

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

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No. \_\_\_\_\_

MICHAEL HEWITT,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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*PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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December 26, 2023

## **QUESTION PRESENTED**

Should the trial court have acquitted Petitioner of conspiracy to distribute methamphetamine where (1) the evidence at best showed a conspiracy to distribute MDMA (ecstasy); (2) the jury expressly acquitted Petitioner of conspiracy to distribute MDMA (ecstasy); (3) there was no evidence of any meeting of the minds about distributing any drug other than MDMA (ecstasy); and (4) the evidence showed that the pills the alleged conspirators (and the police) believed were MDMA (ecstasy) were actually methamphetamine?

### List of All Proceedings

1. United States District Court, E.D.N.Y.(Brooklyn), Docket No. 17-cr-00164-ENV-3; judgment entered 6/17/22.
2. United States Court of Appeals for the Second Circuit, Docket No. 22-1387-cr; judgment entered 9/29/23.

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This case presents an important question of federal law that has not been, but should be, settled by this Court:

In a conspiracy to distribute and possess with intent to distribute a controlled substance, does it matter that the particular drug which the conspirators agreed to distribute and possess with intent to distribute, and which they (and the police) believed they possessed, was different than the drug the jury found they conspired to distribute and possess with intent to distribute?

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Petitioner, Michael Hewitt, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit Court of Appeals entered in this proceeding on September 29, 2023.

### **OPINION BELOW**

The decision of the Second Circuit, United States v. Hewitt, 2023 WL 6324380 (2d Cir. 2023), appears in the Appendix hereto.

### **JURISDICTION**

The judgment of the Second Circuit was entered on September 29, 2023. This petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

### **STATUTES INVOLVED**

#### **21 U.S.C. §841(a): Unlawful Acts**

... 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...

#### **21 U.S.C. §846: Attempt and Conspiracy**

Any person who ... conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the ... conspiracy.

## **STATEMENT OF THE CASE**

Petitioner Michael Hewitt [hereinafter “Hewitt” or “the Petitioner”] was charged by superseding indictment with conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841 and 846, and possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. §841. Hewitt was tried before a jury and convicted of both charges. He received concurrent 84-month terms of imprisonment, to be followed by concurrent four-year terms of supervised release. He filed a Rule 29 Motion for Judgment of Acquittal, and a Rule 33 Motion for a New Trial, both of which were denied by the district court. On appeal to the United States Court of Appeals for the Second Circuit, his convictions were affirmed.

The evidence, viewed in the light most favorable to the government, showed that, on intercepted phone calls, Hewitt arranged with co-conspirator Steven Seaforth to buy approximately 300 MDMA (‘ecstasy’) pills. There was communication between Seaforth and his suppliers, Bonzelee Nimmons and Paul Mitchell, about the type and price of the MDMA. Although the conspirators used coded language, an expert testified that the code used on intercepted conversations meant MDMA.

The drug deal was consummated in the Bronx, at which point law enforcement – which had been surveilling the conspirators, as well as intercepting their communications – arrested them. The agents searched Hewitt’s car and seized cash, cell phone, and a clear plastic bag containing 293 yellow pills.

The police believed the pills contained MDMA, as this had been the subject of the intercepted communications, as well as a prior controlled buy from Nimmons. Prior to the bust, Hewitt had texted that he would soon be selling ecstasy. However, the seized pills were later found to contain methamphetamine, and not MDMA.

### **REASONS FOR GRANTING THE PETITION**

**This case presents an important question of federal law that has not been, but should be, settled by this Court:**

**In a conspiracy to possess with intent to distribute a controlled substance, does it matter that the particular drug which the conspirators agreed to distribute, and which they believed they possessed, was different from the drug that was the subject of the Petitioner’s conspiracy conviction?**

21 U.S.C. §841(a)(1) allows for conviction where a defendant does not know the precise type of drug he possesses, but knows only that he is distributing some unspecified controlled substance. McFadden v. United States, 576 U.S. 186, 192 (2015). However, because “the essence of a

conspiracy is an agreement to commit an unlawful act,” United States v. Jimenez-Recio, 537 U.S. 270, 274 (2003), and “the criminal agreement itself is the actus reus,” United States v. Shabani, 513 U.S. 10, 16 (1994), where the agreement is limited to a particular kind of controlled substance, a defendant cannot be found guilty of conspiring to distribute an entirely different kind of controlled substance. That is exactly what happened here.

The government argued to the jury that it did not need to find that Hewitt knew exactly which drug he was dealing in order to convict. The court instructed the jury that the government did not need to prove that Hewitt knew the exact nature of the drug in order to convict him of conspiracy.

The evidence showed that the agreement between the conspirators was to possess with intent to distribute MDMA (ecstasy). However, the jury expressly acquitted Hewitt of that charge, and instead found a methamphetamine conspiracy. There was no evidence whatsoever that Hewitt and the co-conspirators agreed to distribute methamphetamine. In light of that, the trial court should have granted Hewitt’s Rule 29 motion for judgment of acquittal on the charge of conspiracy to distribute methamphetamine.

Relying on United States v. Andino, 627 F.3d 41, 47 (2d Cir. 2010), both the trial court and the appeals court concluded that “the government need not prove *scienter* as to drug *type* or *quantity* when a defendant personally and directly participates in a drug transaction underlying a conspiracy charge.” The knowledge that the drug is a generic controlled substance cannot be sufficient, however, where – as here – the agreement that formed the basis of the conspiracy charge was limited to a specific controlled substance (here, MDMA).

Although Hewitt was properly convicted of possession of methamphetamine, since he was in fact in possession of that drug even though he believed it to be MDMA, it does not follow that he conspired to possess with intent to distribute methamphetamine.

If three people agree to rob a building thinking it to be a drug store, the fact that the store turns out to contain a postal counter does not make them guilty of conspiring to rob a post office. If the conspirators appear and rob the postal station, they have committed the substantive offense under [18 U.S.C.] §2115 but not (retroactively) a conspiracy to rob the postal station. The crime of conspiracy is committed, or not, before the substantive crime begins...

United States v. Salgado, 519 F.3d 411, 415 (7th Cir. 2008).

Hewitt could have been found guilty on this evidence of conspiracy to possess with intent to distribute MDMA. The jury, however, expressly

found that the government did not prove, beyond a reasonable doubt, that the conspiracy involved a substance containing MDMA. The agreement of the conspirators to deal in MDMA did not retroactively become an agreement to deal in methamphetamine simply because it the pills with which they were caught – which they, and the police, believed to be MDMA – were actually methamphetamine.

### Conclusion

For the foregoing reasons, Petitioner Michael Hewitt respectfully requests that this Petition for Writ of Certiorari be granted.

December 26, 2023

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