No. 18-7581

IN THE

SUPREME COURT OF THE UNITED STATES

Brandon Erwin,

petitioner,

vs.

United States of America,

respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit
Appeal No.: 17-15080-H

BRANDON ERWIN'S REPLY TO THE UNITED STATES'S BRIEF-IN-OPPOSITION TO A WRIT OF CERTIORARI

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BRANDON ERWIN'S REPLY TO THE UNITED STATES'S BRIEF-IN-OPPOSITION TO A WRIT OF CERTIORARI

Brandon Erwin petitioned this Court for a writ of certiorari to the Eleventh Circuit in order that its district courts will accept jurisdiction over § 2241 motions seeking writs of habeas corpus meant to correct illegal detentions resulting from violations of this Court's holding in **Burrage v. United States**, 571 U.S. 204 (2014).

In opposition to that petition, the United States contends that Mr. Erwin "would not be entitled to relief even in courts of appeal that have given the [§ 2255(e)] saving clause the most prisoner-favorable interpretation." Br. in Opp. at 4-5. The United States reaches that conclusion because it believes that Mr. Erwin cannot make the showing required to fit into any of the circuits' interpretations of 28 U.S.C. § 2255(e).

That is, the United States alleges that Mr. Erwin cannot meet the "circuit-busting" or "since-abrogated" standards of those circuits requiring that a § 2241 claim had been foreclosed by a binding circuit precedent "at the time of his first § 2255 motion .... ". Br. in Opp. at 4. And that for those circuits not requiring abrogation of specific precedent, then Mr. Erwin cannot show actual innocence. Br. in Opp. at 5.

Mr. Erwin shows the United States misapprehends the timing of the salient events and that Eleventh Circuit precedent did foreclose his argument at the time of his first § 2255. The controlling circuit decision foreclosing the claim occurred four days (September 12, 2011) before his § 2255 order issued on September 16, 2011. Further, Mr. Erwin shows that the circuit's practice since 2003 involved the broader definition of "death results from" that the **Burrage** Court narrowed. Also, Mr. Erwin shows the government's reliance on the

prosecutor's closing argument is misplaced, the portion of the closing argument used paints an incomplete picture of the trial evidence. Pointedly, later in the closing argument, the same prosecutor (referenced by the United States) tells the jury that "its impossible to determine with any degree of certainty ... [which drug] killed Andrew Culver." (7/19/07 Trial Tr. at 60)(compare with Br. in Opp. at 5 citing 7/19/07 Trial Tr. at 26).

In sum, the United States's conclusion that no circuit would entertain Mr. Erwin's § 2241 is wrong, because the factual premises upon which the conclusion it relies are inaccurate. At least, in the Third, Sixth, and Second circuits the district court would take jurisdiction of Mr. Erwin.

Mr. Erwin addresses each of the premises, then describes why some circuits would hear his claim, and finally he shows how the United States's approach inverts the habeas corpus process, effectively putting the cart before the horse.

1. "On the first prerequisite, petitioner has not shown that his claim was foreclosed at the time of his first Section 2255 motion by any since abrogated precedent." Br. in Opp. at 4.

The Eleventh Circuit decided **United States v. Webb**, 655 F.3d 1238, 1255 (2011)(per curiam) on September 12, 2011. Four days later, presumptively (at least in part) because of the Webb decision the district court denied Mr. Erwin's § 2255 motion. **Erwin v. United States**, Dist. No. 8:06-cv-00039-JSM-EAJ, Doc. 159 (M.D. Fla. Sept. 16, 2011). Simply, at the time of Mr. Erwin's § 2255 Eleventh Circuit precedent foreclosed Mr. Erwin's claim.

In **Webb**, the Eleventh Circuit expressly rejected the argument (and proposed jury instruction) that the jury "had to find proof of actual cause and effect between Webb's own conduct and his patients' death." **Webb**, 655 F.3d at 1249-50 (further stating that proximate cause and foreseeability are unnecessary for a

conviction). A proposition that echoed the circuit's long standing rule that "results from" required only a contribution, not proximate cause or foreseeability. "Moreover, all of the circuits that have looked at the [841(b)(1)(C) death results from] issue resolved it the same way the district court did [against requiring a need for a "finding of proximate causation]." **United States v. Foster,** No. 02-12513 at 4 (11th Cir. Aug. 27, 2003)(unpublished)(collecting cases and specifically citing **United States v. Rodriguez,** 279 F.3d 947, 951 n.5 (11th Cir. 2002)). Essentially, despite the putative labels from 2003 until this Court's decision in **Burrage,** the substance of the Eleventh Circuit rule was to interpret "results from" as "contribution to" rather than proximate cause. The Eleventh Circuit's **Webb** decision four days before the district court's resolution of Mr. Erwin's § 2255 sealed the conclusion that Eleventh Circuit precedent "foreclosed at the time of the first Section 2255 motion" (Br. in Opp. at 4) Mr. Erwin's Burrage based claims.

2. Several circuits, especially the Third and the Sixth, would entertain Mr. Erwin's § 2241 motion regardless of whether this Court's statutory-interpretation rule abrogated Eleventh Circuit precedent.

Third Circuit

The Third Circuit expressly provides that a prisoner need only present a bona fide actual innocence theory based on "a change in statutory caselaw that applies retroactively in cases on collateral review" as long as the prisoner "had no earlier opportunity to test the legality of his detention **since** the intervening Supreme Court decision issued." **Bruce v. Warden Lewisburg, USP,** 868 F.3d 170, 180 (3d Cir. 2017); **In re Dorsainvil,** 119 F.3d 245, 251 (3d Cir. 1997). After this Court's 2014 ruling, Mr. Erwin's only opportunity to establish his actual innocence based claim on that ruling was a traditional writ of habeas corpus under 28 U.S.C. § 2241. The Third Circuit would accept jurisdiction of the § 2241 motion and adjudicate the merits.

Sixth Circuit

The Sixth Circuit has already granted § 2241 relief to a similarly situated prisoner. **Harrington v. Ormond**, 900 F.3d 246 (6th Cir. 2018)(finding Burrage claims inherently souding in actual innocence, thus cognizable under § 2241).

Accordingly, the Sixth Circuit would entertain Mr. Erwin's § 2241 motion. The Sixth requires that a saving-clause petitioner show the existence of a new interpretation of statutory law that applies retroactively on collateral review and that the petitioner had no meaningful opportunity to incorporate the new interpretation into either the petitioner's direct appeals or subsequent motions. Thereafter, the petitioner must also show that he is actually innocent of the crime as newly interpreted. See **Wooten v. Cauley**, 677 F.3d 303, 307 (6th Cir. 2012).

Fourth Circuit

It is noteworthy that the Fourth Circuit would also hear Mr. Erwin's § 2241, but would characterize it as an authorized challenge to an unlawful mandatory minimum sentence. See **United States v. Wheeler**, 886 F.3d 415, 426-33 (4th Cir. 2018); see also **Young v. Ocasio**, No. 17-7141 (2018)(Br. in Opp. at 23).

Mr. Erwin believes that a review of the Eleventh Circuit's precedent and practice shows that at the time of his § 2255 and before, an authoritative obstruction existed to presenting his Burrage-rule-related claims and that most circuits would find his claims surpass the obstructive-criteria necessary for § 2255(e) to authorize the district court to take jurisdiction of Mr. Erwin's § 2241 motion.

3. The United States next argues that according to the prosecutor's "closing arguments that '[e]very single expert said that if Andrew Culver did not have cocaine and methadone in his system he'd be alive today'" and that Culver "died as a result of cocaine and methadone." Br. in. Opp. at 5.

The United States proclaims the "government presented ample evidence at trial that petitioner's drug distribution was the but for cause of death." (Br. in Opp. at 5)(citing 7/19/07 Trial Tr. 26)(government's closing argument). It is noteworthy, however, that the "but for" language was not used by the original prosecutor at closing or otherwise——the (in this context) conclusory term appears only in the Brief in Opposition. Plus, the United States did not read far enough into the record; otherwise, it would have realized that considerable doubt existed about the proximate cause of death. (7/17/07 Trial Tr. at 20-21; 7/19/07 Trial Tr. at 77, 86, 90).

Moreover, the United States overlooked what (later in the same closing argument) the government attorney told the jury after summarizing the expert witnesses' opinions, "[b]ased on the medical testimony you heard, both from medical examiners and toxicologists, it's impossible to determine with any degree of absolute certainty whether it was the cocaine or the methadone that killed Andrew Culver, **but you're not going to be asked to decide that question. That's not on the verdict form.**" (7/19/07 Trial Tr. 60). The simple comparison of the two quotes belies the United States ipse dixit on the ampleness.

4. The United States's analysis, like that of the Eleventh Circuit, inverts the habeas corpus process. This Court's precedent provides a habeas corpus petitioner's non-conclusory allegations are presumptively true, unless conclusively refuted by the existing record or discredited in an evidentiary proceeding.

This Court provides that a movant seeking a writ of habeas corpus need only allege facts, which if proven, establish a right to collateral relief. Then——minimally——the Constitution and the law entitle the petitioner to an

evidentiary hearing. **Schriro v. Londrigan**, 550 U.S. 465, 473-75 (2007); **Townsend v. Sain**, 372 U.S. 293, 307 (1963).

In his § 2241 motion, Mr. Erwin pleads newly presented factual allegations concerning the events surrounding the death of Andrew Culver that were not relevant under the broader definition of "death results from," but are significant in the context of "but for" or proximate causation.

Mr. Erwin's verified § 2241 allegations include the revelation that Mr. Erwin did not provide the drugs to Mr. Culver. Mr. Erwin never saw the drugs, nor did he ever have control or dominion over the drugs. Mr. Erwin referred Mr. Culver to persons who could supply the drugs.

Mr. Culver and Mr. Erwin were friends. Mr. Erwin's job at the Blue Martini Club caused Mr. Erwin to know individuals who sold illegal drugs and illegally sold legal drugs. At the time of his death, as a result of an estrangement with his wife concerning the drug use, Mr. Culver lived in a hotel. Mr. Culver was trying to break the drug habit. On the night of Mr. Culver's death, Mr. Erwin visited Mr. Culver at the hotel because Mr. Culver was experiencing serious withdraw problems. Around 10 P.M. Mr. Culver left the hotel and Mr. Erwin——without drugs——several hours later (around 1 A.M.), Mr. Culver called Mr. Erwin (who was at home) and stated that he was doing fine, not to worry. Mr. Erwin never heard from him again, Mr. Culver died sometime in the next 24 hours.

If proven, these factual allegations break the chain of causation that is necessary under the Burrage rule, which requires the more aggravated "death results from" crime contained in 21 U.S.C. § 841(b)(1)(C) to be the proximate result of drugs provided by the accused. If Mr. Erwin's now-relevant allegations are true——as the law requires this Court, as well as the district court, to presume——then Mr. Erwin is factually innocent of the distinct "death results"

crime for which he became convicted. Once more we point out these facts are only important because this Court narrowed the range of misconduct.

Notably, at the current stage, the important point is that the well-pleaded § 2241 allegations were sufficient to entitle Mr. Erwin to an evidentiary hearing. **Schriro**, 550 U.S. at 473-75; **Townsend**, 372 U.S. at 307. A necessary implication of which is that the district court had jurisdiction to conduct the hearing. Thus the district court had jurisdiction over the § 2241 motion.

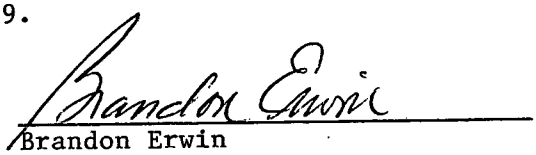
5. This Court has not yet addressed the question of whether a freestanding actual innocence claim is cognizable in habeas corpus.

This Court has never addressed whether a freestanding actual innocence claim is cognizable in habeas corpus, nor whether the Constitution forbids Congress from closing or too narrowly restricting every means for an actually-innocent prisoner to access the courts in order to remedy the fundamentally unfair detention of an innocent person. See **House v. Bell**, 547 U.S. 518 (2006)(expressly leaving the question for a different day).

CONCLUSION

The United States acknowledges a need for this Court to resolve the mature circuit split. Mr. Erwin's facts present a clean question——one not cluttered by the categorical approach——this Court should grant the writ of certiorari and hear argument on behalf of Mr. Erwin.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted by Brandon Erwin on this 29th day of April, 2019.



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VERIFICATION

Under penalty of perjury as authorized by 28 U.S.C. § 1746, I swear that the factual statements and factual allegations contained in this document are true and correct to the best of my knowledge.

Brandon Erwin

Brandon Erwin