No. ________

In The
Supreme Court of the United States

Jawayne Watkins, AKA Weezy,

Petitioner,

v.

The United States of America,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's Grand Jury Clause permits a conviction for distributing a specifically charged Schedule I controlled substance to rest on forensic proof that is, by the government's own account, incapable of distinguishing the charged substance from chemically related isomers that were lawful at the time of the offense.
2. Whether the "death results" enhancement of 21 U.S.C. § 841(b)(1)(C) is satisfied by expert testimony that death resulted from an unidentified member of an isomer family, only one member of which was a controlled substance.

PARTIES TO THE PROCEEDING

Petitioner is Jawayne Watkins. Respondent is the United States of America. No corporate parties are involved in this case. The caption of this case contains the names of all parties.

RELATED CASES

This case arises from the following proceedings in the Western District of New York and the Second Circuit.

> *United States v. Watkins*, No. 18-CR-32-A, United States District Court for the Western District of New York.
>
> *United States v. Watkins*, No. 22-1296-cr, United States Court of Appeals for the Second Circuit.

No other proceedings directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jawayne Watkins, an inmate currently incarcerated in the Bureau of Prisons, FCI Danbury, by and through undersigned counsel, Parker R. MacKay, Esq., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit (Walker, Park, and Lee, *JJ.*) is reported at No. 22-1296-cr, 2026 WL 1425536 (2d Cir. May 21, 2026) and is reproduced at pages 1 to 13 of the Appendix. The District Court's decision denying Petitioner's motion pursuant to Federal Rules of Criminal Procedure 29 and 33 is reported at No. 18-CR-32-A, 2021 WL 3732298 (W.D.N.Y. Aug. 24, 2021) and is reproduced at pages 21 to 38 of the Appendix.[1]

JURISDICTION

The Court of Appeals entered its summary order and judgment on May 21, 2026. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition within 90 days of that judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

[1] The "Appendix" is hereinafter referred to as "A.__."

Section 841(a)(1) of Title 21 provides, in relevant part, that 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."

Section 841(b)(1)(C) of Title 21 specifically provides, in relevant part:

> "[I]f death or serious bodily injury results from the use of such substance[,] [such person] shall be sentenced to a term of imprisonment of not less than twenty years or more than life. . . ."

STATEMENT OF THE CASE

In November 2017, 4-fluoroisobutyryl fentanyl ("4-FIBF") was a Schedule I controlled substance, but its positional isomers—3-fluoroisobutyryl fentanyl ("3-FIBF") and 2-fluoroisobutyryl fentanyl ("2-FIBF"), which differ only in the location of a single fluorine atom—were not federally controlled. Post-mortem toxicology could not distinguish among these isomers. Petitioner Jawayne Watkins was indicted for, and convicted at trial of, distributing heroin and 4-FIBF with death resulting in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), based on a toxicology report identifying only "meta/para-fluoroisobutyryl fentanyl" in the decedent's blood and corresponding expert testimony attributing death to the unidentified fluoroisobutyryl analogue family. The Second Circuit affirmed Petitioner's convictions but acknowledged that "the toxicology analysis did not prove" the presence of the charged isomer. A.4. It instead held that the forensic proof at trial was "consistent with" the government's theory. A.4. This shift in the quantum of proof necessary to convict was inconsistent with the Fifth Amendment's Grand Jury Clause and 21 U.S.C. § 841(b)(1)(C)'s "but for" causation requirement.

A. The Charge and the Limits of Post-Mortem Toxicology Proof

Petitioner was charged by a second superseding indictment with four counts arising from alleged narcotics trafficking in the Buffalo, New York area in 2017. Count 4—the most serious count and the focus of this Petition—charged that Petitioner possessed with intent to distribute and distributed heroin and 4-FIBF, and that the death of A.C. (his girlfriend) resulted from the use of those substances, all in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). The grand jury specifically named 4-FIBF as the Schedule I controlled substance.

4-FIBF is one of a family of fentanyl isomers distinguished only by the position of a fluorine atom on the isobutyryl fentanyl molecule. The "4" denotes that the fluorine occupies the "para" position; in 3-fluoroisobutyryl fentanyl ("3-FIBF") the fluorine occupies the "meta" position; in 2-fluoroisobutyryl fentanyl ("2-FIBF"), the "ortho" position. During the charged offense period (June through November 10, 2017), 4-FIBF had been temporarily scheduled by the Drug Enforcement Administration as a Schedule I controlled substance effective May 3, 2017. 82 Fed. Reg. 20544. 3-FIBF was not separately scheduled until 2018: the DEA issued a notice of intent to temporarily schedule fentanyl-related substances on December 29, 2017, 82 Fed. Reg. 61700, and a temporary scheduling order on February 6, 2018, 83 Fed. Reg. 5042. A permanent rule specific to 3-FIBF was issued on December 7, 2023, 88 Fed. Reg. 85104, and Congress made the fentanyl-wide placement permanent in 2025. HALT Fentanyl Act, Pub. L. No. 119-26 (2025). 2-FIBF was not individually proposed for scheduling until 2021. 86 Fed. Reg. 14707.

Possession or distribution of 3-FIBF or 2-FIBF during June to November 2017 was therefore not a federal controlled-substance offense under §841.

Post-mortem forensic toxicology could not distinguish among these isomers. As the Chief County Toxicologist for Erie County, New York testified at trial, the instrument used to analyze A.C.'s blood "is not able to distinguish whether the fluoro is in the 3 position or the 4 position." The DEA itself implicitly acknowledged this limitation when it scheduled 4-FIBF in 2017, noting that deaths attributable to 4-FIBF were likely underreported because "standard immunoassays may not differentiate this substance from fentanyl." 82 Fed. Reg. at 20545. Accordingly, the toxicology report on A.C.'s blood identified the substance present only as "meta/para-fluoroisobutyryl fentanyl"—a designation that encompasses both the charged, scheduled isomer (4-FIBF) and an uncharged isomer that was lawful at the time (3-FIBF).

B. Trial Proceedings

At trial, the government introduced evidence of controlled purchases from Petitioner by a confidential informant, including one on July 13, 2017, and one on November 9, 2017. Gas chromatography testing of those seized narcotics—which, unlike post-mortem toxicology, *can* differentiate isomers—confirmed that the controlled-buy samples contained heroin and 4-FIBF. But no evidence established that the controlled-buy drugs were the drugs A.C. ingested on the night of November 9-10, 2017 when she passed away. The drugs sold to the informant were not recovered; no drugs were found on or near A.C.; and the investigating detective found no heroin or drug packaging among A.C.'s personal effects. The trial evidence also showed that A.C. spent part of the evening of November 9 away from Petitioner, visiting family at her mother's residence, while Petitioner went to a different address.

A.C. was found unresponsive on November 10, 2017 and was pronounced dead that day. The government presented Dr. Stacey Hail as a medical toxicology expert in its case-in-chief, who opined that A.C. would not have died "but for the fluoroisobutyryl fentanyl laced heroin" in her system. On cross-examination, Dr. Hail acknowledged that she had not reviewed any report demonstrating "that it was the 4-fluoro analogue as opposed to the 3-fluoro analogue found in the decedent," and conceded that "[i]t is next to impossible to isolate these different isomers from each other."

The defense called Dr. Katherine Maloney, the Deputy Chief Medical Examiner of Erie County, who performed A.C.'s autopsy, in its case-in-chief. Dr. Maloney testified that the cause of death was a "mixed drug intoxication" that "included an unknown fentanyl analog," together with heroin, cocaine, and ethanol, and that singling out the fentanyl analogue as the sole but-for cause of death "would be arbitrary," because there was no quantitative measurement of the fluoroisobutyryl fentanyl in A.C.'s blood.

C. The District Court's Rulings

At the close of the government's proof, and again by post-trial motion under Rules 29 and 33, Petitioner argued that the government failed to prove that the substance in A.C.'s system was 4-FIBF, and that the variance between the indicted analogue and the trial proof amended the indictment. The District Court denied the motions. In its oral ruling denying the motions during trial, the District Court reasoned that "[e]ither [isomer] would have caused the death of the victim in this case," and, appearing to waver in its pronouncement, it noted that Petitioner "was clearly on notice as to what the substance—*variation of the substance* was present." It further found in its post-trial written decision that "substantial circumstantial evidence that the heroin A.C. used was laced with the 4-flu[o]roisobutyryl fentanyl isomer charged in the Indictment." A.11. The Second Circuit echoed this finding. *See* A.4. The District Court did not address the fact that one of the two isomers the toxicology could not exclude was not a controlled substance during the charged period.

The jury convicted Petitioner on all counts. By special verdict on Count 4, the jury found that A.C.'s death resulted from "the heroin and 4-fluoroisobutyryl fentanyl" Petitioner possessed with intent to distribute or distributed. Petitioner was sentenced principally to 360 months' imprisonment—a sentence driven by Count 4's twenty-year mandatory minimum and Guidelines range of life.

D. The Second Circuit's Affirmance by Summary Order

The Second Circuit affirmed by summary order on May 21, 2026. Its decision acknowledged the gap in forensic evidence, noting that "the toxicology analysis did not prove that the fentanyl analogue present in A.C.'s body was 4-fluoroisobutyryl fentanyl." A.4. The court nevertheless declined to find a constructive amendment, reasoning that: "the proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment"; that the indictment gave Petitioner "notice of the core of criminality to be proven at trial" and that Petitioner "d[id] not claim that he lacked such notice"; that "the toxicology analysis was consistent with the government's theory"; and that the District Court "properly found" substantial circumstantial evidence that the heroin A.C. used was laced with the charged isomer. A.4.

Although the government argued that Petitioner's reliance on the unscheduled status of 3-FIBF was not specifically presented to the District Court, the panel appeared to bypass that argument, instead reviewing the constructive amendment claim *de novo* and rejecting it on the merits. The circuit court did not address the legal significance of the fact that the alternative isomer the toxicology could not exclude was not a controlled substance during the charged period.

REASONS FOR GRANTING THE WRIT

This petition presents a question of law: may the government charge a defendant with distributing one specifically-named controlled substance, and then convict him of that offense, on forensic proof that concededly cannot establish that the charged substance—rather than a chemically related, lawful substance—was present? The courts below answered yes, so long as the proof was "consistent with" the charged substance and the defendant had "notice." That answer cannot be reconciled with the Fifth Amendment, with the requirement of proof beyond a reasonable doubt of every element of the offense, or with this Court's decision in

Burrage v. United States, 571 U.S. 204 (2014) regarding "but for" causation. Because of mismatches in testing technology, and the availability of synthetic drugs, the question will continue to arise in serious federal prosecutions involving narcotics that are not specifically scheduled.

I. The Decision Below Permits Conviction on a Charge the Grand Jury Did Not Return and the Government Could Not Prove.

A. The Grand Jury Clause Requires Proof of the Specific Offense Charged in the Indictment.

The Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST AMEND V. That guarantee functions as an indispensable check on prosecutorial power by interposing a body of citizens between the government's accusation and the defendant's trial. It is fundamental that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960); *see Ex parte Bain*, 121 U.S. 1, 7 (1887). After an indictment is returned, "its charges may not be broadened through amendment except by the grand jury itself." *Stirone*, 361 U.S. at 215-216. So, while the government's proof may permissibly *narrow* the charge, it may never *broaden* it. *See United States v. Miller*, 471 U.S. 130, 138-145 (1985).

A constructive amendment occurs when "either the trial evidence or jury charge broadens the possible bases for conviction from that which appeared in the indictment, such that it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Prawl*, 149 F.4th 176, 186-187 (2d Cir. 2025). Constructive amendment is *per se* reversible error; that is, courts may not apply harmless-error analysis. *Stirone*, 361 U.S. at 217-219; *United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012).

These principles bear directly on this case because the specification in the indictment (the identity of the fentanyl isomer) is what separated criminal conduct from lawful conduct. Only 4-FIBF was scheduled during the offense period; its forensically indistinguishable relatives were not. The identity of the substance was therefore not a detail of how the offense was committed. It determined whether a federal crime had been committed at all, and whether the "death results" element—which requires that death result from the use of a *controlled* substance distributed in violation of § 841(a)—could be established. And the government made a deliberate charging choice by electing to name a single specific isomer in the indictment to the exclusion of others.

B. The Identity of the Substance in this Case Separates Guilt from Innocence.

Section 841(a)(1) makes it unlawful "knowingly or intentionally" to distribute "a controlled substance." A "controlled substance" is a scheduled substance. 21 U.S.C. § 802(6). In *McFadden v. United States*, 576 U.S. 186 (2015), this Court explained that the knowledge element may be established in either of two ways: by "evidence that a defendant knew that the substance with which he was dealing is some controlled substance," even if he did not know which one, or by evidence that the defendant knew the identity of the substance he possessed, where that substance is in fact listed on the federal drug schedules. *Id.* at 188-189, 192. But both routes require that the substance distributed is, in fact, a controlled substance.

The law's flexibility as to the defendant's knowledge of the substance's precise identity exists only because the objective, scheduled status of the substance supplies the criminality. Neither route can be satisfied in this case if the substance at issue was 3-FIBF. In November 2017, 3-FIBF was not "some controlled substance," so the first route fails; and knowledge of its identity was knowledge of a lawful compound, so the second fails as well. No quantum of *mens rea* can make distribution of an unscheduled compound a §841 offense.

The gap in forensic evidence here evokes a Grand Jury Clause problem rather than an ordinary evidentiary dispute. The grand jury found probable cause for a charge whose element spoke to a compound that was, in fact, scheduled. A petit jury permitted to convict on proof equally consistent with 3-FIBF may have convicted on a set of facts that describes no federal offense, much less the offense the grand jury returned. Where the trial proof leaves it "uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment," *Prawl*, 149 F.4th at 186-187, and one of the open possibilities was lawful conduct, the trial did not merely adjust the indictment's details. It substituted an accusation that the grand jury did not return.

C. Proof That Is Merely "Consistent With" the Charged Substance Cannot Sustain the Conviction.

The Second Circuit acknowledged that "the toxicology analysis did not prove that the fentanyl analogue present in A.C.'s body was 4-fluoroisobutyryl fentanyl."

A.4. It affirmed anyway because "the toxicology analysis was consistent with the government's theory." A.4. But the problem with substituting a "consistent with" framework is that test results that cannot distinguish between Substance A (charged and illegal) and Substance B (uncharged and legal), by definition, produce results that are equally consistent with both. Evidence in that posture cannot establish the charged substance beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and it does not assure that the petit jury convicted on the charge the grand jury returned rather than on an uncharged—and, here, lawful—alternative. In that sense, the Second Circuit ignored its own precedent that evidence giving "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence" requires acquittal. *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008). So, at bottom, a forensic test that by design cannot differentiate the charged substance from a lawful one is not weak support for the charged isomer; it is no basis at all for choosing between them.

In the separate context of sentencing, the courts of appeals have insisted on proof of the specific isomer when the answer carries legal consequences. This specificity should apply just as much at trial. For instance, the Eleventh Circuit has held that the government bears the burden of production and persuasion as to which type of methamphetamine (the D- or L-isomer) was involved in an offense, and it vacated a sentence imposed on the unproven assumption that the harsher isomer was involved. *See United States v. Patrick*, 983 F.2d 206, 208-211 (11th Cir.

1993). The Third Circuit agreed, explaining that "considering the magnitude of the difference in sentencing that could result from the application of the wrong organic isomer," a failure to determine the isomer "would result in a grave miscarriage of justice." *United States v. Bogusz*, 43 F.3d 82, 90 (3d Cir. 1994). The Eleventh Circuit later went even further, holding it plain error to sentence on the basis of an isomer the government never proved. *See United States v. Ramsdale*, 61 F.3d 825 (11th Cir. 1995). If the government must affirmatively prove the correct isomer at sentencing under a preponderance standard, that proof cannot be dispensed with at a trial where the isomer's identity determines guilt itself, and the standard is proof beyond a reasonable doubt.

Nor is the notice rationale sufficient. The Second Circuit (like the District Court below) relied upon the "core of criminality" doctrine, under which flexible proof is permitted "provided that the defendant was given notice of the core of criminality to be proven at trial," and observed that Petitioner "does not claim that he lacked such notice." A.4 (quoting *McGinn*, 787 F.3d at 128). But notice was never the issue, and the "core of criminality" concept presupposes that every basis for conviction within the "core" is, in fact, criminal. Here, the proof encompassed conduct (distribution of 3-FIBF) that Congress and the DEA had not yet criminalized. A defendant cannot be "on notice" that he must defend against conduct that was not a federal crime, and a grand jury cannot be presumed to have charged one. *Stirone* makes clear that the controlling question is not notice or prejudice but whether the defendant was convicted of an offense not charged in the indictment. 361 U.S. at 217-219. And by converting the constructive-amendment inquiry into an ordinary sufficiency review by asking whether the jury *could have* convicted on the charged basis deprives the Grand Jury Clause of independent force.

The circumstantial evidence the Second Circuit cited does not bridge the gap. The government proved, through gas chromatography, that drugs Petitioner sold to a confidential informant on other occasions contained 4-FIBF. But those drugs were not recovered in connection with A.C.'s death, no drugs were found on or near A.C., nothing connected the controlled-buy samples to anything A.C. ingested, and A.C. spent part of the relevant evening away from Petitioner. Testimony about the rarity of the drug—that a single county laboratory had confirmed 4-FIBF in only four to six seized-drug analyses, four linked to Petitioner—was generated by seized-drug instrumentation that *can* distinguish isomers; it says nothing about the relative prevalence of 3-FIBF in the unregulated street supply, which the DEA itself recognized was systematically under-identified in biological samples. 82 Fed. Reg. at 20545. Likewise, the case agent's testimony that he had never encountered 3-FIBF proves little where post-mortem instrumentation could not have identified it as such in fatal overdoses. Such inferences may have force in an ordinary sufficiency dispute; they cannot supply the grand jury's charge or convert proof of a substance class into proof of the indicted substance.

D. The Question Is Important and Will Recur.

The forensic limitation at issue is not constrained to one laboratory or one prosecution. The DEA's own 2017 scheduling notice for 4-FIBF acknowledged that standard immunoassays may be unable to differentiate fentanyl compounds, 82 Fed. Reg. at 20545, and the government's own trial expert testified that "[i]t is next to impossible to isolate these different isomers from each other." The regulatory record speaks to the breadth of the problem. Within weeks of the conduct charged here, the DEA abandoned compound-by-compound scheduling for this family altogether: it announced its intent to schedule fentanyl-related substances as a class on December 29, 2017, 82 Fed. Reg. 61700, issued a temporary class-wide order on February 6, 2018, 83 Fed. Reg. 5042, and Congress made the class placement permanent in the HALT Fentanyl Act, Pub. L. No. 119-26 (2025). The resort to class-wide scheduling was a recognition that controlling individual compounds had left lawful, forensically indistinguishable chemical relatives in circulation. The charged offense period in this case falls squarely within that acknowledged gap.

The question remains open in two respects. First, prosecutions arising from conduct predating the February 2018 class-wide order may continue to arise, given that the federal conspiracy statute is a continuing offense. Second, this problem arises whenever an indictment names a specific compound that the available forensic proof cannot distinguish from a different compound, whether the alternative is unscheduled, as here, or scheduled under a provision carrying different penalties. Novel psychoactive substances outside the fentanyl family continue to be scheduled compound by compound, and forensic methods continue to lag behind synthetic chemistry. And this is a problem that reaches beyond just fentanyl compounds. What proof the Constitution requires before a defendant may be convicted of distributing a specifically charged substance is a question warranting this Court's review.

II. The Decision Below Conflicts With *Burrage*'s But-For Causation Requirement.

A. *Burrage* Requires Proof Beyond a Reasonable Doubt That the Charged Substance Caused the Death.

In *Burrage*, this Court held that the "death results" enhancement of § 841(b)(1)(C) "is an element that must be submitted to the jury and found beyond a reasonable doubt," 571 U.S. at 210, and that, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death," the defendant cannot be liable "unless such use is a but-for cause of the death," *id.* at 218-219. This Court rejected a "contributing cause" standard because of the enhancement's severe consequences. *Id.* at 214-219.

Burrage focused whether the defendant's drug *caused* the death. This case presents the question that *Burrage* presupposed: whether the government proved that the defendant's *charged* drug was even present. The statutory text ties the enhancement to death resulting "from the use of such substance"—the controlled substance distributed in violation of § 841(a). Where the forensic proof cannot identify the substance in the victim's body as the charged, scheduled substance—as opposed to an uncharged compound that was not controlled at all—the chain of statutory causation fails at its first link.

B. The Government's Own Expert Could Not Identify the Substance, Much Less Prove That It Caused A.C.'s Death.

The government's causation opinion was directed at a family of compounds, not the charged substance. Dr. Hail opined that A.C. would not have died "but for the fluoroisobutyryl fentanyl laced heroin" in her system. That statement encompassed, at a minimum, both the scheduled 4-FIBF and the then-unscheduled 3-FIBF. She acknowledged on cross-examination that she had reviewed no report demonstrating "that it was the 4-fluoro analogue as opposed to the 3-fluoro analogue found in the decedent," and that isolating the isomers is "next to impossible." The government's expert therefore established, at most, that *some* fluoroisobutyryl compound was a but-for cause of death—not that the charged controlled substance was. Under *Burrage*, that is not enough.

The remaining medical evidence pointed the other way. The medical examiner who actually performed the autopsy attributed death to a "mixed drug intoxication" involving an "unknown fentanyl analog," heroin, cocaine, and ethanol acting in combination, and testified that singling out the fentanyl analogue as the sole but-for cause "would be arbitrary"—particularly absent any quantitative measurement of the analogue in A.C.'s blood. On this record, the government never established that any fluoroisobutyryl compound—let alone 4-FIBF specifically—was an "independently sufficient" cause of death rather than one component of a multi-drug fatality. *Burrage*, 571 U.S. at 218-219.

The District Court's oral reasoning, that "[e]ither [isomer] would have caused the death of the victim, " is the clearest example of *Burrage* error where one isomer was neither scheduled nor charged in the indictment. Under this theory, apparently adopted by the Second Circuit, the twenty-year mandatory minimum would then be triggered not by proof of the charged offense, but by proof that the defendant dealt in some related compound. That dilutes the causation element this Court rejected in *Burrage*. Review is accordingly warranted to ensure that *Burrage* retains its force in prosecutions involving novel synthetic opioids.

III. This Case Is an Ideal Vehicle for Review.

This case presents an ideal vehicle for review. First, the questions presented are outcome-determinative. Count 4 carried the twenty-year mandatory minimum and the Guidelines range of life that drove Petitioner's 360-month sentence. A ruling in Petitioner's favor would require vacatur of Count 4.

Second, the questions are purely legal and the predicate facts are undisputed. The scheduling chronology appears in the Federal Register. The incapacity of post-mortem toxicology to distinguish the isomers was established by the government's own witnesses. And the Second Circuit itself acknowledged that the toxicology "did not prove" the presence of the charged isomer. A.4. There is no factual dispute for this Court to untangle; the Court need only reach the legal question of whether what remains satisfies the Fifth Amendment and *Burrage*.

Third, the questions were passed upon below. Petitioner challenged the isomer discrepancy at the close of the government's case, in post-trial motions under

Rules 29 and 33, and on appeal. Although the government argued below that Petitioner's reliance on the unscheduled status of 3-FIBF had not been specifically presented to the District Court, the Second Circuit did not rest on forfeiture; it reviewed the constructive-amendment claim *de novo* and decided it on the merits. In any event, the legal status of 3-FIBF in November 2017 is an indisputable matter of public record.

Finally, the disposition below illustrates why this Court's review is needed. The Court of Appeals resolved a structural Fifth Amendment claim, in a mandatory-minimum death-results case, by non-precedential summary order applying a "consistent with" standard. Absent this Court's intervention, the question is likely to continue to be resolved summarily, without published guidance.

CONCLUSION AND PRAYER FOR RELIEF

The Second Circuit's decision permits a federal conviction carrying a twenty-year mandatory minimum to stand even though (a) the grand jury charged a specific Schedule I controlled substance that post-mortem toxicology could not confirm was present in the victim's blood; (b) the toxicology was equally consistent with an isomer that was not a controlled substance during the charged period; and (c) the government's causation expert admitted she had seen no report confirming the presence of the charged isomer. These defects go to the core protections of the Fifth Amendment's Grand Jury Clause and to the rule this Court established in *Burrage*.

Consequently, this Court should grant certiorari to review the Second Circuit's summary order, summarily review the decision below on Petitioner's constructive amendment claim, or grant such other relief as justice requires.

Dated: August 18, 2026
Kenmore, New York

/s/ Parker R. MacKay, Esq.
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APPENDIX

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22-1296-cr
United States of America v. Watkins

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of May, two thousand twenty-six.

PRESENT:

JOHN M. WALKER, JR.,
MICHAEL H. PARK,
EUNICE C. LEE,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v. 22-1296-cr

JAWAYNE WATKINS, AKA WEEZY,
Defendant-Appellant.

FOR DEFENDANT-APPELLANT: PARKER R. MACKAY, The Law Office of Parker R. MacKay, Kenmore, NY

FOR APPELLEE: MONICA J. RICHARDS, Assistant United States Attorney, *for* Michael DiGiacomo, United States Attorney for the Western District of New York, Buffalo, NY

Appeal from a judgment of the United States District Court for the Western District of New York (Arcara, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Jawayne Watkins was indicted on one count of conspiracy to possess with intent to distribute, and conspiracy to distribute, heroin and 4-fluoroisobutyryl fentanyl; two counts of possession with intent to distribute and distribution of heroin and 4-fluoroisobutyryl fentanyl; and one count of possession with intent to distribute and distribution of heroin and 4-fluoroisobutyryl fentanyl causing serious bodily injury and death. After trial, he was convicted on all four counts. Watkins moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and for a new trial under Rule 33. The district court denied his motions and sentenced him to 360 months in prison. On appeal, Watkins raises six challenges to his trial and sentence. We assume the parties' familiarity with the facts, procedural history, and issues on appeal.

I. Constructive Amendment

Watkins contends the indictment was constructively amended as to Count 4, which charged that in November 2017 Watkins possessed with intent to distribute and distributed two Schedule I controlled substances, heroin and 4-fluoroisobutyryl fentanyl, and that the death of A.C. resulted from her use of those substances. He contends that the post-mortem toxicology test could not identify the specific fentanyl analogue present in A.C.'s body and instead indicated the presence of *either* 4-fluoroisobutyryl fentanyl (the Schedule I controlled substance listed in the indictment) *or* 3-fluoroisobutyryl fentanyl (a fentanyl analogue that was not named in the indictment and was not a Schedule I controlled substance in November 2017 when the offense occurred). This ambiguity in the toxicology analysis, Watkins argues, resulted in a constructive amendment of the indictment.

"We review de novo the question of whether an indictment was constructively amended." *United States v. Daugerdas*, 837 F.3d 212, 225 (2d Cir. 2016). "An indictment has been constructively amended in violation of the" Fifth Amendment's "Grand Jury Clause when either the trial evidence or jury charge broadens the possible bases for conviction from that which appeared in the indictment, such that it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Prawl*, 149 F.4th 176, 186-87 (2d Cir. 2025) (cleaned up).

The indictment was not constructively amended. Consistent with the charge in Count 4, the government argued throughout the trial that A.C.'s death resulted from her use of the heroin and 4-fluoroisobutyryl fentanyl that Watkins possessed with intent to distribute in November 2017. The government presented evidence that: (1) Watkins possessed with intent to distribute and distributed 4-fluoroisobutyryl fentanyl and heroin in July 2017, August 2017, and September 2017 and on November 9, 2017, one day before A.C.'s death; (2) on November 9, 2017, after selling 5 grams of heroin laced with 4-fluoroisobutyryl fentanyl to confidential informant James Ulrich, Watkins said he would get the rest of Ulrich's order from the Riverside area of Buffalo; (3) Watkins and A.C. then drove to the Riverside area, A.C. visited her family at her mother's residence, Watkins went to a different Riverside address, Watkins and A.C. later returned to Watkins' residence, and A.C. remained with Watkins until her death on November 10; (4) one of A.C.'s relatives testified that A.C. appeared sober and did not drink alcohol or ingest drugs while with her family on November 9 and that A.C. sounded sober and alert during a 3:00 a.m. phone call on November 10; (5) Watkins later spoke with Erin Cameron, who recalled Watkins saying "she should have never stolen it," App'x at 623; (6) A.C.'s toxicology report indicated the presence of "meta/para" fluoroisobutyryl fentanyl (i.e., 3- or 4-fluoroisobutyryl fentanyl), *id.* at 1061; and (7) toxicologist Dr. Stacey Hail testified that A.C. would not have died "but for the fluoroisobutyryl fentanyl laced heroin" in her system, *id.* at 794.

Although the toxicology analysis did not prove that the fentanyl analogue present in A.C.'s body was 4-fluoroisobutyryl fentanyl, "the proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment and this court has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *United States v. McGinn*, 787 F.3d 116, 128 (2d Cir. 2015) (cleaned up). Here, the indictment and the government's case at trial put Watkins on notice that the government sought to prove that he possessed with intent to distribute heroin and 4-fluoroisobutyryl fentanyl and that A.C.'s death resulted from the use of those substances. Watkins does not claim that he lacked such notice. And the toxicology analysis was consistent with the government's theory. *See id.* at 129. Moreover, the district court properly found that the non-toxicology evidence presented by the government constituted "substantial circumstantial evidence that the heroin A.C. used was laced with the 4-flu[o]roisobutyryl fentanyl isomer charged in the Indictment." App'x at 1421. We thus conclude that the indictment was not constructively amended as to Count 4.

II. Sufficiency of the Evidence

Watkins challenges the sufficiency of the evidence supporting his conspiracy conviction on Count 1. "We review *de novo* a district court's order denying a Rule 29 motion addressing the sufficiency of the evidence." *United States v. Klein*, 913 F.3d 73, 78 (2d Cir. 2019). "In challenging the jury's verdict, a Rule 29 movant bears a heavy burden. A reviewing court must credit every inference that could have been drawn in the government's favor and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt." *Id.* (cleaned up). A "court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Temple*, 447 F.3d 130, 136 (2d Cir. 2006) (quotation marks omitted). "In cases of conspiracy, deference to the jury's findings is especially important because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Morgan*, 385 F.3d 196, 204 (2d Cir. 2004) (cleaned up). "To affirm a conviction for conspiracy to distribute under [21 U.S.C. § 846], the record must support a rational jury's finding (1) the existence of the conspiracy charged; (2) that the defendant had knowledge of the conspiracy; and (3) that the defendant intentionally joined the conspiracy." *United States v. Barret*, 848 F.3d 524, 534 (2d Cir. 2017) (quotation marks omitted).

The evidence was sufficient to support Watkins' conspiracy conviction. The government presented evidence that Anika Williams purchased heroin laced with 4-fluoroisobutyryl fentanyl from Watkins for resale to users, Watkins showed her how to package the drugs for resale, Watkins lowered his drug prices as Williams bought larger quantities from him, and Watkins told Ulrich that he intended to have Williams take over his smaller-quantity drug sales so that Watkins could focus on bulk sales. Crediting "every inference that could have been drawn in the government's favor," *Klein*, 913 F.3d at 78 (quotation marks omitted), a rational jury could have found beyond a reasonable doubt that Watkins had knowledge of and intentionally joined a conspiracy whereby he sold heroin and 4-fluoroisobutyryl fentanyl to Williams, who resold those substances to others.

Watkins contends that the evidence "speaks to [his] mere awareness" that Williams would resell his drugs, "rather than active facilitation of distribution" to third parties. Appellant's Br. at 33. But the government introduced evidence that Watkins facilitated the drug resales by showing Williams how to package the drugs for resale and by discounting prices for larger-quantity drug purchases. Watkins also highlights Williams' testimony that she was an "independent contractor." App'x at 489. In light of the evidence supporting the conspiracy count, the jury was entitled to reject Williams' characterization of her role. *See Morgan*, 385 F.3d at 204 ("In cases of conspiracy, deference to a jury's findings is especially important." (quotation marks omitted)). Finally, Watkins asserts that his relationship with Williams "lacked a profit-sharing component or the structure of sales-on-credit that spoke to conspiratorial intent to further a single joint venture." Reply Br. at 6. But "[n]o single factor," including "sales on credit," "is dispositive" to the "highly fact-specific inquiry into whether the circumstances surrounding a buyer-seller relationship establish an agreement to participate in a distribution conspiracy." *United States v. Hawkins*, 547 F.3d 66, 74 (2d Cir. 2008) (quotation marks omitted). As explained above, the evidence here is sufficient for a jury to find beyond a reasonable doubt that Watkins agreed to participate, and did participate, in a conspiracy to distribute heroin and 4-fluoroisobutyryl fentanyl.

III. Motion To Suppress

Watkins claims the district court abused its discretion in denying without a hearing his motion to suppress statements made during recorded conversations with Ulrich, the confidential informant. "The denial of an evidentiary hearing" on a motion to suppress "is reviewed for abuse of discretion." *United States v. Lewis*, 62 F.4th 733, 741 (2d Cir. 2023). An "evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact . . . are in question." *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 165 (2d Cir. 2008) (quotation marks omitted).

A "defendant's fourth amendment rights are not violated when the defendant's conversations with a government informant are electronically monitored by a government agent with the consent of the wired informant." *United States v. Fuentes*, 563 F.2d 527, 533 n.4 (2d Cir. 1977). To demonstrate an "informer's consent to the monitoring or recording of a telephone conversation," "it will normally suffice for the Government to show that the informer went ahead with a call after knowing what the law enforcement officers were about." *United States v. Bonanno*, 487 F.2d 654, 658-59 (2d Cir. 1973). "[T]his showing, which is considerably less stringent than that required to show consent for a physical search, may consist of circumstantial evidence, rather than direct evidence from the informant or from agents to whom the informant gave his express consent." *Fuentes*, 563 F.2d at 533.

The district court did not abuse its discretion in denying Watkins' motion to suppress without a hearing. The government submitted an affidavit from the lead agent in the investigation, who averred that he "utilized a confidential informant ('CI')" and "explained to the CI the purpose of the phone calls was to arrange controlled purchases of narcotics from" Watkins. App'x at 87. The agent also attested that the informant: "agreed to make phone calls with" Watkins "and to have those phone calls recorded"; "made numerous consensually monitored telephonic communications with" Watkins; "agreed to make controlled purchases from" Watkins "and to have the controlled purchases recorded"; "made two controlled purchases from" Watkins, "both of which were recorded"; and "made recorded phone calls with" Watkins "after the first controlled purchase and before the second controlled purchase." *Id.* at 87-88. The affidavit is "direct evidence . . . from [the] agent[] to whom the informant gave his express consent," *Fuentes*, 563 F.2d at 533, and it establishes that the informant allowed himself to be recorded and "went ahead with . . . [recorded] call[s]" and recorded drug transactions "after knowing what the law enforcement officers were about," *Bonanno*, 487 F.2d at 658-59. Watkins' motion to suppress does not establish that "contested issues of fact" as to the informant's consent "are in question." *Terrorist Bombings*, 552 F.3d at 165 (quotation marks omitted). The district court thus did not abuse its discretion in denying Watkins' suppression motion without a hearing.

IV. Masking Requirement for Prospective Jurors and Jurors

Watkins seeks a new trial because the district court ordered prospective jurors and jurors to wear partial face coverings in light of the COVID-19 pandemic. The test for granting a Rule 33 motion for a new trial "is whether it would be a manifest injustice to let the guilty verdict stand." *United States v. Guang*, 511 F.3d 110, 119 (2d Cir. 2007) (quotation marks omitted). "For a trial judge to grant a Rule 33 motion, he must harbor a real concern that an innocent person may have been convicted." *Id.* (quotation marks omitted). The "district court enjoys ample discretion in determining how best to conduct the *voir dire*," *United States v. Kelly*, 128 F.4th 387, 421 (2d Cir. 2025) (quotation marks omitted), and it likewise "has considerable discretion in the conduct of a trial," *Boyle v. Revici*, 961 F.2d 1060, 1064 (2d Cir. 1992).

The district court did not abuse its discretion in requiring prospective jurors and jurors to wear masks "as a result of the precautions observed during the Covid-19 pandemic." App'x at 19. Watkins cites no authority holding that a COVID-related mask requirement for prospective jurors and jurors violates the defendant's constitutional rights, and there is substantial authority to the contrary. *See, e.g.*, *United States v. Ayala-Vieyra*, 2022 WL 190756, at *5 (6th Cir. 2022) ("Courts have consistently held" that "seeing the bottom of the jurors' faces is [not] constitutionally required." (collecting cases)); *United States v. Trimarco*, 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020) ("Being able to see jurors' noses and mouths is not essential for assessing credibility because demeanor consists of more than those two body parts since it includes the language of the entire body." (cleaned up)). That prospective jurors and jurors wore masks in this case does not give rise to "a real concern that an innocent person may have been convicted." *Guang*, 511 F.3d at 119 (quotation marks omitted).[1]

V. Sentence

Watkins argues that his 360-month sentence is substantively unreasonable. "We review a district court's sentencing determination for substantive reasonableness under the abuse of discretion standard." *United States v. Pollok*, 139 F.4th 126, 144 (2d Cir. 2025). "A sentence is . . . substantively unreasonable only if affirming it would damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Id.* (quotation marks omitted). "[A]lthough a within-Guidelines sentence is not presumptively reasonable, we have observed that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Id.* at 145 (quotation marks omitted).

Watkins' 360-month sentence was not substantively unreasonable. Watkins faced a 20-year mandatory minimum sentence and a Guidelines range of life imprisonment. The district court appropriately considered the factors in 18 U.S.C. § 3553(a) in imposing a below-Guidelines sentence. The court explained that, on the one hand, "the conduct of the instant offense represents

[1] Watkins asserts that the district court's ruling requiring prospective jurors to wear masks during *voir dire* "cast a chilling effect on Appellant's counsel's ability to speak up." Appellant's Br. at 36. But this claim is belied by the fact that Watkins' trial lawyer later moved for a mistrial after "a juror or jurors" reportedly "had some complaints about the conduct of counsel relative to COVID safety practices." App'x at 633. The district court denied the motion, and Watkins does not challenge that ruling on appeal.

a very serious crime involving very dangerous drugs that are inflicting significant harm to families within our community"; "a vulnerable individual has lost her life as a result of the substances provided by" Watkins; "the instant offense represents [Watkins'] third felony conviction; the prior two felonies being possession and attempted possession of controlled substances"; "[d]espite having been granted leniency on several occasions, [Watkins] failed to commit himself to leading a law-abiding life following those convictions"; and Watkins "committed the instant offense while under New York State penal supervision." App'x at 1471-72. At the same time, the court considered factors supporting a "downward variance" from the Guidelines range of life imprisonment, including Watkins' "difficult childhood"; the absence of "aggravating circumstances" warranting a life sentence, "such as multiple fatal overdoses, large-scale drug distributions, gang warfare, organized crime," or "use of firearms"; the indications that Watkins' "criminal activity did not support a luxurious lifestyle"; and the fact that the sole victim was Watkins' "significant other, and not a drug customer." *Id.* at 1472-74.

Watkins stresses the factors that he claims warrant a lower sentence. But in "assessing the sentence imposed by a district court, we do not reweigh the relevant factors; rather, we evaluate only whether a factor can bear the weight assigned it by the District Court under the totality of circumstances in the case." *United States v. Albarran*, 943 F.3d 106, 116 (2d Cir. 2019) (cleaned up). Here, the "district court's imposition of a below-Guidelines" 360-month sentence, "after having balanced [Watkins'] aggravating and mitigating factors, is substantively reasonable and not an abuse of the court's considerable discretion." *United States v. Darrah*, 132 F.4th 643, 653 (2d Cir. 2025).

VI. Ineffective Assistance of Counsel

Finally, we review *de novo* Watkins' claim that he received ineffective assistance from his trial counsel. *See United States v. Melhuish*, 6 F.4th 380, 392 (2d Cir. 2021). Although we have a "baseline aversion to resolving ineffectiveness claims on direct review," *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003) (quotation marks omitted), we reject Watkins' ineffectiveness claim here because it "is beyond any doubt" that the claim fails, *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003) (quotation marks omitted).

To prove the Sixth Amendment "right to *effective* assistance of counsel" "has been violated, a defendant must show (1) the attorney's representation 'fell below an objective standard of reasonableness' and (2) there was 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *United States v. Rosemond*, 958 F.3d 111, 121 (2d Cir. 2020) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). "Courts reviewing ineffective assistance of counsel claims are highly deferential, and must strongly presume that counsel made all significant decisions in the exercise of reasonable professional judgment. This presumption is overcome only if counsel failed to act reasonably considering all of the circumstances." *Id.* (cleaned up).

Watkins claims his trial lawyer was ineffective because he failed to call a medical toxicologist as a witness to counter the government's expert witnesses. Watkins contends that, given the limitations of the toxicology analysis, his trial "counsel should have been able to understand that the government's toxicologist would not be able to definitively report that 4-fluoro was found in A.C.'s system" and "should have endeavored to find a toxicologist to contextualize and contest the expected testimony" from the government's witnesses. Appellant's Br. at 38.

But *Strickland* does not "requir[e] for every prosecution expert an equal and opposite expert from the defense," and in "many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Here, Watkins' trial lawyer elicited cross-examination testimony on the toxicology analysis that was favorable for the defense.[2] In Watkins' case-in-chief, moreover, his attorney called the medical examiner, who testified that (1) she performed the autopsy on A.C.; (2) she was not being paid for her testimony; (3) in her opinion, "the cause of death . . . was a mixed drug intoxication" that "included an unknown fentanyl analog," App'x at 849; and (4) in her view, singling out the fentanyl analog as the sole but-for cause of A.C.'s death "would be arbitrary," *id.* In closing argument, Watkins' attorney emphasized that the toxicologist "was unable to determine whether it was a 3-fluoro or 4-fluoro" and that the medical examiner "concluded the death was a combination of controlled substances; heroin and an unknown analog . . . not 4-fluoro, unknown." *Id.* at 913-14. Watkins' trial lawyer thus elicited and highlighted to the jury favorable testimony on the precise issue underlying Watkins' ineffectiveness claim. Watkins has failed to demonstrate that, "in light of all the circumstances," his trial counsel's decision not to call a toxicology expert was "outside the wide range of professionally competent assistance." *Melhuish*, 6 F.4th at 393 (quotation marks omitted).

* * *

[2] Under questioning from Watkins' lawyer, for instance, the government's toxicology expert testified that (1) she earned more than $6,000 to prepare for her testimony and would also be paid for her trial time; (2) she had never performed an autopsy; (3) she relied on reports from the medical examiner and toxicologist in forming her opinion as to the but-for cause of A.C.'s death; (4) she did not review any report showing "that it was the 4-fluoro analogue as opposed to the 3-fluoro analogue found in the decedent," App'x at 805; and (5) "[i]t is next to impossible to isolate these different isomers from each other," *id.* at 806.

We have considered Watkins' remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

AO 245B (Rev. 10/19) Judgment in a Criminal Case
Sheet 1

TEB/js (14618)

UNITED STATES DISTRICT COURT

Western District Of New York

UNITED STATES OF AMERICA v. Jawayne Watkins a/k/a Weezy	**JUDGMENT IN A CRIMINAL CASE** Case Number: 1:18CR00032-001 USM Number: 17352-055 Parker Roy MacKay Defendant's Attorney

UNITED STATES DISTRICT COURT
FILED
JUN 13 2022
MARY C. LOEWENGUTH, CLERK
WESTERN DISTRICT OF NY

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) 1 – 4 of the Second Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), 21 § 841(b)(1)(B)	Conspiracy to Possess with Intent to Distribute and to Distribute, 10 Grams or More of Heroin, and 4-Fluoroisobutyryl Fentanyl	11/09/2017	1
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B)	Possession with Intent to Distribute, and Distribution of, 10 Grams or More of Heroin, and 4-Fluoroisobutyryl Fentanyl	07/13/2017	2
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C)	Possession with Intent to Distribute, and Distribution of, Heroin and 4-Fluoroisobutyryl Fentanyl	11/10/2017	3
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C)	Possession with Intent to Distribute, and Distribution of, Heroin and 4-Fluoroisobutyryl Fentanyl Causing Serious Bodily Injury and Death	11/10/2017	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 6, 2022
Date of Imposition of Judgment

Richard J. Arcara
Signature of Judge

Richard J. Arcara, Senior U.S. District Judge
Name and Title of Judge

June 13, 2013
Date

AO 245B (Rev. 10/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

TEB/js (14618)

Judgment — Page 2 of 7

DEFENDANT: Jawayne Watkins a/k/a Weezy
CASE NUMBER: 1:18CR00032-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

360 months on Counts 1, 2, and 4; and 240 on Count 3 served concurrently to each other for an aggregate term of 360 months imprisonment.

☒ The court makes the following recommendations to the Bureau of Prisons:

- Designate close to Buffalo, New York.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ________ ☐ a.m. ☐ p.m. on ________ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on ________ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ________ to ________

at ________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ________
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 10/19) Judgment in a Criminal Case
Sheet 3 — Supervised Release

TEB/js (14618)

Judgment—Page 3 of 7

DEFENDANT: Jawayne Watkins a/k/a Weezy
CASE NUMBER: 1:18CR00032-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: Four (4) years on Counts 1 and 2; three (3) years on Counts 3 and 4, all counts to run concurrently

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Jawayne Watkins a/k/a Weezy
CASE NUMBER: 1:18CR00032-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the court determines in consultation with your probation officer that, based on your criminal record, personal history and characteristics, and the nature and circumstances of your offense, you pose a risk of committing further crimes against another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

Upon a finding of a violation of probation or supervised release, I understand that this court may (1) revoke supervision, (2) extend the terms of supervision, and/or (3) modify the conditions of probation or supervised release. A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature ______________________ Date ____________

U.S. Probation Officer's Signature ______________________ Date ____________

AO 245B (Rev. 10/19) Judgment in a Criminal Case
Sheet 3B — Supervised Release

TEB/js (14618)

DEFENDANT: Jawayne Watkins a/k/a Weezy
CASE NUMBER: 1:18CR00032-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program for substance abuse, including substance abuse testing such as urinalysis and other testing, and shall undergo a drug/alcohol evaluation and treatment if substance abuse is indicated by the testing. The probation officer will supervise the details of any testing and treatment, including the selection of a treatment provider and schedule. If in-patient treatment is recommended, however, it must be approved by the Court unless the defendant consents. The defendant is not to leave treatment until completion or as ordered by the court. While in treatment and after discharge from treatment, the defendant is to abstain from the use of alcohol. The defendant is required to contribute to the cost of services rendered.

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, and permit confiscation of any evidence or contraband discovered.

AO 245B (Rev. 10/19) Judgment in a Criminal Case
Sheet 4 — Criminal Monetary Penalties

TEB/js (14618)

Judgment—Page 6 of 7

DEFENDANT: Jawayne Watkins a/k/a Weezy
CASE NUMBER: 1:18CR00032-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	AVAA Assessment*	JVTA Assessment**	Fine	Restitution
TOTALS	$ 400	$ 0	$ 0	$ 0	$ 0

☐ The determination of restitution is deferred until ______ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$ ______	$ ______	

☐ Restitution amount ordered pursuant to plea agreement $ ______

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jawayne Watkins a/k/a Weezy
CASE NUMBER: 1:18CR00032-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ ____________ due immediately, balance due

☐ not later than ____________ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay a special assessment of $100 on each count for a total of $400, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

DECISION AND ORDER
18-CR-32-A

JAWAYNE WATKINS,
Defendant.

On October 19, 2020, defendant Jawayne Watkins was convicted of four narcotics-related offenses after a seven-day jury trial. Defendant Watkins moves pursuant to Federal Rule of Criminal Procedure 29 for a judgment of acquittal notwithstanding the jury's verdicts. He primarily challenges the legal sufficiency of evidence that his possession with intent to distribute or distribution of a mixture of heroin and a fentanyl analogue caused the serious injury or death of an overdose victim. For the reasons stated below, the Court finds that the jury's guilty verdicts were supported by legally sufficient evidence. The defendant's motion pursuant to Rule 29 for a judgment of acquittal is therefore denied.

Defendant Watkins also moves for a new trial pursuant to Fed. R. Crim. P. 33. In support of his new-trial motion, the defendant supplements his insufficiency of the evidence arguments with argument that he was denied a fair trial due to the Court's COVID-19-related health and safety protocols. After due consideration, for the reasons that are also stated below, the Court finds that the guilty verdicts were not manifestly unjust. The defendant's Rule 33 motion for a new trial is therefore also denied.

BACKGROUND

In October 2020, defendant Watkins was convicted of one Count of conspiracy to possess with intent to distribute, or to distribute, 10 grams or more of heroin and 4-fluoroisobutyryl fentanyl, a fentanyl analogue, in violation of 21 U.S.C. § 846 (Count 1); two Counts of possession with intent to distribute or distribution of heroin and 4-fluoroisobutyryl fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and (b)(1)(C), respectively (Counts 2 and 3); and one Count of possession with intent to distribute or distribution of heroin and 4-fluoroisobutyryl fentanyl that resulted in a serious bodily injury or death, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (Count 4). The most serious offense, Count 4, stemmed from the defendant's role in an overdose death, and he went to trial facing a mandatory sentence of life imprisonment if convicted of that offense.

The defendant's post-trial Rule 29 and Rule 33 motions were timely filed, but after the trial and convictions, the defendant's relationship with his counsel broke down and new counsel was assigned to represent him. On August 19, 2021, based upon a change in U.S. Department of Justice policy, and unrelated to the defendant's change of counsel, the United States withdrew a previously filed Information pursuant to 21 U.S.C. § 851 that had given the defendant formal notice that the United States would rely upon a prior drug conviction to trigger a mandatory life sentence for a conviction on the charge related to the overdose death. Doc. No. 198. Because the § 851 Information has been withdrawn, the defendant now faces a statutory mandatory-minimum term of imprisonment of 20 years to life for that conviction. 21 U.S.C. § 841(b)(1)(C).

DISCUSSION

Rule 29 Motion for a Judgment of Acquittal. In general, Rule 29 imposes a "heavy burden" on a defendant challenging a conviction by a jury. *United States v. Cuti*, 720 F.3d 453, 461 (2d Cir. 2013). A court may enter a judgment of acquittal:

> . . . only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt. In applying these principles, [the Court] review[s] all of the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government.

United States v. Facen, 812 F.3d 280, 286 (2d Cir. 2016) (quotations and citations omitted). Rule 29 requires the Court to give substantial deference to a jury finding as to "the weight of the evidence and the reasonable inferences to be drawn" from the evidence. *Id*. (quotation omitted). Not only "must [a court] credit every inference that could have been drawn in the government's favor," but, in assessing the sufficiency of the evidence, a court "must view the evidence as a whole." *United States v. Applins*, 637 F.3d 59, 76 (2d Cir. 2011). And "where either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *Facen*, 812 F.3d at 286 (quotation and brackets omitted).

Viewed "in the light most favorable to the government, with all reasonable inferences drawn in its favor," *United States v. Rowland*, 826 F.3d 100, 105 n.1 (2d Cir. 2016) (quotation marks omitted), evidenced introduced during defendant

Watkins' trial showed that that he and his co-conspirators were trafficking in heroin laced with 4-fluroisobutyryl fentanyl in this District between approximately June 2017 and November 9, 2017.

On July 13, 2017, the U.S. Department of Homeland Security--Investigations conducted a controlled purchase of heroin from the defendant using an undercover law enforcement agent and a cooperating witness. The cooperating witness arranged to purchase approximately 15 grams of heroin from the defendant. The undercover agent made the purchase, in the presence of the cooperating witness, and obtained both video and audio recordings of the purchase. Laboratory analysis confirmed that the substance weighed approximately 15 grams, and that it contained heroin and 4-fluoroisobutyryl fentanyl, which is a fentanyl analogue.

This controlled purchase of heroin and 4-fluoroisobutyryl fentanyl was the subject of Count 2 of the Indictment against defendant Watkins. Doc. No. 164, p. 2 (redacted version of Second Superseding Indictment, Doc. No. 42.) Suffice it to say that the recordings, the testimony of the undercover agent and the cooperating witness, and the evidence of the chemical analysis of the substance purchased from the defendant, constituted more than legally sufficient evidence to prove beyond a reasonable doubt defendant Watkins' possession with intent to distribute and distribution of 10 grams or more of heroin and 4-fluoroisobutyryl fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). The defendant's conclusory challenge to the sufficiency of the evidence supporting this conviction and jury's drug-quantity finding merits no further discussion.

On November 9, 2017, Homeland Security--Investigations made a second controlled purchase from the defendant. On that day, the same cooperating witness was directed by the defendant to 384 Broadway in Buffalo, which was a halfway house where the defendant was required to stay while on New York State parole. The witness had been provided government funds to buy approximately 18 grams of heroin.

The defendant was subject to GPS location monitoring as a condition of parole, and GPS tracking data confirmed he was at the halfway house at the time of the purchase. The cooperating witness wore a concealed audio recording device and obtained audio recordings while at the defendant's residence. The cooperating witness also saw the defendant's girlfriend, A.C.[1], in the defendant's room, and she was recorded on the audio recordings made by the witness.

The defendant told the cooperating witness he had only 5 of the 18 grams of heroin that he had offered to sell to the witness. He indicated he planned to go to the Riverside neighborhood to get more and that he would have the remainder of the 18 grams that night. The defendant sold the 5 grams of heroin that he had at the time to the cooperating witness. Later chemical analysis confirmed that this heroin was also laced with 4-fluroisobutyryl fentanyl.

The November 9, 2017 controlled purchase of heroin and 4-fluoroisobutyryl fentanyl was the subject of Count 3 of the redacted Indictment. The Court specifically finds that the audio recordings, testimony of the cooperating witness, and the evidence of the chemical analysis of the substance purchased from the

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[1] The initials "A.C." refer to the deceased overdose victim.

defendant, were legally sufficient to prove beyond a reasonable doubt the defendant's possession with intent to distribute and distribution of heroin and 4-fluoroisobutyryl fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Once again, the defendant's challenge to the legal sufficiency of the evidence supporting the jury's verdict on this Count is conclusory and without merit.

Later on November 9, 2017, defendant Watkins did go to the Riverside neighborhood of Buffalo. A.C. accompanied him, and the defendant dropped A.C. off at her mother's house. During this visit with her family, A.C. did not use drugs, and did not arrange to buy drugs. When the defendant returned to pick up A.C., they went directly back to the defendant's residence at the halfway house at 384 Broadway.

That night, A.C. overdosed and died at the halfway house. Images recorded by a halfway house security camera during the early morning hours of November 10th showed the defendant carrying A.C.'s limp body from his bedroom to the bathroom across the hall. When paramedics arrived, they attempted to revive A.C. but were unsuccessful. Buffalo Police Department Homicide officers arrived to investigate and took photographs, some of which were also admitted into evidence.

After A.C.'s death, toxicology analysis showed that A.C. had heroin and para/meta fluroisobutyryl fentanyl in her system. Para-fluroisobutyryl fentanyl is 4-fluoroisobutyryl fentanyl and meta-fluroisobutyryl fentanyl is 3-fluoroisobutyryl fentanyl. The toxicology analysis did not distinguish between the two isomers. Two expert witnesses testified during the trial that the heroin and fentanyl analogue in A.C.'s system caused her death.

Arrests of persons supplied heroin by the defendant or his co-conspirators and related drug seizures during the summer and fall of 2017 showed that the defendant was selling heroin laced with 4-fluroisobutyryl fentanyl. In Erie County, where Buffalo is located, only a handful of drug seizures have ever resulted in detection of 4-fluroisobutyryl fentanyl. Nearly all were from the time period after the defendant was out of custody and on parole.

Defendant Watkins argues more specifically that insufficient evidence supports the jury's verdict on Count 1 that he conspired with anyone or that he was responsible for the substances that caused A.C.'s serious injury or death as charged in Count 4. In resolving the defendant's Rule 29 motion, the Court must evaluate "the totality of the government's case, . . . as each fact may gain color from others." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (citing *United States v. Monica*, 295 F.2d 400, 401 (2d Cir. 1961) (Friendly, J.)). And when the United States introduces circumstantial evidence it "need not 'exclude every reasonable hypothesis other than that of guilt.'" *Guadagna*, 183 F.3d at 130 (quoting *Holland v. United States*, 348 U.S. 121, 139 (1954)). Applying these principles, the evidence during the defendant's trial was clearly sufficient for "any rational trier of fact [to] have found," beyond a reasonable doubt that the jury's verdicts and findings were supported by legally sufficient evidence.

It is well-settled that to sustain a conspiracy conviction, "there must be some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Gaviria*, 740 F.2d 174, 183

(2d Cir. 1984)). Anika Williams testified that the defendant was supplying heroin to her and to others for resale. Williams testified that she sometimes delivered controlled substances the defendant sold to others on his behalf. The defendant taught Williams how to package drugs for resale. And a cooperating witness testified that the defendant admitted that he wanted Williams to sell smaller quantities of drugs so that he could concentrate on bulk sales.

Two cooperating witnesses who were customers of Williams testified about purchasing heroin from her that she testified she obtained from defendant Watkins. Chemical analyses showed the mixture of heroin in both of these sales contained 4-fluoroisobutyryl fentanyl.

The evidence regarding Williams' role in the conspiracy charged in Count 1 established the defendant's agreement with Williams to sell controlled substances for resale knowing and specifically intending that she would possess it and distribute it to others. The testimony of cooperating witness Erin Cameron, including his testimony about his routine distribution-weight purchases of heroin from the defendant, and about a seizure of heroin laced with 4-fluoroisobutyryl fentanyl from him, further supports the jury's guilty verdict on the conspiracy charge. The Court finds the evidence admitted at trial about the defendant's drug-trafficking established beyond a reasonable doubt that he knowingly participated in the conspiracy violating 21 U.S.C. § 846 that he was charged with in Count 1, and that he had specific intent to accomplish its objectives of possessing with intent to distribute and distributing heroin and 4-fluroisobutyryl fentanyl.

Defendant Watkins suggests the jury's guilty verdict on the conspiracy charge was contrary to the evidence because Williams agreed during cross-examination by defense counsel that she was like an "independent contractor." The Court is unpersuaded. As noted above, when the United States proves a conspiracy by circumstantial evidence, the evidence "need not exclude every reasonable hypothesis other than that of guilt." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (quoting *Holland v. United States*, 348 U.S. 121, 139 (1954).) The jury had already heard Williams' testimony about her guilty plea to a federal drug-conspiracy offense based upon her conspiracy with the defendant. The jury eventually heard and saw the evidence summarized above of Williams' participation in the conspiracy with the defendant, as well as Erin Cameron's. The jury remained free not to adopt Williams' characterization during cross-examination of her drug-trafficking relationship with the defendant --- especially since it was instructed by the Court before its deliberations on factors that are useful to distinguish a mere buyer-seller relationship from that of co-conspirators.

Defendant Watkins more vigorously argues that the evidence admitted during the trial did not support the jury's conclusion that the mixture or substance ingested by A.C. before her serious injury and death contained 4-fluroisobutyryl fentanyl, as well as heroin, as was charged in Count 4. Due to limitations of analytic equipment that was used for a post-mortem toxicology analysis relied upon the United States, the evidence identified meta/para-fluroisobutyryl fentanyl in A.C.'s system but did not distinguish between the presence of the meta isomer, 4-fluroisobutyryl fentanyl, and the para isomer, 3-fluroisobutyryl fentanyl. The defendant insists that the imprecision of the toxicology analysis that was introduced into evidence constructively amended the Indictment because it allowed the jury to convict him regardless of whether the heroin in A.C.'s system included 3-fluroisobutyryl fentanyl when the Indictment returned by the Grand Jury specifically charged that it was 4-fluroisobutyryl fentanyl.

A constructive amendment of an indictment occurs when evidence at trial and the jury instructions "so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment". *United States v. Lisyansky*, 806 F.3d 706, 712 (2d Cir. 2015). But the amendment must be of an essential element of the offense to be a constructive amendment. *See United States v. LaSpina*, 299 F.3d 165, 181 (2d Cir. 2002). And an indictment is not constructively amended just because "a generally framed indictment encompasses the specific legal theory or evidence used at trial." *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003). The "proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983). "[S]ignificant flexibility in proof [is allowed], provided that the defendant was given notice of the 'core of criminality' to be proven at trial." *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992).

Here, defendant Watkins does not address how he was deprived of notice of the "core of criminality" of the evidence offered against him. That the drug mixture that allegedly caused the serious bodily injury or death of A.C. included 4-

fluroisobutyryl fentanyl, as was specifically alleged in the Indictment, was not an essential element of the death-resulted penalty enhancement in 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). *See generally*, Leonard B. Sand, *et al.*, 3 *Modern Federal Jury Instructions: Criminal*, Instruction 56-2 (2021); *Burrage v. United States*, 571 U.S. 204 (2014); *see United States v. Knuckles*, 581 F.2d 305 (2d Cir. 1978). The operative set of facts were the same whether A.C.'s serious injury or death ultimately resulted from heroin laced with 4-fluroisobutyryl fentanyl, 3-fluroisobutyryl fentanyl, or a combination of all three controlled substances. The core of criminality was the same.

In any event, there was substantial circumstantial evidence that the heroin A.C. used was laced with the 4-fluroisobutyryl fentanyl isomer charged in the Indictment, meaning that there was no discrepancy between the evidence and Indictment and no grounds for finding a constructive amendment or even a variance. The United States introduced testimony establishing that 4-fluroisobutyryl fentanyl was exceptionally rare in seized controlled substances in this geographic area and nationally. According to the testimony of a chemist employed by the Erie County Central Police Services laboratory, of the total of six controlled substance seizures analyzed by that laboratory that detected 4-fluroisobutyryl fentanyl, four were substances supplied to others by the defendant during the July to November 2017 time period at issue. All four corresponded to specific transactions proven during the defendant's trial.

The five grams of heroin purchased from the defendant by a cooperating witness in defendant Watkins' residence on November 9, 2017, less than 24 hours before her death, contained 4-fluroisobutyryl fentanyl. A.C. expressed a desire for drugs while the cooperating witness was purchasing those five grams.

The defendant told the cooperating witness he could have “the rest” of the 18 grams that the witness had arranged to buy after the defendant picked it up later that day. Until her death, A.C. was with the defendant except for the short period when the defendant dropped her off at her mother’s residence. During that time period, she was with relatives and neither acquired nor arranged to acquire any controlled substance. After that, she was with the defendant at his residence until her overdose.

Under all the circumstances proven during the trial, the Court finds that the defendant was shown by legally sufficient evidence to have been the source of the drugs detected in A.C.’s system during the post-mortem toxicology examination. A rational jury could conclude beyond a reasonable doubt that A.C. ingested heroin laced with 4-fluroisobutyryl fentanyl that was either distributed to her by the defendant or that she took from his possession while he had the intent to distribute it.

Moreover, evidence of the severe overdose symptoms that afflicted A.C. before her death and the expert opinion evidence admitted during the trial established that her overdose on heroin and a fentanyl analogue was an independently sufficient factual cause of her serious injury or death. The jury therefore had legally sufficient evidence to support its conclusion that the drugs A.C. obtained from defendant Watkins were a but for cause of her serious injury or death. The defendant’s motion pursuant to Rule 29 for a judgment of acquittal is denied.

Rule 33 Motion for a New Trial. Defendant Watkins seeks a new trial pursuant to Fed. R. Crim. P. 33 partly on the ground that COVID-19 related health and safety protocols the Court followed during his trial violated his rights to a fair trial. Rule 33(a) provides, in part, that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." In general, the Rule "confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992). But "[t]o grant [a Rule 33] motion, '[t]here must be a real concern that an innocent person may have been convicted.' " *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013) (quoting *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 1997) (alteration omitted). The defendant complains of a Court requirement that prospective jurors and jurors wear surgical masks covering their noses and mouths during jury selection and trial.

Specifically, defendant Watkins argues that he and his counsel were unable to conduct effective voir dire because they could not adequately assess prospective jurors' facial expressions behind the surgical masks the Court had supplied to all prospective jurors. Defendant made the same argument before jury selection began. Doc. No. 146, pp. 4-5. The court heard oral argument and denied the motion. In light of the serious public health and safety concerns due to the COVID-19 pandemic, the Court found that its requirement that prospective jurors wear surgical masks was not an unreasonable impediment to effective voir dire and defendant's rights to effective voir dire would not be violated because of the mask mandate.

During voir dire, the defendant did not request additional questioning of any prospective juror based upon a concern that a surgical mask was impeding assessment of the prospective juror. He did not ask that any prospective juror remove a mask while being questioned to facilitate assessment of the juror. He sought no additional procedural safeguard of any kind. When challenges for cause were raised and preemptory challenges exercised --- the time during which the Court may have been able to address any specific concerns --- the defendant did not express any reservations about the efficacy of any challenges or the impartiality of the jury. He nevertheless renews his earlier argument that his rights to a fair trial were violated.

A defendant is entitled to a trial "by an impartial jury." U.S. Const. amend. VI. And jury selection is the "primary means" of protecting that right and of insuring that the jury is "free from . . . predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989). The Constitution does not require a perfect voir dire procedure, but it does guarantee a defendant a free and fair opportunity to expose prospective jurors' biases and prejudices and a free and fair opportunity meaningfully to exercise peremptory challenges. *See generally*, *United States v. Barnes*, 604 F.2d 121, 137-41 (2d Cir. 1979).

Defendant Watkins cites no authority for his argument that the opaque surgical masks were an unconstitutional impediment to effective voir dire. As other courts that have addressed this argument have found, "[b]eing able to see jurors' noses and mouths is not essential for assessing credibility because demeanor consists of more than those two body parts since it includes the language of the entire body." *United States v. Trimarco*, No. 17-CR-583 (JMA), 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020) (quotation omitted). The defendant and his counsel were able to observe and assess prospective jurors' body language and voices during voir dire. While "being able to see a potential juror's full facial expressions may be tactically preferable, . . . the Court is unconvinced that it is required by the Constitution." *United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *8 (M.D. Ga. Aug. 21, 2020). Based on this reasoning, the Court finds that the defendant's rights to a fair and impartial jury were not violated by the Court's requirement that prospective jurors wear opaque surgical masks during jury selection.

The defendant similarly argues that he was deprived of a fair trial because he and his counsel were unable to assess jurors' reactions to trial proceedings because of the surgical masks. Again, the defendant cites no authority in support of his argument, and he has alleged no instance of prejudice he suffered in support of the argument. The Court followed health and safety protocols set forth in a Western District of New York General Order[2] regarding the COVID-19 pandemic, as well as recommendations by a COVID-19 Judicial Task Force[3]. The protocols were cumbersome, but the Court finds that while they may have impeded the defendant's ability to assess jurors' reactions to openings, witness examinations and cross-examinations, exhibits, counsels' objections, argument, rulings, and closing

[2] https://www.nywd.uscourts.gov/sites/nywd/files/COVID-19%20General%20Order%20-%20Extension%20to%20December%2024%2C%202020.pdf

[3] https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf

arguments, they did not deprive the defendant of his Sixth Amendment right to a fair trial or his right to due process.

The defendant suggests that the jurors' masks also violated his right to a public trial, although he does not explain how. Giving the defendant the benefit of this additional conclusory argument, the Court finds that his right to a public trial was not violated based on the reasoning in *United States v. Donziger*, No. 11-CV-691, 2020 WL 4747532, at *3-4 (S.D.N.Y. Aug. 17, 2020).

Finally, the defendant argues that jurors' concerns about the COVID-19 pandemic were such a large distraction during the trial that the trial was fundamentally unfair. On or about the fourth day of proof, the Court's courtroom deputy clerk advised the Court and the parties that a juror told the deputy clerk that counsel were not always following COVID-19 health and safety protocols during the trial. The Court discussed the comment with counsel, but they were unable to identify what may have prompted the juror's comment. The Court made no further inquiry of the juror or jury --- none was sought by either party and the Court elected not to inquire further on its own --- and encouraged counsel for both parties to follow all the health and safety protocols that had been adopted.

The defendant moved for a mistrial due to the juror's observation on the ground that the juror's concerns about COVID-19 may have shown that the jury was paying inadequate attention to the trial because of concern about COVID-19. He did not seek removal of the juror who made the comment, and the Court did not seriously consider removal of the juror on its own. In any event, the Court did not find grounds to conclude the jury was seriously distracted from the trial and denied the motion for a mistrial.

Defendant Watkins now points to no other reason to think that the jury may have been so distracted by their concern about the COVID-19 pandemic that he was denied a fair trial. Nothing happened later during the trial to support the defendant's speculation that the jury was distracted. There were no further comments to Court staff from any of the jurors. And based upon the Court's observations, the jury was generally very attentive during the trial. After the trial, the Court met with the jurors to thank them for their service, and none expressed a COVID-19-related concern. The Court therefore finds the jury was not unduly influenced by any COVID-19 concerns and that the defendant received a fair trial.

The Court has also considered defendant Watkins' Rule 29 arguments that the evidence against him was legally insufficient as additional possible grounds for the Court to order a new trial pursuant to Rule 33. The Court is permitted under Rule 33 to evaluate the weight of the evidence and the credibility of witnesses. *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992). The Rule gives the Court "broad discretion . . . set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001). Nevertheless, after consideration of the collective weight of the evidence and of the defendant's arguments for a new trial, the Court finds no manifest injustice in the jury's verdicts as to any of the convictions, the jury's drug quantity finding, or that the defendant's drugs were a but for cause of the serious bodily injury or death of A.C. The defendant's motion for a new trial pursuant to Rule 33 is therefore denied.

CONCLUSION

For the reasons stated above, the motions of the defendant, Jawayne Watkins, for a judgment of acquittal pursuant to Fed. R. Crim. 29 and for a new trial pursuant to Fed. R. Crim. P. 33, Doc. No. 160, are denied.

IT IS SO ORDERED.

__*s/Richard J. Arcara*________
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: August 24, 2021