No. 18-6605

ORIGINAL

In the
SUPREME COURT OF THE UNITED STATES

Joseph Perrone,
Petitioner,

v.

United States of America,
Respondent.

On petition for a writ of certiorari
from the United States Court of Appeals
for the Seventh Circuit, No. 16-2437

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the lower courts refuse to follow the decision and holdings of this Court in United States v. Burrage, 571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), and thereby violate fundamental principles of due process, in finding that the record was insufficient under the "but for" causation standard but then accepting as sufficient the Government's factual assertions on appeal which were not in the record, had not been presented to the District Court, and had never been tested in any adversarial proceeding?

LIST OF PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case on the cover page.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall be ... deprived of life, liberty, or property, without due process of law ...."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 21, United States Code, Section 841:

(a) Unlawful acts .... it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense ... a controlled substance ....

(b) Penalties .... any person who violates subsection (a) of this section shall be sentenced as follows:

(1) ... (C) In the case of a controlled substance in Schedule I or II ... such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life ....

Title 28, United States Code, Section 2255:

(a) A prisoner ... claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or ... that the sentence ... is otherwise subject to collateral attack, may move the court ... to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto....

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OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Illinois appears at APPENDIX C to this Petition and is published at 2016 U.S. Dist. LEXIS 66194 (S.D.Ill. 5/19/2016). The Opinion of the U.S. Court of Appeals for the Seventh Circuit appears at APPENDIX A and 889 F.3d 898 (7th Cir. 5/14/2018) (reh. den. 7/26/2018, APPENDIX B).

JURISDICTION

The date on which the United States Court of Appeals for the Seventh Circuit issued its Opinion was May 14, 2018. A timely petition for rehearing was denied on July 26, 2018. Copies of these appear at APPENDIX A and APPENDIX B, respectively.

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

STATEMENT OF THE CASE

Terry Learn and Joseph Perrone were a couple who lived an incredibly self-destructive, drug-fueled lifestyle. In April, 2008, the body of Ms. Learn was discovered in her apartment next to a hypodermic needle by officers of the Belleville Police Department.

The investigation revealed that she had a history of depression and associated hospitalizations for overdose-related suicide attempts, and a toxicology report was prepared in support of the postmortem examination. The victim's blood contained alcohol (142 mg/dl), cocaine (per se, 0.90 mcg/ml), benzoylecgonine (a cocaine metabolite, 2.3 mcg/ml), methyl-ecgonine (another cocaine metabolite, 1.9 mcg/ml), and smaller amounts of cocaethylene (a byproduct of alcohol and cocaine) and morphine (a metabolite of heroin).

The coroner's inquest ruled the manner of death to have been "accidental," the cause -- "combined toxicity with cocaine, ethanol, and opiates" -- to have had an "onset" some "hours"

before death. Motivated by remorse, Petitioner voluntarily came forward to confess his involvement in his girlfriend's overdose, and submitted to a series of interviews with law enforcement which were audio- and video-taped.

After she had ingested substantial amounts of cocaine, heroin, and alcohol obtained elsewhere and in the company of others (whose corroborative statements were presented to the Grand Jury), Ms. Learn joined Petitioner and (leaving and returning at least once during the course of the interaction) proceeded to share some of the stash of cocaine he had earlier procured from a dealer -- two "eight balls," or a total of 7 grams -- for their mutual use.

Having eventually gotten so intoxicated that she could no longer hold the needle steady, the victim relied on Petitioner to administer one more intravenous dose, after which she "immediately" died.

Federal prosecutors in the Southern District of Illinois charged Petitioner with drug distribution resulting in death, 21 U.S.C. §841(b)(1)(C), carrying a 20-year mandatory minimum sentence. Petitioner pled guilty pursuant to a plea agreement and factual basis which, while suggesting that his conduct "caused the death of another person," did not establish that the victim would have lived absent Petitioner's action.

Obviously, Petitioner wanted to be held responsible under the law for his role in his girlfriend's death. His lawyer represented to him that his conduct was sufficient to support his conviction even if the alcohol, heroin, and other cocaine

she had consumed would have themselves brought about death. Had the law remained as it was understood by Petitioner at the time of his plea, that would have been the end of this tragic story.

But in 2014, this Court decided in Burrage that the strict-liability provision established by Congress in §841(b)(1)(C) distinguishes it from most criminal statutes and can only be applied in cases of "mixed drug intoxication" when the government proves a defendant's "distribution" to have been the "but for cause" of death. Burrage, 134 S.Ct. at 887-88.

In this case, although several witnesses had testified ex parte before the Grand Jury and although the PSR referred to select investigative summary reports, the totality of the basis for Petitioner's conviction was the three-point stipulation underpinning his pre-Burrage guilty plea:

> 1. In April 2008, [Petitioner] injected Terry Learn with a syringe containing cocaine.
>
> 2. Terry Learn died immediately after receiving the injection.
>
> 3. [Petitioner] and another person then moved Terry Learn's body to her own apartment, and left it there next to a syringe, in order to create the false impression that Terry Learn had died alone in her own residence.

Thus Petitioner's plea and its factual basis left the issue of "but-for" causation unaddressed.

Petitioner filed a timely pro se petition under 28 U.S.C. §2255 which entitled him to a "prompt hearing" where the record cannot "conclusively" refute his claims to relief. §2255(b). He claimed that the decision in Burrage invalidated his plea

and alleged both ineffective assistance of counsel and "actual innocence" to overcome any procedural default; however, under §2255(f)(3), Petitioner's Burrage claim was per se cognizable.

The Government acknowledged that an evidentiary hearing might be in order to align the record with the new standard, and solicited an email from a toxicologist proffering the evidence that could be put on at such a hearing. This email, however, while suggesting that "the cocaine is the primary cause of death" and pointing out that "the autopsy results show[] that [the victim] consumed a large amount of cocaine close to the time of her death," did not distinguish between the cocaine already metabolized, ingested prior to the victim's encounter with Petitioner, and the unmetabolized cocaine for which Petitioner was directly responsible.

On 5/12/2014, the District Court directed appointed counsel to address the Government's response, either by stipulating to the content of the proffered email or by requesting a full adversarial hearing. Appointed counsel did neither, ignoring the District Court's directive entirely.

Petitioner asked for new counsel, and was eventually able to prevail upon one such appointed attorney to file a bare-bones request for an evidentiary hearing which did not address any of the salient issues. Without scheduling any hearing, on 5/19/2016 the District Court dismissed the petition, relying on the sufficiency of Petitioner's guilty plea and a misrepresentation of the stipulations in the factual basis. The Order made no mention of the Government's ex parte email. APPENDIX C at 12.

("Perrone is bound by his representations. He did not agree to a factual basis which provided that cocaine was a cause of death; rather, he agreed to a factual basis that cocaine was the cause of death").

Believing this to misapply Burrage and violate §2255(b), Petitioner, pro se once again, sought to take an appeal to the Seventh Circuit. Judge Bauer granted a Certificate of Appealability as to three issues:

> We find that Perrone has made a substantial showing of the denial of a constitutional right regarding whether his drug distribution did not in fact cause another's death under the "but for" causation standard required by Burrage v. United States, 134 S.Ct. 881 (2014), whether his plea was knowing and voluntary, and whether counsel provided ineffective assistance for not addressing the issue of causation given our decision in United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010). See 28 U.S.C. §2253(c)(2).

The Court of Appeals appointed counsel once again, this time to brief Petitioner's certified claims on appeal.

Appointed counsel's opening brief, however, appeared to abandon the issue as to the knowing and voluntary nature of his plea. Pro se, Petitioner advised the Seventh Circuit as to this concern, and asked the Court to direct counsel to supplement the brief accordingly. On 8/2/2017, Judge Rovner denied this request:

> Appellant's brief already sufficiently addresses all three issues for which the court granted Appellant's certificate of appealability.

The Seventh Circuit's 5/14/2018 Opinion authored by Judge Barrett, however, held that appointed counsel had "presse[d] only ... two of [the certified] arguments on appeal,"

Perrone v. United States, 889 F.3d 898, 903 (7th Cir. 2018).

The Opinion pointed out that the Government's reliance on the Grand Jury testimony of the medical examiner, Dr. Nanduri, was insufficient, and that the Government's reliance on its solicited email from Dr. Long, the toxicologist, was likewise not enough. However, the Government's appellate response, in addition, referred more than a dozen times to Petitioner's allegedly having injected the victim with "7.5 grams of cocaine."

That statement was nowhere in the record underpinning Petitioner's conviction and the District Court's decision to deny Petitioner's §2255 motion had nothing whatsoever to do with this novel invention. And not only was it false; it was demonstrably absurd: The total quantity of cocaine in Petitioner's residence, and thus available for sharing between Petitioner and the victim, was 7 grams; the syringes and water used as solvent could not accommodate so much cocaine solute; and any human being, no matter how high their cocaine "tolerance," would die from a fraction of such a quantity.

Reliable sources suggest that the solubility of cocaine in 100mL of water (the maximum volume of the diabetic syringe recovered from the scene and used by both Petitioner and the victim) is about 250mg. Adversarial process would have revealed that it is physically impossible to dissolve more than ¼ gram of cocaine in a single injection. The Government, and the Opinion of the Seventh Circuit, ascribe nearly 30 times that amount to Petitioner's "distribution," and rest the affirmance of the District Court's disposition of the §2255 action thereon.

The Government claimed to have come across this information in the PSR while formulating its appellate response. But the PSR had only misrepresented a conclusory report of a police interview which, incidentally, would be subject to examination in its original audio/video form if introduced in an actual adversarial hearing.

Such an untested conclusion should have no place in an appeal where it had no basis in the record below. Even if it were acceptable for the Government to advance a new argument on appeal based on information never admitted as evidence -- and set off against the Government's citation to an internet blog for effect -- the Seventh Circuit has clearly (and rightly) held that PSR statements in the sentencing context are not validly invoked to sustain a conviction. See United States v. Kelly, 314 F.3d 908, 913 (7th Cir. 2003). (The Government cited Kelly, see Response at 6, fn.3, only to pretend that it stood for the opposite proposition.)

The quantity of cocaine "distributed" by Petitioner was not part of the stipulation underpinning his guilty plea and conviction, so, under Kelly and Burrage, even if it were to be relied on by the Government to prove Petitioner's liability under the new "but-for" causation standard, the fact would have to be exposed to adversarial testing.

Here, the Government had been ready to present the testimony of a toxicologist at an evidentiary hearing in the District Court until the District Court wrongly decided that Petitioner's original stipulated plea to a different standard required no

reevaluation in light of Burrage -- at which point the Government had to come up with a completely new position on appeal if it wanted to defend the pelt the District Court had so graciously bestowed upon it without cost.

The Government made up a series of facts cherry-picked from various ex parte sources to suggest that "7.5 grams of cocaine" is "an exceedingly large amount by any standard," Response at 29, fn.11. This position, accepted by the Seventh Circuit, hardly satisfies due process. Cf. Burrage, 187 L.Ed.2d at 727 ("very less likely" "uncertainty").

Rather than allow development of the record to show what would have been at issue if Petitioner had not pled to an interpretation of §841(b)(1)(C) rejected by this Court in Burrage, the Seventh Circuit's Opinion parroted the Government's recitation of facts not in evidence which could never survive adversarial testing.

This decision shifted the burden of proof and allowed the Government to preserve its conviction without having to put on any evidence or contend with any meaningful opposition whatsoever. APPENDIX A.

Petitioner's pro se petition for rehearing was denied in the Seventh Circuit on 7/26/2018. APPENDIX B. This petition for a writ of certiorari timely follows.

SUMMARY OF THE ARGUMENT

At some point, due process requires that the Government be made to put on a sufficient factual basis to show that Petitioner is guilty of violation of §841(b)(1)(C) under the standard set

forth in Burrage. See, e.g., Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

The question of whether Petitioner's conduct meets the "but for" causation standard has not been exposed to proper adversarial testing. The Seventh Circuit understood that his stipulated plea -- the basis for the District Court's decision -- was insufficient, but affirmed the outcome below on the notion that the Government could have demonstrated Burrage liability given reliance on facts not in the direct record, and which could never survive cross-examination: No rational juror would believe the "7.5 grams" claim if it was presented, not alone and in an appellate brief, but alongside expert testimony to show that terrestrial physics and chemistry do not allow such a quantity of cocaine to fit into a syringe.

The disposition of the courts below undoes this Court's careful work in Burrage by holding that the basis for preserving or affirming a conviction under the "but-for" standard can now be satisfied with a hodgepodge of ex parte presumptions drawn from any available source on appeal without qualification of provenance or reliability.

And the disposition of the Seventh Circuit affirming the District Court's denial of an evidentiary hearing conflicts with its own holdings and those of every other Circuit Court of Appeals. Though §2255(b) allows a court to resolve a petition without a hearing where "the record before the district court" conclusively refutes the claims to relief, Perrone, 889 F.3d at 909-10, it does not allow resolution without a hearing upon

extra-record materials not in evidence without an opportunity for refutation. Yet that is what happened in this case.

Apparently this Court has not yet been clear enough with respect to the manner in which Burrage must be applied. The Court should reverse the holdings below with directions to develop a record before deciding how the case should be resolved.

ARGUMENT

The Seventh Circuit's Opinion states that "the fact that other substances in [the victim's] bloodstream played a part in her death does not defeat the government's claim that her death resulted from the cocaine [Petitioner] gave her," Perrone, 889 F.3d at 906, and held that "there is sufficient evidence to have permitted a jury to find [Petitioner] guilty" on the premise that Petitioner's action (as invented ex parte by the Government on appeal) "pushed her over the edge," Id., citing Burrage, 134 S.Ct. at 890.

The Opinion rests its decision to affirm the District Court's denial of an evidentiary hearing on the Government's erroneous and unqualified "7.5 grams" line, Perrone, supra, at 906. "Before the grand jury, the government seemed focused on" a pre-Burrage state of the law, Id. at 907, and so "when the coroner, Dr. Raj Nanduri, testified before the grand jury, she never expressly opined that [the victim] would have lived if she had not consumed the cocaine [Petitioner] gave her," Id., overtly refusing to testify that those other substances "were not lethal," Id.

In addition to having noted pulmonary congestion indicative

of opiate overdose, Dr. Nanduri testified to the Grand Jury that "the role the morphine played in [the victim's] death" had not been "independently" determined: the answer "depends on numerous factors," Id. Dr. Nanduri even pointed out "that a person's morphine level might be deceptively low if the person ... continued metabolizing the morphine before dying," Id.

These pre-indictment statements by the medical examiner point to the nature of expert testimony that would be necessary at an evidentiary hearing to determine Petitioner's liability under Burrage: Questions about metabolic rates and whether a particular level of toxic substance shows that the body had been affected thereby, or had not yet begun to "digest," are at least as important as where the drugs came from and how much had been ingested in the first place.

The Opinion recognized this. "Nanduri's testimony thus does not establish that cocaine was the but-for cause of [the victim's] death. But the government has **testimony** from another expert, Dr. Chris Long, who did expressly state that [the victim] would have lived but for the cocaine," Id. Petitioner maintains that this is not even what Dr. Long's ex parte email said, but in any event, it was never admitted into evidence nor subjected to adversarial testing, was not relied on by the District Court below, and certainly was not "**testimony.**"

> [Petitioner's] best response is to say that even if cocaine caused [the victim's] death, the cocaine that killed her was not the cocaine he gave her. ... [Petitioner] may have injected cocaine into a woman with an already-lethal amount of cocaine in her body.

Id.

That, Petitioner agrees, is precisely the question that needs to be answered in order to sustain Petitioner's conviction under the "but-for" causation standard established by this Court in Burrage. The problem is that the District Court erred in finding that the three-point stipulation forming the factual basis for Petitioner's guilty plea was inherently sufficient, despite that the law to which Petitioner had pled had changed, and the Seventh Circuit allowed the Government to suggest, without any record development, that it would have succeeded at any hearing in any event.

In fact, the Opinion with one hand allowed the Government to insert surmise and conjecture -- having accepted the ex-parte email originally proffered in support of the scheduling of an evidentiary hearing (and not for evidence per se) and calling it "**testimony**" despite the "witness" never having taken the stand, never having been sworn much less qualified as an expert, and never having been exposed to cross-examination nor rebuttal evidence -- and with the other hand refused to allow Petitioner an equivalent opportunity to develop the record.

The Opinion actually stated: "There is no evidence that [the victim] acquired or took any cocaine ... [before] [Petitioner] [and, arguendo,] a rational factfinder could easily conclude that she would have taken only a nonlethal dose." Perrone, supra, at 907-908. The size of any one dose can **never** be properly excluded from this analysis, and in fact a rational factfinder **would** have been presented with precisely that contradictory evidence. But the omniscient Seventh Circuit concluded that the Government's arguments precluded a showing "more likely than

not that no reasonable juror would have voted to find [Petitioner] guilty beyond a reasonable doubt," Id. at 908. That, however, is not the posture of the case, where under §2255(b) Petitioner is entitled to relief by further proceedings where the actual record could not "conclusively refute" his Burrage claim.

Because the stipulated facts underpinning Petitioner's plea did not address causation under the Burrage standard, and no other evidence is properly in the record that would allow the District Court to have resolved the motion summarily, the case should have been remanded by the Seventh Circuit. If the Government can put on evidence satisfying due process of law, it may opt to press the prosecution by whatever steps necessary in the interest of justice. Is this in the interest of justice?

In Burrage, the victim, "a long-time drug user, died ... following an extended drug binge" which "began on the [preceding] morning." Burrage, 187 L.Ed.2d 715 at 720. That victim had been sharing drugs with his partner, including the opiates which had been obtained from that criminal defendant, when he was thereafter found dead.

The defendant in Burrage pled not guilty and was afforded a trial at which two medical experts testified, Id. at 720-21. The toxicology report in that case showed "that multiple drugs were present in [that victim's] system at the time of his death," Id. Because that defendant had been the supplier of the opiate used by the victim, the question was whether "morpine, a heroin metabolite," was the cause of death, Id.

The experts in Burrage "could not say whether [the victim] would have lived had he not taken the heroin," though they

agreed that it "was a contributing factor," Id. This Court reversed the conviction in Burrage in light of the defendant's constitutional right to a jury's determination, beyond a reasonable doubt, that his conduct was the "but-for cause of death," because the appellate court had affirmed "based on a markedly different understanding," Id. at 728.

Significantly, the Burrage Court focused on the government's misplaced reliance, in that case, on expert testimony that the victim's death would have been "[v]ery less likely" without that defendant's contribution:

> Is it sufficient that use of a drug made the victim's death 50 percent more likely? Fifteen percent? Five? Who knows. Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend.

Id. at 727.

In this case, what Petitioner did, and did not do -- and not his intent, see, e.g., United States v. Burkholder, 2016 U.S. App. LEXIS 4118, No. 13-8094 (10th Cir. 2016) -- is relevant to the status of his conviction because, unlike the situation in Burrage (where the defendant was a heroin dealer and the heroin in the victim's system had only come from one source), Petitioner and the victim were sharing drugs as a couple, and effectively all of the cocaine that had already been metabolized by the victim's system had not come from Petitioner.[1]

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1. Petitioner, of course, was not the intended object of §841, see, e.g., Weldon v. United States, 2016 U.S. App. LEXIS 15626, No. 15-1994 (7th Cir. 2016) (citing United States v. Swiderski, 548 F.2d 445 (2d Cir. 1997)); cf. 21 U.S.C. §844.

Imagine a home health aide whose job it is to administer a set quantity of palliative to a patient at 60-second intervals. At 12:01, he administers 1 milligram. At 12:02, 1 mg. At 12:03, 1 mg. Imagine that after the 12:45 dose the nurse's shift ends and he hands off the job to his replacement, who seamlessly takes over and administers a dose at 12:46.

And then, imagine that the patient "immediately" dies. One question might obviously be: did the second nurse give the patient a too-large dose? But that would first of all miss the point that, medically speaking, the death almost certainly did not result from the immediately-preceding action but from the body's having **metabolized an accumulation** of earlier-administered drugs. See, e.g., Gaylord v. United States, 829 F.3d 500 (7th Cir. 2016); Krieger v. United States, 2016 U.S. App. LEXIS 20992, No. 15-2481 (7th Cir. 2016).

In Petitioner's case, though the victim died "immediately" after Petitioner's having given her an injection of cocaine per se (indeed, this is the only fact on which the conviction rests), more must be shown to prove that it was his cocaine, and not the cocaine she had previously ingested from other sources and recently metabolized, which caused her death. Cf. United States v. Washington, 596 F.3d 926, 932-33 (8th Cir. 2010); Roundtree v. United States, 885 F.3d 1095, 1097 (8th Cir. 2017).

Especially because a known quantity of cocaine was never metabolized by her system, and because the most recent cocaine ingested by the victim is that for which he is liable, it cannot be said -- without medical analysis -- that Petitioner's action was the but-for cause of death, especially where the record

contains no measurement or analysis to support a finding that Petitioner's distribution of cocaine amounted to a lethal dosage, much less that the victim would have lived absent his conduct.

Another analogy might serve to drive home Petitioner's fear that the Opinion's dismantling of Burrage jettisons far more than his personal interests, and embodies a mortal threat to the due process rights of all individuals:

Imagine that the government were to arrest a man whose concealed knife during the commission of a crime triggered the application of a statutory penalty enhancement defined as requiring the involvement of a "dangerous weapon." Imagine that the government secures a plea and stipulation that the perpetrator did possess a dangerous weapon in connection with the crime.

Imagine then that the Supreme Court were to hold that, in the context of the statute, a dangerous weapon must be minimally defined as a firearm. Nowhere in the record is the nature of the weapon addressed because at the time only the fact that the weapon possessed was "dangerous" was germane.

It is as if in Petitioner's case the Government is saying, "he also had a gun... and we have an email from a guy who says his hyper-acute vision revealed that the knife was outfitted in some high-tech way to be able to fire bullets." Well, that may be. A hearing would certainly seem to be in order, though, because the accused must be afforded an opportunity to challenge such a witness within the context of the totality of the circumstances.

If a jury heard that witness's emailed statement, it might

very well convict. But the thing about the constitutional rights to trial and confrontation is that the quality of the evidence will be tested, and possibly rebutted by contrary information. The witness may be found not credible, or the true issue may render the witness's statement immaterial. More likely, the witness would not actually maintain such a ridiculous premise once provided with a thorough opportunity to evaluate the facts and faced with the case that he may be liable for perjury.

In this case, the Government's email and "7.5 grams" claim are misleading and useless, not least because these proffers do not even purport to consider all of the relevant scientific factors. The Seventh Circuit's decision to rest its affirmance of the District Court's disposition on such an easily-disprovable extra-record position is no less than frightening. If a hearing were to be held, the recording of Petitioner's statements which led to the PSR's misrepresentation (the underlying police report certainly did not say "7.5 grams" either) would be examined, and the result would most certainly not be something so blatantly impossible.

The issue presented by Petitioner's petition for a writ of certiorari reflects the essential nature of one of the most pernicious of the constant threats to our Constitution -- and this, Petitioner submits, is one of the most important duties of the Judiciary: to check the overreach of the Executive.

The Government's case, upon Petitioner's nonfrivolous habeas petition, must be put to the test; for as it stands, Petitioner is literally confined on a record and factual basis that the law does not proscribe. See Thompson, supra; see also

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 217, 219 n.2, 224-25, 97 L.Ed. 956, 73 S.Ct. 625 (1953) (Black, J., Douglas, J.; Jackson, J., Frankfurter, J., dissenting) (habeas petitioner's "continued imprisonment without a hearing violates due process of law").

In its most basic form, Petitioner's pro se motion under §2255 simply sought that the government justify his detention under the law in light of Burrage.[2] The record on which his plea and conviction rest is baldly insufficient: As the Opinion held, "[w]hether the government has proven an element of the crime is always a question for the jury," Perrone, 889 F.3d at 906; Petitioner's stipulated plea was to an interpretation of §841(b)(1)(C) that was unconstitutional and thus it was not knowing, voluntary, and intelligent, see Id. at 908. No amount of appellate briefing, no matter the apparent weight of any particular what-ifs and maybes, can ever suffice. See Burrage, 187 L.Ed.2d at 727.

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2. Petitioner is assisted by fellow prisoners to the best of their lay ability, see 28 C.F.R. §543.11(f). This case is in a sense an apt illuminator of the sorry state of the criminal defense bar under the Criminal Justice Act, rife with examples of negligence rising to the level of outright malpractice. That Judge Rovner's response to Petitioner's pro se notice that appointed counsel had ignored his express direction to fully brief all of his certified claims was blithely overridden by Judge Barrett's Opinion should not accrue to the detriment of Petitioner. And yet Petitioner only succeeded in preventing Mr. Reidy, an attorney with Winston & Strawn, from filing a motion to withdraw that explicitly voiced his opinion that Petitioner's case lacked merit and that any further efforts would be frivolous by threatening to submit a formal bar complaint. Conscious of the inadequacy of any pro se prisoner pleading, though, Petitioner prays that the Court will appoint competent counsel should the Court agree with him that his essential position raises one or more meritorious questions of import.

Because no evidence or testimony has been admitted to the record in contemplation of the independent effects of the various toxic agents involved, Petitioner is entitled to due process of law and the issuance of a writ of habeas corpus. The resolution of the case below is internally inconsistent and denies Petitioner his constitutional rights under the Fifth and Sixth Amendments. As Justice Jackson wrote: "Petitioner might fail to make good on a hearing; the question is, must he fail without one?" Shaughnessy, supra.

It is crucial, Petitioner thinks, to the endurance of the convictions on which this democracy was founded for the people to impose upon the executive branch of their government serious limits on what sorts of factual bases might support the penalty enhancement in §841(b)(1)(C). Therein, Congress crafted a strict-liability statute that substantially increases the punishment for "drug distribution" in which scienter is not required; therefore, the only check on the executive's ability to dramatically enhance a sentence is the scrupulousness of the courts in requiring that prosecutors actually prove causation with something at least resembling reliable facts.

The Government should be made to do an honest job. To hold otherwise unleashes the very evil sought to be restrained by the Bill of Rights. Because the Opinion below was "based on a markedly different understanding," Burrage, 187 L.Ed.2d at 728, this Court should reverse with instructions for issuance of the writ unless the Government can prove Petitioner's culpability under the proper standard.