

No.

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IN THE  
Supreme Court of the United States

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DONALD BILL SMITH,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the witness tampering resulting in death statute, 18 U.S.C. §§1512(a)(1)(A) and (k), requires the Government to prove beyond a reasonable doubt that the defendant knew his obstructive conduct would affect a particular foreseeable official proceeding and whether, in this case, the Government satisfied its burden.
2. Whether the standard established by the Eighth Circuit Court of Appeals to differentiate between a conspiracy to distribute a controlled substance and a mere buyer-seller agreement conflicts with the standard established by other circuit courts of appeals.

## LIST OF PARTIES AND RELATED CASES

*United States v. Donald Bill Smith and Samuel Sherman*, No. 4:19CR00514 DPM

(E.D. Ark.)

*United States v. Samuel Sherman*, 81 F.4<sup>th</sup> 800 (8<sup>th</sup> Cir. 2023).

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## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 81 F.4th 800 (8th Cir. 2023). (App. A).

The order of the United States Court of Appeals for the Eighth Circuit denying the petition for rehearing and rehearing *en banc* is unpublished but available at 2023 U.S. App. LEXIS 26524 (8th Cir. Oct. 5, 2023). (App. B).

## **STATEMENT OF JURISDICTION**

The Eighth Circuit filed its opinion and judgment on August 30, 2023. (App. A). The Eighth Circuit denied a petition for rehearing and rehearing *en banc* on October 5, 2023. (App. B). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The U.S. Constitution, amendment V provides,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

## STATEMENT OF THE CASE

The Petitioner, Donald Bill Smith, and Samuel Sherman were convicted of conspiracy to commit witness tampering resulting in death in violation of 18 U.S.C. §§1512(k). Smith was also convicted of the substantive offense of witness tampering resulting in death in violation of 18 U.S.C. §§1512(a)(1)(A); conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§841(a)(1), 846; and, aiding and abetting the use of a firearm in relation to drug trafficking crime in violation of 18 U.S.C. §924(c)(1)(A). Smith was sentenced to life imprisonment on both witness tampering convictions to run concurrently, 20 years' imprisonment on the drug trafficking conviction to run concurrently with the witness tampering convictions, and 50 years' imprisonment on the firearm conviction to run consecutively to the other sentences.

The evidence against Smith was disputed at trial. There was no dispute that Sherman, while serving a term of federal supervised release, engaged in five controlled sales of methamphetamine to a confidential informant, Susan Cooper<sup>1</sup>. The Government moved to revoke Sherman's supervised release, and counsel for the Government and counsel for Sherman discussed resolving the pending revocation petition and a potential indictment. An agreement was not formalized.

The plea discussions occurred on September 23, 2016. Sherman's supervised release revocation hearing was scheduled for September 29, 2016. Both counsel for

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<sup>1</sup> Herein, Susan Cooper shall be referred to as "Susan" to distinguish her from Rachel Cooper.

Sherman and counsel for the Government believed the case was resolved and that Sherman would plead guilty. Susan disappeared on September 26, 2016. The revocation proceeding was continued to a future date.

Phone records established that Sherman's and Smith's cell phones were in contact with each other between September 23, 2016, and September 26, 2016. The Government, however, presented no evidence of the content of these calls. Rachel Cooper<sup>2</sup> testified that on September 26, 2016, Smith enlisted Rachel to broker a drug transaction between Smith and Susan and that, when Smith arrived at the location, he shot and killed Susan.

Other evidence showed that Sherman and Smith suspected that Susan was an informant, and Sherman confronted her with a pistol, asking if she was working for law enforcement. On another occasion, Sherman engaged in a controlled sell of methamphetamine to Susan that she turned over to law enforcement. Sherman later asked Susan to send him a photograph of the drugs he had sold her.

Rachel testified that she bought methamphetamine from Smith two to three times per week. She further testified that she often obtained drugs from Smith before she sold drugs to third parties. Finally, the Court of Appeals found that Rachel agreed she could "get meth [from Smith] before [she] ha[d] the money or the drugs to exchange it."

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<sup>2</sup> Herein, Rachel Cooper shall be referred to as "Rachel" to distinguish her from Susan Cooper.

Smith appealed. Among other challenges, Smith asserted that the District Court should have granted a judgment of acquittal on the witness tampering charges for the Government's failure to prove a nexus between Smith's obstructive conduct and an official proceeding. He also asserted that the Government's proof that Smith engaged in a conspiracy to distribute methamphetamine was insufficient. He argued that the evidence showed only a buyer-seller agreement, not a conspiracy. That insufficiency, Smith further asserted, was fatal to the firearm conviction on which the drug trafficking conviction was based.

In upholding the witness tampering convictions, the Court of Appeals, stated, Sufficient evidence demonstrates a nexus between Susan's murder and the upcoming revocation hearing, as well as a potential future federal prosecution for distributing drugs. The jury heard from the prosecutor in the revocation matter and from Sherman's defense attorney that, while plea negotiations had taken place, those negotiations had resolved neither the pending revocation matter nor the potential additional charges. The jury also heard from the prosecutor that Susan would have been a key witness in the revocation hearing and in the potential future prosecution. We conclude that the evidence was sufficient for a reasonable jury to find a nexus between Sherman's and Smith's conduct and the pending revocation proceeding, as well as the potential future prosecution.

In upholding the drug and firearm convictions, the Court of Appeals found Rachel's testimony sufficient. It showed evidence of multiple transactions (thus establishing a conspiracy), not a single transaction involving a small quantity of drugs consistent with personal use (and, thus, only a buyer-seller agreement).

## REASONS FOR GRANTING THE PETITION

The Eighth Circuit Court of Appeals erred in concluding the evidence was sufficient to prove the “official proceeding” element necessary to sustain convictions for conspiracy to commit, and to commit, witness tampering resulting in death in violation of 18 U.S.C. §§1512(a)(1)(A), (k). To satisfy the “official proceeding” element, the Government was required to prove beyond a reasonable doubt a nexus between the obstructive conduct and a foreseeable particular proceeding. The Government, and the Court of Appeals, focused exclusively on what Sherman knew, not what Smith knew. Sherman’s knowledge, however, cannot be transferred to Smith. A person, such as Smith, who lacks knowledge of a pending proceeding necessarily lacks the evil intent to obstruct. According to the Court of Appeals opinion, Sherman’s knowledge was sufficient to satisfy the “official proceeding” element. The Eighth Circuit decision conflicts with precedent from this Court and alleviates the Government’s burden of proving every element of the obstruction offenses beyond a reasonable doubt.

The Court of Appeals further erred in finding that the evidence was sufficient to establish a conspiracy to distribute drugs and not a mere buyer-seller agreement. Eighth Circuit precedent holds that evidence of anything more than a single transaction of a personal use amount of drugs is sufficient to establish a conspiracy to distribute drugs. The precedent conflicts with the decisions of other circuit courts of appeals and violates the Due Process Clause by reducing the Government’s constitutional burden of proof.

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1. Title 18, United States Code, Section 1512(a)(1)(A), provides:

Whoever kills or attempts to kill another person, with intent to –

(A) prevent the attendance or testimony of any person in an official proceeding . . .

shall be punished as provided in paragraph (3).<sup>3</sup>

Under the Due Process Clause of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element necessary to constitute the crime for which the defendant is charged. *In re Winship*, 397 U.S. 358 (1970). In *Aguilar v. United States*, the Court interpreted 18 U.S.C. §1503 – endeavoring to obstruct the due administration of justice – to require a nexus between the alleged obstructive act and a judicial proceeding. 515 U.S. 593 (1995). Otherwise, “if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.” *Id.* at 599, citing *Pettibone v. United States*, 148 U.S. 197 (1893).

In *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Court construed another obstruction statute, 18 U.S.C. §1512(b)(2)(A) (later amended). The statute made it a crime to “knowingly use intimidation or physical force, threaten, or corruptly persuade another person . . . with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in an “official proceeding.”

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<sup>3</sup> Subsection (k) prohibits conspiring to commit the offense.

The Court held that, for the government to satisfy the “official proceeding” element, it must prove a nexus between the defendant’s conduct and a foreseeable particular proceeding. *Id.* at 707-08. The Government resisted this interpretation, relying on the language of 18 U.S.C. §1512(e)(1), which provides that an official proceeding “need not be pending or about to be instituted at the time of the offense.” The Court, however, found it necessary to cabin the scope of the statute, stating: “It is, however, one thing to say that a proceeding ‘need not be pending or about to be instituted at the time of the offense,’ and quite another to say a proceeding need not even be foreseen.” *Id.* at 708-09. After all, “[i]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding . . . he lacks the requisite intent to obstruct.” *Id.* at 708, citing *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

Assuming that the *Arthur Andersen* nexus requirement applies to all subsections of §1512, including the specific provision here, §1512(a)(1)(A), *see United States v. Tyler*, 732 F.3d 241, 249-50 (3rd. Cir. 2013), the Eighth Circuit Court of Appeals holding in this case conflicts with this Court’s witness tampering jurisprudence. The Government failed to present any evidence that Smith knew of any particular official proceeding his actions would affect. The Court of Appeals only addressed Sherman’s knowledge of an official proceeding against him. It did not address any evidence showing Smith’s knowledge, and there was none.

The Government failed to prove what Smith knew. It proved that *Sherman* knew a revocation petition was pending against him and a likely future indictment; that *Sherman* engaged in plea discussions with the government (that broke down

after Susan's death); and, that *Sherman* knew Susan would have been a key witness at his revocation hearing and future trial. The trial record, however, lacks any evidence to prove that *Smith* knew Sherman's revocation hearing was pending and that his indictment likely. At best, it can only be inferred from the phone records that Smith and Sherman engaged in conversations in the days before Susan's disappearance. There was no proof of what was discussed, and a rational juror could only speculate that they discussed killing Susan to prevent her testimony against Sherman.

*United States v. Friske*, 640 F.3d 1288 (11th Cir. 2011), provides a useful example. Friske received a recorded jail phone call from a friend who told Friske to go to the friend's home for a repair job on the pool. Friske was advised to wear gloves, inspect the pool pump, and report back. In response to the recorded call, law enforcement made it to the home before Friske. They found \$375,000 hidden under the pool pump. Friske was charged with, and convicted of, obstructing an official proceeding – a forfeiture action – by attempting to hide the money.

The Eleventh Circuit vacated Friske's conviction, finding the evidence insufficient that Friske knew of the forfeiture proceeding. The Court began by adopting the decisions of other circuits that impose the nexus requirement. It further found that, under *Aguilar*, "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct" and held that the government is required to prove the defendant knew of, or at least foresaw, the official proceeding.

*Id.* at 1292. It stated:

The only way the jury could conclude that Friske knew his actions were likely to affect a forfeiture proceeding, in the absence of any evidence that he was aware that a forfeiture proceeding was pending or foreseeable, would be through speculation. But speculation is not enough to sustain a conviction based on circumstantial evidence.

*Id.*

Faced with the Government's evidence against Smith, a rational juror could only speculate that Smith was aware of a supervised release revocation proceeding against Sherman. The Court of Appeals interpreted the statute too broadly by allowing a conviction to stand on less than proof beyond a reasonable doubt of the "official proceeding" element. Such a broad interpretation of the statute is not warranted. It, in fact, conflicts with this Court's "traditional[] . . . restraint in assessing the reach of a federal criminal statute . . ." *See United States v. Aguilar*, 515 U.S. 593, 601 (1995); *Fowler v. United States*, 563 U.S. 668, 685 (2011) ("We have adopted a federalism principle that applies when a statute would render 'traditionally local criminal conduct . . . a matter for federal enforcement.'" Scalia, J., concurring.). By not insisting on a sufficient nexus between the obstructive conduct and an official federal proceeding, the Court of Appeals broadened the scope of the witness tampering resulting in death statute to encompass a purely local crime. Clarification by this Court on the breadth of the statute is necessary.

2. The Court of Appeals found there was sufficient evidence to sustain Smith's conviction for conspiring with Rachel to distribute methamphetamine and, therefore, Smith's conviction for using a firearm in relation to that conspiracy. The Court relied primarily on two Eighth Circuit opinions to explain the Eighth Circuit's

distinction between a “buyer-seller” agreement and a conspiracy to distribute drugs: *United States v. Rodriguez*, 984 F.3d 704 (8th Cir. 2021), and *United States v. Conway*, 754 F.3d 580 (8th Cir. 2014). A buyer-seller agreement exists, according to *Rodriguez* and *Conway*, if the evidence shows a single transaction involving a small quantity of drugs consistent with personal use. Under the Eighth Circuit standard, a drug distribution conspiracy is proved if there is evidence of multiple transactions.

The Eighth Circuit Court of Appeals standard for differentiating between a conspiracy to distribute a controlled substance and a mere buyer-seller agreement conflicts with the standards established by other courts of appeals. In *United States v. Loveland*, the Ninth Circuit stated, “For the seller to be conspiring with the buyer to redistribute, there has to be an agreement, not just surmise or knowledge, between the seller and buyer for the buyer to redistribute.” 825 F.3d 555, 561 (9th Cir. 2016). In *United States v. Johnson*, the Seventh Circuit found that “to prove a conspiracy, the government must offer evidence establishing an agreement to distribute drugs that is distinct from evidence of the agreement to complete the underlying drug deals.” 592 F.3d 749, 754 (7th Cir. 2010). *United States v. Brown*, 726 F.3d 993 (7th Cir. 2013), confirmed this view. “Conspiracy to traffic drugs,” the Court stated, “requires an agreement to advance *further* distribution.” (emphasis in original). *Id.* at 999. The seller’s mere knowledge that the buyer may engage in a resale does not make the seller a coconspirator. *Id.* *But, cf. United States v. Ramirez*, 350 F.3d 780 (8th Cir. 2003). The Seventh Circuit, therefore, approved a jury instruction that stated that “the government must prove that, in addition to agreeing to buy drugs,

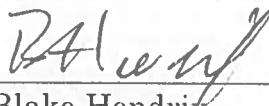
the defendant further participated with the seller in an arrangement involving mutual dependence, cooperation or assistance in distributing drugs.” *Id. at 1003.*

To satisfy the Due Process Clause, the Government was required to prove that Smith made an agreement with Rachel that she would engage in further distributions of the controlled substances she received from Smith. The Eighth Circuit standard, however, only requires that the Government prove that seller and buyer engage in more than one transaction. Such evidence is constitutionally deficient to prove an agreement to advance further transactions.

## CONCLUSION

For the reasons set out above, the petition for writ of certiorari should be granted, and upon plenary consideration and oral argument, the judgment of the Eighth Circuit Court of Appeals affirming all of Smith's convictions should be vacated and the case remanded.

Respectfully submitted,

  
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