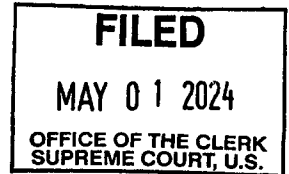


No. _____

23-7461

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



SHANE A. FOX — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SHANE A. FOX 22716-032
(Your Name)

FCI - Gilmer
P.O. Box 6000
(Address)

Glenville, WV 26351
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I. WHETHER THE INCHOATE OFFENSE OF ENGAGING IN A
ILLEGAL DRUG CONSPIRACY CONSTITUTES A SERIOUS
DRUG OFFENSE FOR PURPOSES OF INCREASING A
DEFENDANT'S STATUTORY MAXIMUM PENALTY AS A
CAREER OFFENDER?

2. WHETHER THE PETITIONER WAS DEPRIVED OF DUE
PROCESS WHEN NO EVIDENTIARY HEARING WAS HELD?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 6, 2024.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

21 USC § 846

21 USC § 851(a)

28 USC § 2255

STATEMENT OF THE CASE

On September 12, 2019, a grand jury indicted the Petitioner - Shane A. Fox, for conspiring with eight other individuals to possess with intent to distribute 280 grams of crack cocaine, in violation of 21 U.S.C. §§ 846, and 841(a)(1). Thereafter, Shane Fox entered a guilty plea to the aforesaid count, without obtaining a plea agreement from the Government. Significantly, the Government served notice, prior to entry of plea, of an intention to seek an increase in the statutory maximum penalty through filing a notice pursuant to 21 U.S.C. § 851(a)(1). It was the Government's position that Fox's prior state illegal drug convictions constituted "serious drug felonies", triggering the increased statutory penalty for the drug conspiracy count to which he later pled guilty. Thus, Fox was placed on notice that the statutory penalty for the offense would increase the mandatory minimum from zero months, to 300 months, imprisonment, if the prior state trafficking offenses qualified as "serious drug felonies" under 18 U.S.C. § 924(e)(2)(A)(i), a/k/a the "Armed Career Offender" Act.

The ensuing Pre-Sentence Report adopted the Government's position that Shane Fox should be sentenced as a

"career offender", to which the petitioner filed objections. It was petitioner's position that his prior convictions did not constitute "serious drug felonies", however, defense counsel failed to argue that the offense to which Shane Fox had pled guilty (drug conspiracy), did not meet the definition of a "controlled substance offense" since it is only an inchoate crime without an "actus reus" element. Neither did the conduct proscribed by 21 U.S.C. § 846, require an "overt act". The offense was complete upon a defendant entering the unlawful agreement. United States v. Shabani, 513 U.S. 1015 (1994); United States v. Iannelli, 420 U.S. 770, 777 (1975).

At the sentencing hearing, the district court overruled Shane Fox's objection, and ruled that the penalty set-forth in 21 U.S.C. §841(b)(1)(A), applied even though the indictment failed to charge that statute, or give notice of the statutory penalty which petitioner faced if convicted of the drug count. Accordingly, rather than facing a penalty range of zero to 360 months, the district court used an incorrect statutory penalty range of 300 months to life imprisonment. Consequently, the district court imposed a sentence of 300 months on Shane Fox. The sentence was affirmed on appeal. United States v. Fox, No. 20-6039 (6th Cir., August 25, 2021)

The instant proceeding was timely filed by Shane Fox. The present motion to vacate (28 USC § 2255) asserted a claim of ineffective assistance of counsel. The petition was summarily dismissed without conducting an evidentiary hearing, or appointment of counsel. Likewise, the Sixth Circuit Court of Appeals denied issuance of a certificate of appealability without addressing whether Shane A. Fox was properly sentenced as a career offender under the increased penalties set-forth in 21 USC § 841(b)(1)(A), or whether counsel provided professionally competent representation. Fox v. United States, 2024 U.S.App.LEXIS 2753 (6th Cir. Feb. 6, 2024). Thus, the instant claim has not been ruled upon by any court even though the Sixth Circuit has previously ruled that "conspiracy" crimes do not meet the definition of a "controlled substance offense". See United States v. Havis, 927 F.3d 382, 387 (6th Cir.2019); United States v. Powell, 2019 U.S.App.LEXIS 21736 (6th Cir. 2019); and United States v. Butler, 2020 U.S.App.LEXIS 14404 (6th Cir.2020).

An inchoate crime has been held to not qualify as a "controlled substance offense", and could not serve as a basis for a career offender enhancement under the Guidelines, in United States v. Dupree, 57 F.4th 1269 (11th Cir.2023)

(en banc); and in United States v. Nasir, 17 F.4th 459, 471 (3rd Cir.2021)(en banc). Those cases resulted in a ruling that an inchoate offense does not qualify as a "controlled substance offense" for purposes of the career offender sentencing enhancement under the Sentencing Guidelines (§ 4B1.2(b)). The district court sentenced Deupre as a career offender by relying on § 846, his offense of conviction. The en banc court held that the definition of "controlled substance offense" in § 4B1.2(b) does not include inchoate offenses. In accord: Nasir, supra, and Havis, supra. Accordingly, this same reasoning should apply equally to the use of a § 846 drug conspiracy offense, and disqualify it from triggering application of the increased penalties set forth in 21 USC § 841(b).

REASONS FOR GRANTING THE PETITION

WHETHER THE INCHOATE OFFENSE OF ENGAGING IN A ILLEGAL DRUG CONSPIRACY CONSTITUTES A SERIOUS DRUG OFFENSE FOR PURPOSES OF INCREASING A DEFENDANT'S STATUTORY MAXIMUM PENALTY AS A CAREER OFFENDER?

Petitioner - Shane A. Fox, had his drug conspiracy offense conviction (21 U.S.C. § 846) sentence increased because of prior state convictions which were considered to be controlled substances offenses, and met the current definition of a "serious drug offense", as defined by 18 U.S.C. § 924(e), or the "Armed Career Criminal Act". The lower courts failed to address the issue which surrounded the "offense of conviction", and the fact that as a inchoate crime, it was not required for the petitioner to have violated a substantive drug crime. In addition, no consideration was given to the fact that a drug conspiracy offense, under 21 U.S.C. § 846, requires no overt act by a participant.

"Because conspiracy is an inchoate offense, the essence of a conspiracy 'is an agreement to commit an unlawful act.'" United States v. Hofstetter, 31 F.4th 396 (6th Cir.2022)(quoting Iannelli v. United States, 420 U.S. 770, 777 (1975)). Thus, the offense prohibited by § 846, is committed once the parties agreement is entered into by them. Id.; United States v. Havis, 927 F.3d 382,(391-92 (6th Cir.,2019); and United States v. Shabani, 513 U.S. 10, 15 (1994). "The government did not need to prove that Hof-

stetter completed her agreed-upon drug crime or even that she 'took an overt act to implement the crime.'" Hofstetter, supra (citing Iannelli v. United States). Therefore, drug quantity and drug type are not facts that transform those issues into a mens rea element of § 846. United States v. Williams, 974 F.3d 320, 362 (3rd Cir. 2020). Those factors are reserved for the sentencing proceeding, Id.

Because § 846 contains no penalty for its violation, and since it does not include any reference to drug type, or drug quantity, the statute is intended to prohibit an agreement to violate the "Controlled Substances Act", and does not apply to an actual violation of the Act by engaging in illegal drug trafficking. Consequently, § 846 is a inchoate crime, which eliminates it as qualifying as a predicate for increasing the penalties found in 21 USC § 841(b). Neither does a violation of § 846, qualify as a "serious drug offense", as defined in 18 USC § 924(e).

Under 28 USC § 2255(a), a motion to vacate may be filed by a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States,

or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." § 2255(a). The court shall grant relief if it finds "that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." § 2255(b). Petitioner - Shane A. Fox has been sentenced under a false application of § 846 as a inchoate offense which triggered an enhanced statutory sentence, thus, creating a "miscarriage of justice", and permitting review of the sentence under § 2255.

It was clear error for the lower courts not to set a evidentiary hearing, and, failing in that regard, to grant a "certificate of appealability" on the issue for further development. Remand is required to correct the errors. See United States v. Addonizio, 442 U.S. 178, 185 (1979).

WHETHER THE PETITIONER WAS DEPRIVED OF DUE PROCESS
WHEN NO EVIDENTIARY HEARING WAS HELD?

"[W]hen a defendant presents an affidavit containing 'a factual narrative of the events that is neither contradicted by the record nor inherently incredible' and the government offers nothing more than 'contrary representations' to contradict it, the defendant is entitled to an evidentiary hearing." Pola v. United States, 778 F.3d 525, 532-33 (6th Cir.2015)(quoting Huff v. United States, 734 F.3d 600, 607 (6th Cir.2013)). It is error for a district court to summarily dismiss a collateral challenge to a conviction and/or sentence in a § 2255 motion. Lindhorst v. United States, 585 F.2d 361, 363 (8th Cir.1978)(remanding for an evidentiary hearing where "[n]either the motion nor the files and records of the instant case 'conclusively show that the prisoner is entitled to no relief.'"). Importantly, opposing affidavits submitted by the government are not to be considered as part of the "files and records of the case". Id. Thus, they cannot be used as a basis to deny an evidentiary hearing. Id.

Since it is elementary habeas corpus law that a petitioner need only allege - not prove - reasonably specific, non-conclusory facts that, if true, require relief, it was

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shirley F. Lee

Date: 4-30-24