No. 05-336

In the Supreme Court of the United States

JAMES R. TURCOTTE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court omitted a necessary element of the offense in instructing the jury on scienter in a prosecution for possession with intent to distribute the controlled substance analogue Gamma Butyrolacetone (GBL), in violation of 21 U.S.C. 813 and 841(a)(1).

2. Whether the court of appeals erred in finding no reversible error in the jury instructions, where it is sufficient to convict a defendant of possession of GBL with intent to distribute that the defendant know the substance is GBL, and the jury instructions required a finding that petitioner knew the substance was GBL.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 405 F.3d 515. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 39a-45a) is reported at 286 F. Supp. 2d 947.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2004. A petition for rehearing was denied on June 14, 2005 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on September 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing a controlled substance analog with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 813, and of conspiring to possess controlled substances and controlled substance analogues with intent to distribute them, in violation of 21 U.S.C. 846. He was also convicted of conspiring, in violation of 18 U.S.C. 371, to sell misbranded drugs in violation of 21 U.S.C. 331(a) and 333(a)(2). The district court sentenced petitioner to 54 months of imprisonment on each count. The court of appeals affirmed. Pet. App. 1a-36a.

1. Petitioner's convictions arose from his activities with co-defendant Brian Gore involving the sale of products containing the drug Gamma Butyrolacetone (GBL), a substance that converts in the human body to Gamma Hydroxybutyric Acid (GHB), a Schedule I controlled substance.[1] Pet. App. 2a-3a.

In March 2000, petitioner became the owner of Best Buy Supplements, an internet-based company through which he sold Verve 5.0, a purported vitamin supplement that contained GBL. Best Buy Supplements advertised a variety of purported bodybuilding and fitness products, including "Growth Hormone Products"

[1] GHB, a Schedule I controlled substance that is known as the "date-rape" drug, is most commonly used as a party drug for its intoxicating or euphoric effects, although some use it believing it to be effective in stimulating muscle growth, promoting sleep, or enhancing libido. *United States* v. *Ellis*, 326 F.3d 550, 552 (4th Cir. 2003); *United States* v. *Fisher*, 289 F.3d 1329, 1331 (11th Cir. 2002), cert. denied, 537 U.S. 1112 (2003). While it causes a feeling of euphoria, it can also result in dizziness, vomiting, urinary incontinence, seizures, coma, and even death. *Id.* at 1331 & n.2.

such as Verve. A company website advertised Verve as the "absolute finest quality GHB precursor." Another of petitioner's websites acknowledged that ingredients in Verve are "illegal nationwide." Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

To fulfill customer orders, petitioner purchased cases of Verve in which the contents were labeled "cleaning supplies." Pet. App. 3a; Gov't C.A. Br. 4 (citation omitted). One such label stated, "[d]ue to FDA regulations this product is sold as a solvent only." *Id.* at 4-5. A representative of the manufacturer of the GBL in Verve testified at trial that his firm marketed GBL as a chemical solvent to be used as a paint thinner, paint stripper, or for a similar use. *Id.* at 8.

A Drug Enforcmement Agency (DEA) informant arranged for a purchase of Verve from petitioner. Petitioner was arrested after he took $10,000 in cash in a styrofoam cup from the informant in a gas station parking lot and in turn gave the informant 20 cases (60 gallons) of Verve. Pet. App. 3a; Gov't C.A. Br. 5-6.

2. Petitioner was charged in three counts of a five-count indictment. Count One charged petitioner with conspiring to sell misbranded drugs, in violation of 18 U.S.C. 371. Pet. App. 3a, 39a. Count Two charged petitioner with conspiring to possess with intent to distribute mixtures containing GHB and GBL for human consumption, in violation of 21 U.S.C. 846. Pet. App. 3a-4a, 39a. Count Five, arising from petitioner's $10,000 transaction with the DEA informant just preceding his arrest, charged him with possessing with intent to distribute 60 gallons of GHB and GBL for human consumption, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a-4a, 39a-40a. The indictment identified GHB as a schedule I controlled substance, and GBL as a con-

trolled substance analogue.[2] Gov't C.A. Br. 6-7. Under 21 U.S.C. 813, a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813.

The term "controlled substance analogue," with exceptions not relevant here, is defined by statute to mean a substance—

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucino-

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[2] The indictment also contained allegations relating to 1, 4 Butanediol (BD), but the court of appeals found that BD was not the basis for petitioner's controlled substance convictions and that it was not a factor in petitioner's sentencing. Pet. App. 11a-12a (noting both the government's position that petitioner "was [not] convicted or sentenced for possession or distribution of BD at all," and the statement in the Presentencing Investigation Report that the amounts of substances containing BD were not included in the drug quantity calculation). Petitioner does not raise any claims relating to BD in this Court.

> genic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. 802(32)(A).

3. At trial, the district court instructed the jury with respect to the Count Five substantive violation of Section 841(a)(1) that:

> To sustain the charge in Count Five of possessing with intent to distribute mixtures containing a controlled substance, the government must prove the following propositions: First, the defendant knowingly and intentionally possessed mixtures containing GBL; Second, the defendant possessed mixtures containing GBL with the intent to deliver it to another person; and Third, that mixtures containing GBL are an analogue of GHB, a Schedule I Controlled Substance. It does not matter whether the defendant knew the substance was a controlled substance, only that it was a mixture containing GBL.

Gov't Jury Instruction No. 25, at 29; see Pet. App. 13a. Petitioner's convictions on Counts 2 and 5 rested on the evidence and jury findings with respect to GBL as a controlled substance analogue, not GHB.

Petitioner was convicted on all three counts with which he was charged. In addition, the jury returned a special verdict finding that GBL was an analogue of the schedule I controlled substance GHB because all three criteria of the definition were satisfied, to wit: (1) GBL and GHB have substantially similar chemical structures; (2) GBL and GHB have substantially similar effects on the central nervous system; and (3) petitioner represented or intended that GBL and GHB had a substantially similar effect on the central nervous system. Special Verdict Form One. See Pet. App. 8a. The dis-

trict court sentenced petitioner to concurrent sentences of 54 months of imprisonment on each of the three counts on which he was convicted. Pet. App. 6a; Gov't C.A. Br. 12.

3. The court of appeals affirmed. Pet. App. 1a-36a. First, the court agreed with petitioner's argument that satisfying just one of the three criteria in the definition of a controlled substance analogue in 21 U.S.C. 802(32)(A) is not sufficient to satisfy the definition. Disagreeing with the district court, the court of appeals held instead that Section 802(32)(A) should be given a "conjunctive" reading so that, to qualify as a controlled substance analogue, (1) the substance in question must have a chemical structure substantially similar to a controlled substance (criterion one in Section 802(32)(A)); and (2) it must have either a substantially similar effect on the central nervous system (criterion two in Section 802(32)(A)) or be purported or intended to have such an effect (criterion three in Section 802(32)(A)). Pet. App. 6a-10a. The court of appeals noted that its conjunctive reading of Section 802(32)(A) was in accord with the vast majority of federal court decisions. *Id.* at 8a-9a (citing, *e.g.*, *United States* v. *Hodge*, 321 F.3d 429, 433 (3d Cir. 2003)). The court found that the conjunctive reading of Section 802(32)(A) did not benefit petitioner, however, in part because the jury had specifically found by special verdict that GBL met all three criteria in the definition of a controlled substance analogue.[3] Pet. App. 11a.

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[3] The jury did not find that the substance BD met all the criteria in Section 802(32)(A), but the court of appeals determined that the allegations on BD had no impact on petitioner's sentence. See note 2, *supra*.

The court of appeals next held that, whatever "shortcomings" might exist in the district court's scienter instructions, they did not amount to reversible error. Pet. App. 20a. The court of appeals stated that a conviction under Section 841(a)(1) based on a controlled substance analogue ordinarily requires that "the defendant must know that the substance at issue meets the definition of a controlled substance analogue set forth in [Section] 802(32)(A)." *Id.* at 18a. In the court's view, that meant that "[a] defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects." *Ibid.* The court recognized that "[t]he question of similar chemical structure is particularly nettlesome since, even if such chemical similarities exist, and even if the defendant is aware of these similarities, the intricacies of chemical science may render it extremely difficult to *prove* that a defendant had such knowledge." *Ibid.* But the court concluded that "[a]s a provisional remedy for this problem," a jury should be "permitted—but not required—to infer that the defendant * * * had knowledge of the relevant chemical similarities," *ibid.*, so long as the defendant had been shown to have scienter with respect to the other half of the definition, *i.e.*, so long as the defendant had been shown either to be aware of the similarity between the analogue's physiological/psychological effects and those of a controlled substance or to intend or represent that the analogue had such similar effects. See *ibid.*

Applying that standard to this case, the court noted that the fact that "the jury specifically determined that [petitioner] represented or intended that GBL had

physiological effects similar to GHB * * * suffices to demonstrate scienter with respect to the second prong of the analogue definition (actual or intended similar physiological effect)," but "it is not equivalent to finding *knowledge* of actual chemical similarity." Pet. App. 19a. On that point, the court commented that the evidence at trial was sufficient to support a finding of such knowledge, but that such a finding was not compelled. *Id.* at 20a. The court held, however, that petitioner's conviction nonetheless should not be reversed because "Congress has specifically identified GBL as an analogue of GHB" and "DEA regulations * * * specify that '[GBL] and [GHB] are *structurally and pharmacologically similar to GHB*.'" *Id.* at 20a-21a (quoting 65 Fed. Reg. 21,645 (2000) and citing *United States* v. *Ansaldi*, 372 F.3d 118, 123 (2d Cir. 2004) ("GBL is one of the substances that the statute actually identifies as a potential controlled substance analogue."), cert. denied, 125 S. Ct. 364 and 430 (2004), and *United States* v. *Fisher*, 289 F.3d 1329, 1336 (11th Cir. 2002), cert. denied, 537 U.S. 1112 (2003) (legislative statements and DEA regulations identify GBL as an analogue of GHB)). The court of appeals concluded that those congressional and regulatory pronouncements were "sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue." Pet. App. 21a. In those circumstances, the court held, petitioner, "having acknowledged that he *knew* he was selling substances containing GBL, * * * cannot then turn around and claim that he had no knowledge of GBL's status as an analogue of GHB." *Id.* at 21a-22a. The court explained that "[a]s with other known controlled substances * * *, knowledge of the substance's specific identity implies knowledge of the substance's legal sta-

tus," and "[i]gnorance of the relevant legal provisions is no defense." *Id.* at 22a. Accordingly, the court stated, "any error in the district court's scienter instructions [was] harmless." *Ibid.*

ARGUMENT

Petitioner contends that this Court's review is warranted because the court of appeals applied a mistaken harmless-error analysis to the omission of what he contends was a necessary scienter element in the instructions given to the jury. Further review is unwarranted. Although the court of appeals articulated a harmless-error rationale in finding no reversible error, its judgment is correct quite apart from harmless-error principles because it is sufficient to convict a defendant of a controlled substance analogue violation involving GBL that the jury found that the defendant "*knew* he was selling substances containing GBL." Pet. App. 21a. There is no need for this Court to review any purportedly mistaken articulation of harmless-error standards in the opinion. The Seventh Circuit has, on many occasions, demonstrated that it correctly understands the harmless-error test laid down in *Neder* v. *United States*, 527 U.S. 1 (1999), when the jury instructions omit an element of an offense. For the same reason, there is no conflict between the law on harmless error in the Seventh Circuit and the law on harmless error in this and other courts. And because the court's rationale does not appear to turn on a conclusive presumption of knowledge, this Court's mandatory presumption precedents are not implicated.

1. The court of appeals correctly noted that defendants charged with a controlled substance violation ordinarily must be shown to have known that the sub-

stance involved is a controlled substance. Pet. App. 14a. Generally, the defendant's knowledge of the identity of the substance—heroin, cocaine, marijuana, etc. —is sufficient to make that showing. *Id.* at 14a-15a. Thus, in ordinary prosecutions for possessing a controlled substance with intent to distribute it under 21 U.S.C. 841(a)(1), the government need not prove the defendant's knowledge of the precise chemical composition of the substance he possessed.

Under the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. 813, a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." Accordingly, when a defendant is charged with possessing GBL—a controlled substance analogue—with intent to distribute it, the ordinary scienter requirement under Section 841(a)(1) applies. Just as a defendant charged with possessing heroin, cocaine, or marijuana need be shown only to have known the identity of the substance he possessed and need not be shown to have known anything about the chemical composition of that substance, a defendant charged with possessing GBL need be shown only to know that he possessed GBL with the intent that it be used for human consumption and need not be shown to have known anything further about its chemical composition.

Based on that analysis, the jury's verdict contained all of the findings necessary to support petitioner's convictions on Counts 2 and 5. The court of appeals noted that "[t]he jury specifically found that [petitioner] knew the substance he possessed contained GBL." Pet. App.

20a.[4] The jury was instructed that it must find that petitioner "knowingly and intentionally possessed mixtures containing GBL," and that "[i]t does not matter whether the defendant knew the substance was a controlled substance, *only that it was a mixture containing GBL*." Gov't Instruction No. 25, at 29 (emphasis added). In those circumstances, as is the case with heroin, cocaine, marijuana, or other controlled substances, "knowledge of the substance's specific identity implies knowledge of the substance's legal status." Pet. App. 22a. The jury's findings were sufficient to satisfy the statutory scienter requirement.

2. The court of appeals did purport to announce a more general rule that to be convicted of an offense involving a controlled substances analogue, the defendant "must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance." Pet. App. 18a. Although the court spoke generally about that questionable knowledge-of-chemical-similarity requirement in controlled substance analogue cases, the court also recognized—as have other courts—that "Congress has specifically identified GBL as an analogue of GHB," and that "DEA regulations also specify" that GBL and GHB are "pharmacologically similar." Pet. App. 20a-21 (quoting 65 Fed. Reg. at 21,645).[5] See *United States* v. *Ansaldi*, 372

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[4] The court noted that "the jury also found that [petitioner] intended or represented that GBL has similar physiological effects to GHB." Pet. App. 22a n.7.

[5] Petitioner argues (Pet. 16 n.3) that the DEA regulation cited by the court of appeals does not compel the conclusion that GBL is a controlled substance analogue, but only provides that GBL "may satisfy" the definition of a controlled substance analogue "under certain circumstances." *Ibid.* (quoting Pet. App. 21a and 65 Fed. Reg. at 21,645).

F.3d 118, 123 (2d Cir. 2004), cert. denied, 125 S. Ct. 364 and 430 (2004); *United States* v. *Fisher*, 289 F.3d 1329, 1336 (11th Cir. 2002). In those circumstances, the court agreed with the Second Circuit that "there is one thing [the laws governing controlled substances] make perfectly clear—the sale of GBL for human consumption is illegal." Pet. App. 21a (quoting *Ansaldi*, 372 F.3d at 122). The court concluded that "such pronouncements [from Congress and the DEA] are sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue," *ibid.*, and the court accepted that, at least in GBL cases, the scienter required is the same as the scienter required for any other violation of Section 841. See *id.* at 22a ("As with other known controlled substances * * *, knowledge of the substance's specific identity implies knowledge of the substance's legal status.").[6]

In light of its discussion, the precise breadth of the court of appeals' knowledge-of-chemical-similarity rule is unclear, and the correctness of that rule is not at issue in any event. The court concluded in this case that proof of such knowledge is not necessary in a GBL case.

Those "circumstances" are surely present here, where the drug was being distributed for human consumption and the jury found that petitioner represented or intended that GBL has similar physiological/psychological effects as GHB. With respect to the issue of the similarity of chemical structure between GLB and GHB, the regulation states unequivocally that GBL is "structurally and pharmacologically similar to GHB." Pet. App. 21a (quoting 65 Fed. Reg. at 21,645).

[6] Although the court of appeals later stated that it found any deficiencies in the instructions harmless, see Pet. App. 22a, the court did not explain how, in light of its conclusion that the scienter requirement is the same for GBL offenses as for offenses involving other controlled substances, there was error in the scienter instructions in this case at all.

At the very least, the drug 1,4 butanediol—which was also originally charged in this case under the name "BD," see note 2, *supra*—would appear to be on a par with GBL. See *United States* v. *Roberts*, 363 F.3d 118, 123-124 (2d Cir. 2004). While the court stated that the instructions in this case might constitute reversible error in unspecified other controlled substance analogue prosecutions, this case does not present any question about whether a more stringent scienter requirement or a knowledge-of-chemical-similarity requirement should be applied in cases *not* involving GBL.

3. Petitioner's primary contention is that the "[t]he Seventh Circuit found that the omission from jury instructions of a contested element of the offense constituted harmless error," and that that finding "contradicts opinions of this Court and the law of at least three sister circuits." Pet. 6 (citing, *inter alia*, *Neder* v. *United States*, 527 U.S. 1 (1999)). There is no reason for this Court to review the Seventh Circuit's understanding of *Neder* in this case.

While the court of appeals criticized the jury instructions in this case and purported to rest its decision on the conclusion that "any error" in the instructions was "harmless," see Pet. App. 22a; see also *id.* at 20a ("any deficiencies * * * harmless"), the court ultimately found no reversible error because it concluded that Congress and the DEA had clearly identified GBL as a controlled substance analogue and thus that a defendant's knowledge that a substance is GBL is sufficient to prove scienter. See, *e.g.*, *id.* at 21a-22a ("Thus having acknowledged that he *knew* he was selling substances containing GBL, [petitioner] cannot then turn around and claim that he had no knowledge of GBL's status as an analogue of GHB."); *id.* at 22a ("knowledge

of the substance's specific identity implies knowledge of the substance's legal status"). The court's opinion thus cannot be understood, as petitioner claims, as a general holding that the omission of a seriously contested element from jury instructions can be harmless error. Rather, the court's holding turned on its specific conclusion that, where Congress itself has identified a particular substance as a controlled substance analogue, any deficiencies that existed in the jury instructions on scienter did not amount to reversible error.

If a defendant were required to have actual knowledge that a particular substance had a chemical structure substantially similar to that of a controlled substance in *every* prosecution for a controlled substance analogue, then the fact that Congress had specifically identified GBL as a controlled substance analogue would not constitute conclusive proof that a defendant had actual knowledge of chemical similarity. While there is some ambiguous language in the court's opinion, see Pet. App. 21a, the thrust of the court's analysis appears to be that in a GBL case, no further finding on scienter is required as a matter of law once the defendant is shown to have known that a substance is GBL. *Id.* at 22a. That conclusion does not rest so much on analysis under *Neder* (which the court did not cite) or on the application of a conclusive presumption (which the court did not articulate)[7] as it does on an understanding of the statutory status of GBL in the controlled substance analogues law.

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[7] Petitioner's attribution (Pet. 15-19) to the court of appeals of having applied such a conclusive presumption is particularly unwarranted because the court elsewhere (Pet. App. 18a-19a n.4) recognized that such presumptions are constitutionally problematic.

Petitioner is mistaken in claiming (Pet. 9) that the instant case conflicts with *Powell* v. *Galaza*, 328 F.3d 558 (9th Cir. 2003), *United States* v. *Prigmore*, 243 F.3d 1 (1st Cir. 2001), or *United States* v. *Brown*, 202 F.3d 691 (4th Cir. 2000). In each of those cases, the court found that there was an instructional error omitting or materially misstating an element of the offense charged and that the error was not harmless in light of the evidence in the case. None of those cases involved the scienter requirements applicable to GBL-based controlled substance analogue prosecutions, and, therefore, they did not involve the unique statutory context involved in this case. Moreover, the Seventh Circuit has elsewhere consistently applied a correct understanding of harmless-error principles.[8] It is thus clear

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[8] See, *e.g.*, *United States* v. *Ramsey*, 406 F.3d 426, 432 (7th Cir. 2005) (finding omission from jury instructions of element that the defendant must act "knowingly and intentionally" in a prosecution for maintaining a drug house to be harmless under *Neder*; "if the evidence is so strong that a jury would have reached the same verdict absent the erroneous jury instruction, then the error is harmless"), cert. denied, 540 U.S. 1227 (2004); *United States* v. *Knight*, 342 F.3d 697, 712 (7th Cir. 2003) (citing *Neder*, 527 U.S. at 10-11, and finding any alleged error in jury's failure to find foreseeable drug quantity for each defendant harmless under test that asks "whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error") (internal quotation marks omitted); *United States* v. *Souffront*, 338 F.3d 809, 836 (7th Cir. 2003) (finding omission of unanimity instruction on predicate acts in CCE prosecution harmless; "[w]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless") (quoting *Neder*, 527 U.S. at 17), cert. denied, 540 U.S. 1201 (2004); *United States* v. *Swan*, 250 F.3d 495, 499 (7th Cir. 2001) (finding omission of operation-or-management instruction in RICO prosecution not harmless "[b]ecause

that there is no genuine conflict in the circuits on the meaning of *Neder*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
WILLIAM C. BROWN
Attorney

DECEMBER 2005

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the record does not contain overwhelming evidence that Swan managed or operated the enterprise," such that it is not "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error") (quoting *Neder*, 527 US. at 18).