—"a controlled substance." Ibid. A "controlled substance" means a drug or other substance, or immediate precursor included in schedule I, II, III, IV, or V of part B of this title [21 U.S.C. 812]. 21 U.S.C. 802(6). Section 812 provides

the initial schedules of controlled substances and further specifics to see 21 CFR Part 1308 for the amended Schedules. 21 U.S.C. 812(c). See also United States v. Phifer, 909 F.3d 372, 376 (CA11 2018) ("The list of drugs on Schedule I appears at 21 CFR 1308.11."); MacKay v. DEA, 664 F.3d 808, 810 n.2 (CA10 2011) ("Updated Schedules of controlled substances are published in the Code of Federal Regulations.") (Citing 21 CFR 1308.11-15); Borrome v. AG, 687 F.3d 150, 158 (CA3 2012) (citing § 812; 21 CFR 1308.11-15).

The indictment charges violations of Section 841(a)(1) and alleges Tablack knowingly and intentionally . . . manufactured and distributed . . . a controlled substance-analogue, §§ 802(32)(A), 813. (APP. D, pp. D-1 to D-2). "Section 841(a)(1), however, requires that a defendant knew he was dealing with 'a controlled substance.'" McFadden, 576 U.S., at 195. "It is not broad enough to include all substances regulated by any law." Ibid. Therefore, "the feature of a substance 'that br[ings] it within the scope of' § 841(a)(1) is the fact that it is 'controlled.'" Id., at 196 (citing § 802(4) *supra*); see id., at 197 ("a scienter requirement in a statute alleviates vagueness concerns, narrows the scope of its prohibition, and limits prosecutorial discretion"); id., at 198 (Two drugs-dextromethorphan and hydrocodone-are both used

as cough suppressants. Which one is a controlled substance?*) (Roberts, C.J., concurring in part and concurring in judgment).

"There is no question that it is a federal crime to possess with intent to . . . distribute . . . a controlled substance," 21 U.S.C. 841(a)(1), 'one of which is marijuana, § 812(c)." Moncrieffe v. Holder, 569 U.S. 184, 192 (2013); Alpenglow Botanicals, LLC v. United States, 894 F.3d 1187, 1192 (CA10 2018) (the federal government classifies marijuana as a "controlled substance" under schedule I of the Controlled Substances Act ("CSA")) (citing 21 U.S.C. 812(c), Sch 1 (c)(10), 21 CFR 1308.11(d)(23)). See also Mellouli v. Lynch, 575 U.S. 798, 803 (2015) (Adderall, the brand name of an amphetamine-based drug is a controlled substance) (citing 21 CFR 1308.12(d)(1) (2014)); Jeffers v. United States, 432 U.S. 137, 140 n.3 (1977) ("Heroin is a Schedule I narcotic drug controlled substance.") (citing 21 U.S.C. 812(c)(Sch 1)(b)(10); 21 CFR 1308.11(c)(11) (1976)); Mire, supra, at 669 (21 CFR 1308.11(d)(23), (d)(26) (listing "marijuana" and "peyote" as controlled substances)); United States v. Kelly, 874 F.3d 1037, 1044 n.5 (CA9 2017) (Currently, butylone . . . is designated as a Schedule I hallucinogenic listed in the regulations at 1308.11(d)(62)); United States v. Abdulle, 564 F.3d 119, 125 (CA2 2009) (cathinone, a Schedule I controlled substance, 21 CFR

1308.11(f)(3)); United States v. Hamm, 952 F.3d 728, 737 (CA6 2020)(heroin, fentanyl, and carfentanil unquestionably are Schedule I or II controlled substances under 21 CFR 1308.11(b), 21 CFR 1308.12(c)(6), (9), and this is a question of law, not a factual issue for a jury to decide).¹

The CSA "authorizes the Attorney General to add or remove substances, or to move a substance from one schedule to another." Tauby v. United States, 500 U.S. 160, 162 (1991)(citing 21 U.S.C. 811(a)). The Attorney General may temporarily add a substance in schedule I on an emergency basis if the substance is not listed in any other schedule in [21 U.S.C. 812]. 21 U.S.C. 811(h)(1). However, an order to temporarily schedule a drug may not be issued before the expiration of thirty (30) days from the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order, . . . 21 U.S.C. 811(h)(1)(A). See also Tauby, 500 U.S., at 166 (Attorney General must

¹ Due Process mandates "that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." Dunn v. United States, 442 U.S. 100, 112 (1979). The codification of controlled substances in the updated Code of Federal Regulations provides fair notice of illegal drugs and ensures that he or she is not forced to speculate about the legal status of any drug.

publish 30-day notice of the proposed scheduling in the Federal Register, transmit notice to the Secretary of HHS, and take into consideration any comments submitted by the Secretary in response). The scheduling of a substance shall expire at the end of two years from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings with respect to the substance, extend the temporary scheduling for up to 1 year. 21 U.S.C. § 811(h)(2).²

"It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of an offense include a legal element." United States v. Freed, 401 U.S. 601, 615 (1971) (Brennan, J., concurring in judgment). "And here, there is arguably a legal element in Section 841(a)(1)—that the substance be 'controlled.'" McFadden, 576 U.S., at 199 (Roberts, C.J., concurring in part and concurring in judgment).

Cyclopropyl fentanyl was not listed in the U.S. Code or Code of Federal Regulations (CFR) at the time

² Pursuant to § 811(h), the Attorney General issued a 30-day Notice of Intent to schedule Cyclopropyl fentanyl on November 21, 2017. 82 FR 55333-36. On January 4, 2018 the Attorney General published the temporary scheduling order adding Cyclopropyl fentanyl in Schedule I. 83 FR 469-472.

of the charged conduct. See 21 U.S.C. 812(c); 21 CFR 1308.11-.15 (2017). Therefore, the omitted legal element in the indictment from the federal offense in Section 841(a)(1) is a fatal defect that requires dismissal of the charges; cyclopropyl fentanyl was not scheduled as a controlled substance by the Attorney General pursuant to the directives of § 811. See e.g., United States v. Caudle, 828 F.2d 1111 (CA5 1987) (affirming dismissal of indictments in finding that MDMA was not on the list of controlled substances; therefore, defendants could not have been prosecuted for distributing MDMA); United States v. Spain, 825 F.2d 1426 (CA10 1987) (reversing judgment and conviction finding that there was no order as contemplated by 21 U.S.C. 811(h) that the drug became a Schedule I drug; only a 30-day notice of intention was issued); United States v. Gavrilovic, 551 F.2d 1099, 1106 (CA8 1977) (concluding that the defendants' conduct occurred prior to the effective date of the placement of mecloqualone on Schedule I and therefore was not in violation of § 841(a)(1) and § 846).

Any "defect" is reviewed for harmless-error. See, Fed. R. Crim. P. 52(a). The defect argued in the indictment is not harmless. See, Fed. R. Crim. P. 12(b)(3)(B) (defect in the indictment)(v) (failure to state an offense).

II. CYCLOPROPYL FENTANYL WAS NOT LEGALLY A CONTROLLED SUBSTANCE ANALOGUE IN THE INDICTMENT

On November 21, 2017, the Attorney General issued a 30-day Notice of Intent in the Federal Register to temporarily schedule Cyclopropyl fentanyl in Schedule I. 82 FR 55333. On January 4, 2018, the Attorney General published the temporary scheduling order in the Federal Register adding Cyclopropyl fentanyl in Schedule I. 83 FR 469 (citing 21 CFR 1308.11 (2018)). As of today, cyclopropyl fentanyl is permanently scheduled at 21 CFR 1308.11(b)(27). Accordingly, the petitioner argues that the term "controlled substance analogue" in the indictment does not legally include "a controlled substance," even prior to becoming controlled. In other words, because cyclopropyl fentanyl was scheduled as a controlled substance, it cannot and should not be treated legally as a "controlled substance analogue" during the period of charged activity.

"We start, as always, with the language of the statute." Dean v. United States, 556 U.S. 568, 572 (2009). "When 'a Statute includes an explicit definition' of a term,

'We must follow that definition, even if it varies from a term's ordinary meaning.'" Van Buren v. United States, 141 S.Ct. 1648, 1657 (2021). "Legislative history of course is not the law, but that does not mean it cannot aid us in our understanding of a law." Dig. Realty Trust, Inc. v. Somers, 138 S.Ct. 767, 782 (2018) (Sotomayor, J., concurring).

A provision of the Controlled Substances Act, codified at 21 U.S.C. 813(a) states: "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for purposes of any Federal law as a controlled substance in schedule I. Except as provided in subparagraph (c), the Act defines the term "controlled substance analogue" in 21 U.S.C. 802 (32)(A). Such term does not include—"a controlled substance." 21 U.S.C. 802(32)(C)(i). H.R. REP.

NO. 99-848, at 7-8 (1986) provides: The term "controlled substance analogue" does not include:

(i) A controlled substance. If a substance has been scheduled as a controlled substance, then it cannot and should not be treated legally as a controlled substance analogue, even if its history of abuse was before it was controlled.

"Any activity involving cyclopropyl fentanyl not authorized by, or in violation of the CSA, occurring as of January 4, 2018 is unlawful, and may subject the person to administrative, civil, and/or criminal sanctions." 83 FR 472 n.11 (Liability); see 44 U.S.C. 1507 ("The contents of the Federal Register shall be judicially noticed...").

CONCLUSION

For the reasons raised above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Date: 12/1/23

Respectfully submitted,



Andrew Tablack
Reg No. 75731-112
Victorville USP
PO BOX 3900
Adelanto, CA 92301

Pro Se'

APPENDIX

Orders and Judgments of the Courts Below:

- 1.) Judgment of the U.S. Court of Appeals for the Third Circuit on January 24, 2023, affirming conviction. See, A-1 to A-3.
- 2.) Order to vacate and re-enter judgment on October 6, 2023 affirming conviction. See, A-4.
- 3.) Order of District Court denying motion to dismiss on September 11, 2020. See, B-1 to B-5.
- 4.) Order of District Court denying motion for a Judgment of acquittal. See, B-6 to B-8.
- 5.) Order of District Court denying motion for reconsideration. See, B-9 to B-11.

Statutory Provisions: See, C-1 to C-

Indictment: See, D-1 to D-7.

Other Pertinent Document:

- 1.) H.R. REP. NO. 99-848 (1986).
See, E-1 to E-3.