No. 21-5042

IN THE SUPREME COURT OF THE UNITED STATES

JOHN SHIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals permissibly declined to entertain a particular appellate argument, challenging the sufficiency of the evidence underlying one of petitioner's counts of conviction, whose premise was directly contrary to the position that petitioner had taken in his motion for judgment of acquittal on the same count before the district court.

2. Whether the court of appeals correctly determined that sufficient evidence supported petitioner's conviction for conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h).

3. Whether the court of appeals correctly determined that the absence of any factual dispute showed that the district court did not abuse its discretion in declining to hold an evidentiary hearing before denying petitioner's motion to dismiss the indictment on double jeopardy grounds.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tenn.):

United States v. Shields, No. 17-cr-20103 (Dec. 3, 2019)

United States v. Shields, No. 17-cr-20151 (Dec. 3, 2019)

United States Court of Appeals (6th Cir.):

United States v. Shields, No. 19-6428 (Apr. 6, 2021)

United States v. Shields, No. 19-6429 (Apr. 6, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is not published in the Federal Reporter but is reprinted at 850 Fed. Appx. 406. The order of the district court (Pet. App. 24a-32a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2021. The petition for a writ of certiorari was filed on June 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiring to distribute and possess with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2012) and 21 U.S.C. 846; aiding and abetting the distribution and possession with intent to distribute of marijuana, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 42a-43a.

Following a jury trial in the same district, petitioner was convicted under a separate indictment of conspiring to distribute and possess with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012) and 21 U.S.C. 846; conspiring to distribute and possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012) and 21 U.S.C. 846; aiding and abetting the distribution and possession with intent to distribute of one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012) and 18 U.S.C. 2; and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 34a-35a.

The district court imposed a total sentence of 240 months of imprisonment in the two cases, to be followed by five years of

supervised release. Pet. App. 36a-37a, 44a-45a. The court of appeals affirmed in a consolidated appeal. Id. at 1a-23a.

1. In 2013, law enforcement began investigating a street gang in Tennessee known as the Memphis Peda Roll Mafia (PRM), which operated as a subset of the California-based Grape Street Crips gang. Pet. App. 1a; see 17-cr-20151 Presentence Investigation Report (PSR) ¶ 1. The investigation revealed that petitioner was a member of the Memphis PRM and that he had used connections made through the gang to foster his own drug supply and distribution arrangements in Tennessee. Pet. App. 1a-2a. The arrangements involved two separate sets of suppliers and different kinds of drugs.

First, from 2013 to 2017, petitioner and others distributed more than 100 kilograms of marijuana supplied by Reginald Wright, Jr., an associate of the Grape Street Crips. Pet. App. 2a; 17-cr-20151 PSR ¶ 25. Wright mailed the marijuana from California to Tennessee in packages sent to addresses associated with petitioner and his confederates. 17-cr-20151 PSR ¶ 23 Petitioner paid for the drugs by depositing cash into bank accounts specified by Wright, who would then withdraw the funds in California. Pet. App. 2a; Gov't C.A. Br. 4.

Second, from 2013 to 2015, petitioner and others distributed 24 kilograms of heroin and 10 kilograms of methamphetamine supplied by Eric and Calvin Avendano -- two brothers associated with a branch of the Grape Street Crips. Pet. App. 1a-3a; see 17-cr-

20103 PSR ¶ 37; Gov't C.A. Br. 42. The scheme operated similarly to petitioner's separate arrangements with Wright. The Avendano brothers mailed the heroin and methamphetamine from California to Tennessee, and petitioner paid for the drugs by making cash deposits into bank accounts controlled by the Avendanos. Pet. App. 2a-3a; Gov't C.A. Br. 5.

2. In May 2017, a grand jury in the Western District of Tennessee returned two separate indictments against petitioner for the two drug-distribution schemes. Petitioner pleaded guilty to the charges in one indictment and was convicted after a jury trial on the other.

a. In one indictment, the grand jury charged petitioner, Wright, and 17 codefendants with various offenses stemming from the marijuana scheme involving Wright. As relevant here, petitioner was charged with conspiring to distribute and possess with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2012) and 21 U.S.C. 846; aiding and abetting the distribution and possession with intent to distribute of marijuana, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). 17-cr-20151 Indictment 1-4, 8-11. In December 2018, petitioner pleaded guilty to those charges without a plea agreement. 17-cr-20151 PSR ¶¶ 6-7.

In the other indictment, the grand jury charged petitioner, the Avendanos, and six codefendants with various offenses stemming from the heroin and methamphetamine scheme involving the Avendanos. Petitioner was charged with conspiring to distribute and possess with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012) and 21 U.S.C. 846; conspiring to distribute and possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012) and 21 U.S.C. 846; aiding and abetting the distribution and possession with intent to distribute of one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012) and 18 U.S.C. 2; and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). 17-cr-20103 Second Superseding Indictment 1-5, 7, 9-10.

b. After pleading guilty in the Wright case, petitioner joined a codefendant's motion to dismiss the Avendano indictment on double jeopardy grounds. Pet. App. 3a. The defendants contended that the Wright conspiracy and the Avendano conspiracy were the same conspiracy and that a conviction pursuant to the Avendano indictment was therefore "barred by double jeopardy." 17-cr-20103 D. Ct. Doc. 291, at 1 (Jan. 3, 2019); see Pet. App. 3a.

The district court denied petitioner's motion to dismiss. Pet. App. 24a-32a. The court agreed with the government that, "[d]espite some overlap in time, some common co-defendants and

similar distribution methods," the indictments alleged separate conspiracies involving different drugs, "different drug suppliers," "different locations where the suppliers [got] their drugs," and "different money laundering techniques." Id. at 26a-27a; see id. at 28a-32a. And, observing that "the parties did not disagree about the facts" but rather "only disagreed about the legal implications of those facts," id. at 26a n.7, the court also denied petitioner's request for an evidentiary hearing. The court noted that "the indictments and the parties' briefs provided sufficient evidence from which to find by the preponderance of the evidence the existence of two separate conspiracies." Ibid.

Petitioner proceeded to trial on the Avendano indictment. Pet. App. 3a. Several of petitioner's coconspirators testified against him, explaining in detail how the Avendano conspiracy operated -- including how petitioner transported and paid for the heroin and methamphetamine. Id. at 3a-4a; see id. at 4a (describing incriminating text messages and calls made between petitioner and the Avendanos); Gov't C.A. Br. 9-12. A forensic auditor testified that his review of the pertinent bank accounts "showed that, on dozens of occasions, an individual in Memphis had deposited $9,000 into the accounts, and that same amount was quickly withdrawn in California." Pet. App. 4a. Bank surveillance videos introduced at trial captured petitioner making large cash deposits into the listed accounts. Id. at 5a.

An inspector with the U.S. Postal Service testified that he had identified over 200 suspicious packages while investigating the Memphis PRM. Pet. App. 5a. One of those packages formed the basis for the aiding-and-abetting count against petitioner. Ibid. In September 2015, the Avendanos placed a 20-pound package, containing two kilograms of heroin sealed inside a metal box, in the mail to an address provided by petitioner. Ibid.; Gov't C.A. Br. 30-31. Law-enforcement officers intercepted the package, removed the heroin, and resealed the package for delivery. Pet. App. 5a. On the morning of September 17, petitioner texted one of his coconspirators, Jeremy Davis, to pick up the package, and petitioner provided Davis with a tracking number. Ibid. When Davis arrived to pick up the package, he was arrested. Ibid.

The jury found petitioner guilty on all four counts. Pet. App. 6a. With the parties' consent, the district court consolidated the Wright and Avendano cases for sentencing. Ibid. The court sentenced petitioner to 95 months of imprisonment in the Wright case and 240 months of imprisonment in the Avendano case, to be served concurrently and to be followed by five years of supervised release. Ibid.; see id. at 36a-37a, 44a-45a.

3. The court of appeals consolidated petitioner's appeals in the two cases and affirmed in an unpublished opinion. Pet. App. 1a-23a; see 19-6428 C.A. Order 1 (Apr. 13, 2020).

As relevant here, the court of appeals first determined that the district court had not abused its discretion in denying

petitioner's request for an evidentiary hearing on his double jeopardy claim. Pet. App. 7a-8a. The court of appeals observed that the "'general rule' in this circuit is that 'once a defendant has put forth a non-frivolous claim of double jeopardy, the court should hold an evidentiary hearing to resolve any factual disputes that arise.'" Id. at 7a (citation omitted). The court explained, however, that a defendant must first make "at least some initial showing of contested facts" to be entitled to such a hearing, and that petitioner had failed to do so here. Ibid. (citation omitted). The court observed that, even on appeal, petitioner did "not dispute any of the facts upon which the district court based its decision." Id. at 8a.

The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence supporting his money-laundering conviction in the Avendano case. Pet. App. 11a-18a. The court observed that "the evidence showed that [petitioner] deposited income from sales produced by the previous drug shipment to reimburse the Avendanos and prompt the next shipment" of drugs. Id. at 12a (emphasis omitted). And the court explained that because the money-laundering statute expressly defines "proceeds" of illegal activity to "include the gross receipts" from such activity, ibid. (quoting 18 U.S.C. 1956(c)(9)) (brackets omitted), petitioner's assertion that the evidence failed to show specifically that the deposited funds were "profits" was irrelevant, ibid. (emphasis omitted).

The court of appeals additionally rejected petitioner's challenge to the sufficiency of the evidence supporting his conviction for aiding and abetting the distribution of heroin on September 17, 2015. Pet. App. 16a-18a. Petitioner had argued on appeal that he could not have aided and abetted Davis in possessing heroin with intent to distribute it because Davis never possessed the heroin that postal inspectors had seized, id. at 17a, and the government had responded that a rational jury could have found petitioner guilty based on the evidence that he aided and abetted distribution of the heroin by the Avendanos, before it was seized, Gov't C.A. Br. 31. The court of appeals, however, observed that petitioner's argument was contrary to the position he had taken in moving for an acquittal in the district court, where he had accepted that "'the government had proven that Mr. Davis possessed heroin with intent to distribute' on September 17," Pet. App. 17a (brackets omitted), while asserting that he did not aid and abet Davis. The court of appeals stated that, "[a]lthough specificity of grounds is not required" when moving for judgment of acquittal under Federal Rule of Criminal Procedure 29, "where a Rule 29 motion is made on specific grounds, all grounds not specified are waived." Ibid. (quoting United States v. Dandy, 998 F.2d 1344, 1357 (6th Cir. 1993), cert. denied, 510 U.S. 1163 (1994)). And it declined to entertain petitioner's appellate theory.

ARGUMENT

Petitioner contends (Pet. 6-9) the court of appeals erred in declining to entertain his sufficiency-of-the-evidence claim on aiding and abetting, and that other courts of appeals are divided on the appropriate approach when a defendant's specific insufficiency arguments in the district court do not include one that he raises on appeal. This case, however, involves an appellate argument directly contrary to the defendant's position in district court and thus does not squarely implicate any disagreement in the courts of appeals. This case also would not be a suitable vehicle for addressing petitioner's first question presented because he would not be entitled to relief even under the standard of review he seeks. Petitioner separately contends (Pet. 9-15) that no reasonable jury could have convicted him of conspiring to commit money laundering and that the district court erred in declining to hold an evidentiary hearing before denying his motion to dismiss the Avendano indictment on double jeopardy grounds. The court of appeals correctly rejected those factbound challenges, and its unpublished decision does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 6-9) that the court of appeals erred in declining to entertain his sufficiency-of-the-evidence challenge to his aiding-and-abetting conviction, asserting that other courts of appeals apply plain-error review to sufficiency

arguments that were not among the specific ones the defendant made in the district court. But petitioner fails to identify any circuit in which he would have been entitled to plain-error review where the argument he sought to advance on appeal was not only new but directly "opposite" (Pet. App. 17a) a position he had taken in the district court. In any event, petitioner's sufficiency challenge is meritless and would not warrant relief even if plain-error review applied.

a. Federal Rule of Criminal Procedure 29 provides that a defendant may move for a judgment of acquittal "[a]fter the government closes its evidence or after the close of all the evidence" on the grounds that "the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "While Rule 29 motions need not specify grounds for acquittal, it is well established that Rule 29 motions raising particular grounds fail to preserve appellate review of other grounds not raised." United States v. Lopez, 4 F.4th 706, 719 (9th Cir. 2021); see, e.g., United States v. Maynard, 984 F.3d 948, 961 (10th Cir. 2020) ("Although specificity of grounds is not required in a Rule 29 motion, where a Rule 29 motion is made on specific grounds, all grounds not specified are waived.") (citation omitted); United States v. Maez, 960 F.3d 949, 959 (7th Cir. 2020) ("A motion under Rule 29 that makes specific arguments waives issues not presented[.]"), cert. denied, Nos. 20-6129, 20-6226, and 20-6227

(June 21, 2021); United States v. Osborne, 886 F.3d 604, 618 (6th Cir. 2018) (same).

The Sixth Circuit has declined to review such unpreserved Rule 29 arguments, as it did in this case. Pet. App. 17a; see, e.g., Osborne, 886 F.3d at 618 (declining to review sufficiency challenge where the defendant "made a motion for judgment of acquittal on specified grounds, and those grounds did not include the claim that is on appeal"); United States v. Dandy, 998 F.2d 1344, 1357 (6th Cir. 1993) (similar), cert. denied, 510 U.S. 1163 (1994). The court has explained that the "specification of grounds in [a Rule 29] motion is an indication that counsel has evaluated the record and has these particular reasons for his motion," Pet. App. 17a (quoting Dandy, 998 F.2d at 1357), thus warranting a conclusion that the defendant has deliberately foregone any other arguments that could have been raised but were not. Cf. United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing waiver from "[m]ere forfeiture"). The Sixth Circuit will, however, review new sufficiency arguments when doing so would avoid a "manifest miscarriage of justice." United States v. Price, 134 F.3d 340, 350 (1998) (defendant waived Rule 29 arguments by failing to renew his motion for acquittal at the close of evidence), cert. denied, 525 U.S. 845 (1998); see, e.g., United States v. Meade, 677 Fed. Appx. 959, 975 (6th Cir. 2017) (applying miscarriage-of-justice standard to unpreserved Rule 29 argument, where defendant properly made a Rule 29 motion on other grounds); United States v. Watson,

620 Fed. Appx. 493, 504 (6th Cir. 2015) (same), cert. denied, 137 S. Ct. 332 (2016); United States v. Guadarrama, 591 Fed. Appx. 347, 351-352 (6th Cir. 2014) (same); cf. United States v. Martinez-Lopez, 747 Fed. Appx. 326, 331 (6th Cir. 2018) (same, although stating that some "ambiguity" exists in circuit case law as to applicable standard), cert. denied, 139 S. Ct. 1166 (2019).

Contrary to petitioner's suggestion (Pet. 9), several other courts of appeals likewise afford only limited review to Rule 29 arguments raised for the first time on appeal, if the defendant relied on other specific grounds in the district court. See, e.g., United States v. Marston, 694 F.3d 131, 134 (1st Cir. 2012) ("[W]hen a defendant chooses only to give specific grounds for a Rule 29 motion, all grounds not specified are considered waived and are reviewed under * * * [a] 'clear and gross injustice' standard.") (citation omitted); United States v. Chong Lam, 677 F.3d 190, 200 & n.10 (4th Cir. 2012) (explaining that, "[w]hen a defendant raises specific grounds in a Rule 29 motion, grounds that are not specifically raised are waived on appeal," but stating that an exception may exist for any "'manifest miscarriage of justice'") (citation omitted); United States v. McDowell, 498 F.3d 308, 312 (5th Cir. 2007) (noting that, when "a motion for judgment of acquittal insufficiently preserves a claim, [appellate] review is only for a manifest miscarriage of justice").

Other courts of appeals have applied the plain-error standard of review to Rule 29 arguments raised for the first time on appeal,

after the defendant relies on specific other grounds in a Rule 29 motion in the district court. See United States v. Williams, 974 F.3d 320, 361 (3d Cir. 2020), petitions for cert. pending, No. 20-7796 (Apr. 15, 2021), No. 20-7889 (Apr. 21, 2021), and No. 20-7868 (Apr. 26, 2021), and cert. dismissed, 141 S. Ct. 2170 (2021); United States v. Samuels, 874 F.3d 1032, 1036 (8th Cir. 2017); United States v. Baston, 818 F.3d 651, 663-664 (11th Cir. 2016), cert. denied, 137 S. Ct. 850 (2017); United States v. Hosseini, 679 F.3d 544, 550 (7th Cir.), cert. denied, 568 U.S. 1011 and 568 U.S. 1055 (2012); United States v. Goode, 483 F.3d 676, 681 (10th Cir. 2007); United States v. Spinner, 152 F.3d 950, 955 (D.C. Cir. 1998). The Ninth Circuit has applied both approaches. Compare United States v. Graf, 610 F.3d 1148, 1166 (2010), with Lopez, 4 F.4th at 719 & n.19.

This case, however, does not squarely implicate any disagreement among the courts of appeals because it involves a determination that petitioner's argument was not only unpreserved, but also directly contrary to the position that petitioner had taken in moving for an acquittal in the district court. On appeal, petitioner argued that insufficient evidence existed to support his conviction for aiding and abetting the distribution of heroin by his associate, Davis, on the theory that Davis never came into actual or constructive possession of the package of heroin that petitioner tasked him with picking up. Pet. App. 17a; see Pet. C.A. Br. 26-28. In the district court, however, petitioner had

taken "the opposite position" and had "explicitly stated that he thought 'the government had proven that Mr. Davis possessed heroin with intent to distribute' on September 17, 2015," while asserting that the evidence failed to show that petitioner had aided or abetted Davis. Pet. App. 17a (brackets omitted); see 17-cr-20103 Trial Tr. 28, 31 (July 22, 2019).

Petitioner does not identify any case involving similar circumstances. Nor does petitioner identify any court of appeals in which he would have been entitled to plain-error review of such an argument. Cf. United States v. Wells, 519 U.S. 482, 488 (1997) (reciting the rule, applied in many courts of appeals, that "a party may not complain on appeal of errors that he himself invited or provoked the district court to commit") (brackets, citation, and ellipsis omitted). In the absence of any clear conflict in the specific circumstances of a complete switch like the one at issue here, the unpublished decision below neither warrants further review nor would provide a suitable vehicle for addressing the first question presented in the petition.

b. This case would also be an unsuitable vehicle in which to address petitioner's first question because he has failed to demonstrate that the result below would have been different had the court of appeals reviewed his sufficiency claim for plain error. To establish reversible plain error, a defendant must show (1) error; (2) that is clear or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness,

integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732; see Fed. R. Crim. P. 52(b). "Meeting all four prongs" of the plain-error test "is difficult, 'as it should be.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (citation omitted).

Petitioner cannot meet that standard here. Petitioner exclusively focuses (Pet. 8) on whether Davis -- as the purported principal -- ever committed a complete offense by actually or constructively possessing the heroin before it was seized by postal inspectors. But the charge here encompassed aiding and abetting the distribution of heroin by the Avendanos as well. See Gov't C.A. Br. 31 (explaining that petitioner's "actions to aid and abet the Avendanos' distribution occurred prior to the postal inspectors' seizure of the package"); see also 17-cr-20103 Second Superseding Indictment 7 (Count 6); 17-cr-20103 D. Ct. Doc. 471, at 21-28 (July 24, 2019) (jury instructions). As the government explained below, the record contained ample evidence from which a rational trier of fact could have found that petitioner aided and abetted the Avendanos' distribution of heroin. In particular, the evidence showed that petitioner provided the Avendanos with a delivery address for shipping heroin from California to Tennessee -- an address for Davis's mother-in-law, which petitioner received from Davis. Gov't C.A. Br. 30-31. It also showed that petitioner called Davis the morning of September 17, 2015, to tell him that

the package had arrived and to provide him with a tracking number. Ibid.

2. Petitioner separately contends (Pet. 9-11) that the court of appeals erred in rejecting his sufficiency challenge to his conviction for conspiring to commit money laundering. According to petitioner, the court "fail[ed] to draw a distinction between the 'laundering transaction' and the 'criminal conduct generating the proceeds to-be-laundered.'" Pet. 11 (citation omitted). Petitioner misreads the decision below.

The money laundering provision at issue requires proof that the defendant engaged in a financial transaction that "involve[d] the proceeds of specified unlawful activity," 18 U.S.C. 1956(a)(1), with "proceeds" defined to include the "gross receipts" of such activity, 18 U.S.C. 1956(c)(9). The court of appeals observed that the evidence showed that the "proceeds" at issue here were derived "from sales produced by the previous drug shipment," Pet. App. 12a, and petitioner does not argue otherwise. Petitioner deposited those proceeds of drug sales into bank accounts controlled by the Avendanos to repay them for "front[ing]" the drugs and to prompt further shipments. Ibid. Such a scheme "plainly violate[s] the money laundering statute." Id. at 12a-13a; see United States v. Tolliver, 949 F.3d 244, 248 (6th Cir.) (per curiam) (explaining that "a drug dealer using the proceeds of a drug transaction to purchase additional drugs and consummate

future sales" is a "paradigmatic example" of money laundering) (citation omitted), cert. denied, 140 S. Ct. 2838 (2020).

The distinction petitioner would draw (Pet. 10-11) between the decision below and the Fifth Circuit's decision in United States v. Harris, 666 F.3d 905 (2012), is unsound. In Harris, the Fifth Circuit recognized that funds derived from prior drug sales may constitute "proceeds" under the money-laundering statute. See id. at 907-910. On the particular facts of that case, however, the court concluded that the government had failed to establish that the funds deposited by the defendant to pay for drugs were themselves "proceeds of drug trafficking." Id. at 910; see United States v. Gross, 661 Fed. Appx. 1007, 1022 (11th Cir. 2016) (per curiam) ("While Harris stands for the proposition that a mere payment in exchange for controlled substances cannot be considered money laundering, the payment in Harris did not involve proceeds because the drug transaction was not completed until after the money exchanged hands."). Here, in contrast, the evidence supported a jury finding that petitioner engaged in financial transactions using funds "obtained from the sales of illegal narcotics." Pet. App. 12a.

3. Finally, petitioner contends (Pet. 11-15) that the district court abused its discretion when it declined to hold an evidentiary hearing before denying his pre-trial motion to dismiss the Avendano indictment on double jeopardy grounds. The court of

appeals correctly determined otherwise, and its fact-dependent determination does not warrant further review.

On appeal, petitioner did not address "the merits of his double jeopardy claim," but instead simply asserted that the district court should have held an evidentiary hearing so that his claim could "'be further explored.'" Pet. App. 7a-8a. The court of appeals explained, however, that to be entitled to such a hearing under circuit law, petitioner was required to make "at least some initial showing of contested facts." Id. at 7a (citation omitted). Petitioner failed to do so. The district court had found that the parties "did not disagree about the facts," id. at 26a n.7, and petitioner did not challenge that finding on appeal. In addition, as the court of appeals observed, petitioner did "not dispute any of the facts upon which the district court based its decision." Id. at 8a. And even now, petitioner does not identify any contested facts in his petition to this Court. Cf. Pet. 14-15 (faulting the district court for crediting the allegations in the indictment and the government's pre-trial briefing, without identifying any disputed fact).

Petitioner errs in arguing (Pet. 12-15) that the decision below conflicts with decisions of the Third, Fifth, and Eleventh Circuits. According to petitioner, "the rule has developed in the Third, Fifth and Eleventh Circuits that when a defendant advances a non-frivolous claim that his guilty plea to a conspiracy count operates as a double jeopardy bar to a prosecution under a

subsequent indictment for conspiracy, the burden shifts to the government to prove by a preponderance of evidence that the counts charge separate crimes." Pet. 13. But the district court applied that precise approach here. See Pet. App. 27a-32a (articulating the same standard and finding that "the government [h]as satisfied its burden of proving by a preponderance of evidence the existence of two separate conspiracies"). No decision cited by petitioner stands for the proposition that a district court is obligated to hold an evidentiary hearing even when the parties do not dispute the relevant facts, and common sense militates against imposing such a requirement.

In United States v. Inmon, 568 F.2d 326 (1977), the Third Circuit merely stated, in accord with the decision below, that an evidentiary hearing must be held "if there is a factual dispute," id. at 331 (emphasis added), which was not the case here. In United States v. Bennefield, 874 F.2d 1503 (1989), the Eleventh Circuit observed that an evidentiary hearing "may be required" if materials proffered by the government in response to a non-frivolous double jeopardy claim "fail to establish that two separate crimes are charged," id. at 1505-1506, without suggesting that a hearing would be required even in the absence of any disputed facts. And in United States v. Atkins, 834 F.2d 426 (1987), the Fifth Circuit concluded that a hearing was required to explore disputed facts in that case, while stating that a defendant generally "will not be allowed to present any evidence outside of

that contained in the indictments" when the indictments themselves are "sufficiently detailed and specific, and rule out the reasonable possibility of a double jeopardy violation," id. at 442.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2021

* Petitioner errs in relying (Pet. 15 n.2) on Corral v. United States, 562 Fed. Appx. 399 (6th Cir. 2014), which addressed the circumstances in which an evidentiary hearing is required in post-conviction proceedings under 28 U.S.C. 2255, see 562 Fed. Appx. at 405. In any event, any intracircuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).