

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Gregory G. Hatt — PETITIONER
(Your Name)

vs.

USA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gregory G. Hatt (Inmate No. 86355-083)
(Your Name)

FCI Butner Medium II, Federal Correctional Inst., P.O. Box 1500
(Address)

Butner, NC 27509
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Whether failure to convey unbiased, complete, or correct information to a defendant during plea bargaining by defense counsel invalidates a guilty plea once sentencing has occurred.

Whether a charge of distribution of heroin resulting in death can be brought in the absence of clear medical evidence as to a single, independent cause of death when the cause of death is combined effects of multiple drug use.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	13
REASONS FOR GRANTING THE WRIT	19
CONCLUSION.....	27

INDEX TO APPENDICES

APPENDIX A	Decision of the United States Fourth Circuit Court of Appeals	28
APPENDIX B	Decision of Federal District Court for Eastern District of Virginia	33
APPENDIX C		
APPENDIX D		
APPENDIX E		
APPENDIX F		

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Blackledge v. Perry</i> , 417 U.S. 21(1974)	20
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357, 362-63 (1978)	20
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	23
<i>Burrage v. United States</i> , 134 S. Ct. 881 (2014)	23
<i>Cooper v. United States</i> , 471 U.S. 1130 (1985)	21
<i>Hill v. Lockhart</i> , 474 U.S. 52, 53–56 (1985)	20, 21
<i>re Winship</i> , 397 U.S. 358, 364 (1970)	19
<i>Santobello v. New York</i> , 404 U.S. 257	19, 20, 25
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 (1984)	16
<i>United States v. Antowan Thorne</i> , Crim. Case No. 1:14cr165	24
<i>United States v. Carter</i> , 454 F.2d 426, 428 (4th Cir. 1972)	20
STATUTES AND RULES	
U.S. CONST.AMEND. V	19
U.S. CONST.AMEND. VI	21
U.S. CONST.AMEND. XIV	16

18 U.S.C. § 922(g)	14
18 U.S.C. §§ 924(c)(1)(A) and (c)(1)(B)(i)	14
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	14, 15, 23, 24
21 U.S.C. § 846	13, 24
26 U.S.C. §§ 5822, 5861(c)	14
28 U.S.C. § 2255 (2012)	16, 17

OTHER

John G. Douglass, *Fatal Attraction? The Uneasy Courtship of*

Brady and Plea Bargaining, 50 EMORY L.J. 437, 496 (2001)	21
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case
was February 2, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. AMEND. VI : In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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 defense.

U.S. CONST.AMEND.: Amendment XIV Section 1:All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 922(g)

(g) It shall be unlawful for any person--

- (1)** who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2)** who is a fugitive from justice;
- (3)** who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4)** who has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5)** who, being an alien--
 - (A)** is illegally or unlawfully in the United States; or
 - (B)** except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
- (6)** who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

One count of Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (c)(1)(B)(i).

18 U.S.C. § 924(c)(1)(A)

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

- (i)** be sentenced to a term of imprisonment of not less than 5 years;
- (ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § (c)(1)(B)(i)

(B) If the firearm possessed by a person convicted of a violation of this subsection--

- (i)** is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

21 U.S.C. § 841(a)(1)

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b)(1)(C)

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

- (1) (A) In the case of a violation of subsection (a) of this section involving--
 - (C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), 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, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 1,000,000 if the defendant is an individual or \$ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final,

such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 2,000,000 if the defendant is an individual or \$ 10,000,000 if the defendant is other than an individual, or both.

Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

26 U.S.C. § 5822

No person shall make a firearm unless he has (a) filed with the Secretary a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application form in such manner as the Secretary may by regulations prescribe; (d) identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the Secretary to make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

26 U.S.C. § 5861(c)

It shall be unlawful for any person—

- (c) to receive or possess a firearm made in violation of the provisions of this chapter [26 USCS §§ 5801 et seq.]; or

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

- (a) A prisoner in custody under sentence of a court established by Act of Congress 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 court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence 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 cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be

entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section.

The limitation period shall run from the latest of--

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory

authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain--

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

Hatt had been observed selling heroin to individuals on July 1, 2015 and sold approximately 1 gram of heroin to an undercover law enforcement agent on July 22, 2015. Law enforcement agents executed a search warrant on his home on July 24, 2015 and found 36.6 grams of heroin, 17 grams of cocaine, and a short-barreled shot gun.

Hatt was appointed a federal public defender (Rodolfo Cejas) who represented him at his preliminary hearing on November 3, 2015. That public defender filed a motion to withdraw on November 13, 2015 which was granted on November 17, 2015. The court appointed another attorney (Lawrence Woodward) who was a private attorney and served as his public defender on November 20, 2015.

On November 19, 2015, Hatt was charged in an eight-count Indictment returned by a federal grand jury in the Eastern District of Virginia.

At a December 2, 2015 hearing, Hatt waived formal arraignment, entered a plea of not guilty, asked for a trial by jury, and wished to be present during pretrial motions. A jury trial was set for February 9, 2016.

On December 18, 2015, the grand jury returned an eight-count Superseding Indictment charging the defendant with the following crimes: one count of Conspiracy to Distribute Heroin, in violation of 21 U.S.C. § 846; one count of

Distribution of Heroin Resulting in Death, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); two counts of Distribution of Heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); one count of Possession with Intent to Distribute Heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); one count of Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g); and one count of Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (c)(1)(B)(i).

On December 26, 2014, Hatt had provided heroin to Monica Beaudry who subsequently died. Medical records and police reports indicated that Beaudry had been diagnosed with a bronchial infection and was prescribed a cough syrup with codeine. Three-fourths of the bottle had been consumed. She also had been drinking heavily the night of the overdose and had been using cocaine. The medical examiner's report indicated that the cause of death was "combined ethanol and heroin poisoning with recent cocaine use contributing". There was nothing in the report that indicated that but for the heroin in her system, Beaudry would have died nor an indication that it was the independent cause of death.

His public defender told Hatt that the government had agreed to drop the other charges and only seek the mandatory minimum sentence of 240 months in exchange for his cooperation and pleading guilty to the single count of Distribution of Heroin Resulting in Death, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). To Hatt's knowledge, this was the only offer. Hatt's attorney indicated that this was the best

he could do given the evidence against him and that the government only needed to prove that Ms. Beaudry would not have died but for the fact that she ingested heroin. His attorney did not offer or discuss with Hatt any possible defense against the enhanced death charge nor indicated how difficult it would be for the government to meet the higher standard of proof necessary to convict on that charge. Given his attorney's assurance that the government would only seek a 240-month sentence for the enhanced charge and drop the other charges, Hatt decided to plead guilty and not ask for a jury trial as he had done at his previous hearing on December 2, 2015.

On February 9, 2016, Hatt appeared in federal district court and pleaded guilty to Count 2 of the superseding indictment charging him with Distribution of Heroin Resulting in Death in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). During the plea colloquy, Hatt again confirmed with his attorney that the government would only seek a 240-month sentence. Hatt's plea was accepted and he was found guilty. The government staged a televised public relations event that day following the guilty plea on the steps of the federal courthouse with over 70 law enforcement and justice department officials present. On May 19, 2016 at his sentencing hearing, the government recommended that Hatt receive a life sentence. Either the government failed to honor their plea agreement recommendation of 240 months in exchange for his guilty plea or his defense attorney misrepresented the government's offer. Hatt was sentenced to 420 months.

Hatt filed a motion in the Federal District Court for Eastern Virginia to vacate, set-aside, or correct the judgment of his conviction and his sentence pursuant to 28 U.S.C. § 2255 on May 15, 2017. All grounds and claims for relief were based on violations of the Sixth (U.S. CONST. AMEND. VI.) and Fourteenth Amendments (U.S. CONST. AMEND. XIV.) to the United States Constitution. In his motion, Hatt argued that due to ineffective assistance of counsel and prosecutorial misconduct, Hatt entered into a plea agreement uninformed and therefore, not voluntarily [*Strickland v. Washington*, 466 U.S. 668, 104 (1984).] The government failed to consider exculpatory material in pursuing the superseding charge and failed to honor their plea agreement. Had it not been for counsel's ineffective assistance in combination with prosecutorial misconduct, Hatt would not have pled guilty and would have proceeded to trial.

In his motion and accompanying brief, Hatt argued that (1) counsel was deficient for failing to investigate and respond to information in the state's file relating to Beaudry's cause of death and multiple drugs present; (2) counsel's deficient performance had affected the outcome of the plea process by denying Hatt the opportunity to accept an alternate plea deal, or go to trial; (3) failing to consider exculpatory material from witness statements and reports resulting in the superseding charge or overcharging was prosecutorial misconduct; (4) the government violated due process in the plea agreement by charging more severely and recommending a longer sentence. Hatt asked in his motion that the Court (1) Find that the Petitioner received ineffective assistance of counsel; (2) Find that the

Petitioner was deprived his due process rights by the government's failure to honor their plea agreement and sought a very severe sentence; (3) Vacate, Set Aside or Correct the Petitioner's sentence pursuant to 28 U.S.C. § 2255; (4) Permit an evidentiary hearing in the alternative, or (5) Such other relief as the court may determine he is entitled.

In response to Hatt's motion, the government stated that "the United States never contemplated offering a plea agreement other than what was filed in this case...(p.9)". The government's request for life in prison at the sentencing hearing was not the mandatory minimum sentence of 240 months that Hatt's attorney had indicated prior to the plea hearing or during the hearing. If his attorney had not misrepresented the sentence agreement, Hatt would not have pleaded guilty to the enhanced charge and would have requested a trial.

On November 1, 2017, the Court found that no hearing was necessary to address Hatt's motion and his motion was denied. The Court found that Hatt failed to demonstrate a showing of a denial of a constitutional right and denied a Certificate of Appealability (See Appendix B). Hatt filed an Informal Brief for Habeas and Section 2255 cases to the United States Court of Appeals for the Fourth Circuit on January 30, 2018 seeking to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. The Court of Appeals denied a certificate of appealability and dismissed the case on February 2, 2018.

Hatt is asking the Court to grant a writ based on ineffective assistance of counsel for misrepresenting the government's plea agreement which invalidates his guilty

plea and for failure to provide a vigorous defense of the death enhancement charge based on the victim's multiple drug use at the time of her death and not challenging the independent and proximate cause of death based on the medical examiner's report as combined alcohol and heroin poisoning with recent cocaine use contributing.

REASONS FOR GRANTING THE PETITION

1. Misrepresentation of the Plea Agreement Which Invalidates the Plea

The Fourteenth Amendment provides an accused due process of law and protects against practices and policies which violate precepts of fundamental fairness even if they do not violate specific guarantees in the Bill of Rights. "No person shall be deprived of life, liberty, or property, without due process of law. " (U.S. CONST. amend. V)

In *re Winship*, 397 U.S. 358, 364 (1970), the Court held that the due process clauses of the Fifth and Fourteenth Amendments "protect the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged...It is a prime instrument for reducing the risk of convictions resting on factual error." In *Santobello v. New York* (404 U.S. at 260), the Court stated that the considerations justifying the recognition of plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor. Due process and fairness clearly require relief for breach of a specific promise made to a defendant who has relied upon that promise. When pretrial negotiations lead to the entry of a guilty plea in court, the plea is not only an admission of guilt but also a waiver of important constitutional rights. A guilty plea constitutes "waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted

beyond all reasonable doubt." (*Santobello v. New York*, 404 U.S. at 264)) Thus, substantial safeguards must accompany the entry of a guilty plea to ensure against the unjust denial of the defendant's rights.

In *Blackledge v. Perry*, 417 U.S. 21(1974), the Court held that in accepting guilty pleas, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly and the "adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled". The requirements that vindictiveness play no part in the prosecutor's actions (*Bordenkircher v. Hayes*, 434 U.S. 357, 362-63 (1978)) and that promises or agreements made by the prosecution to induce guilty pleas be fulfilled (*United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)) are the due process requirements for plea bargaining as established by the Supreme Court.

In *Hill v. Lockhart* (474 U.S. 52, 53–56 (1985)), the Court allowed a defendant to vacate a guilty plea where the ineffective assistance of counsel led him to accept a plea bargain and forgo trial. Hill's attorney told him that he would be eligible for parole under the guilty plea agreement much earlier than was actually the case (*Id.* at 55). The Court extended the Sixth Amendment to protect defendants against deficient counsel who misled them into entering a guilty plea. A defendant who

pleads guilty does not waive the right to attack the validity of the guilty plea itself, including challenges to the knowing and voluntary nature of the plea and claims of ineffective assistance of counsel (See John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 496 (2001)). The Court in *Cooper v. United States*, (594 F.2d at 18) found "no suggestion of deliberate abuse," but noted that "our failure to [recognize a] constitutional right and violation in this case would necessarily give judicial approval to a practice whose possibilities for easy abuse, or at least the appearance of abuse, are abundantly clear." (Id. at 20).

Hatt contends that it is a violation of his Sixth Amendment rights considering *Hill* (474 U.S. 52, 53–56 (1985) because his public defender misrepresented the government's plea bargain to him when he indicated to Hatt that the government was offering a lesser sentence (the mandatory minimum of 240 months) for his guilty plea to the death enhancement charge. This information was communicated contemporaneously to his parents during phone conversations and visits. In a response to Hatt's motion, the government indicated that they never made that offer. If that was known prior to the plea hearing, Hatt would have pleaded not guilty to the distribution of heroin resulting in death and would have requested a jury trial as he had done at his December 2, 2015. Defense counsel is obligated to convey unbiased, complete, and correct information to a defendant. Defense counsel's misrepresentation of the plea agreement to Hatt renders his guilty plea invalid. Given these facts, Hatt contends that he was not fully informed and did not

have the knowledge to have “knowingly” accepted the plea agreement but would have pleaded to a lesser offence or requested a trial.

Based on the reasons presented above, the decision of the Fourth Circuit Court of Appeals to deny Hatt’s 2255 motion and certificate of appealability may have been in error. It is important that the Court review this case as it deals with defense counsel’s responsibilities in plea bargaining and under what circumstances misrepresenting a plea agreement to a defendant affects the validity of the plea post sentencing.

2. Death Enhancement Charge and Presence of Multiple Drugs

The finding of facts filed in open court on February 9, 2016 by the prosecution at Hatt’s plea agreement hearing states: “This statement of facts includes those facts necessary to support the plea agreement between the defendant and the United States. It does not include each and every fact known to the defendant or to the United States, and it is not intended to be a full enumeration of all of the facts surrounding the defendant’s case.” It also states: “The cause of death was listed as combined ethanol and heroin poisoning. A blood test revealed that she had an ethanol level of 0.065% by weight by volume and a morphine level of 0.23 mg/L in her blood at the time of death.” That statement fails to include the complete findings from the Certificate of Analysis that the cause of death was “Combined ethanol and heroin poisoning with recent cocaine use contributing”. The government also failed to include in the finding of facts that Beaudry had been taking cough syrup with codeine which was in reports from the nursing supervisor

at Chesapeake Regional Medical Center and from Officer Thomas Downey's police report. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that a prosecutor has an affirmative duty to disclose material information that is potentially exculpatory and relevant to the issue of guilt or punishment which may influence sentencing.

The combined effects of ethanol, cocaine, codeine, and heroin may have all contributed to Beaudry's death which contradicts the distribution of heroin resulting in death charge. Therefore, the government may have over-charged and did not consider or present all the relevant and material facts involved and, therefore, did not meet the more difficult burden of proof required in light of *Burrage v. United States*, 134 S. Ct. 881 (2014). In *Burrage*, The Supreme Court held "that at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable for penalty enhancement under §841(b)(1)(C) unless such use is a but-for cause of the death or injury. Pp. 4–15. (a) Section 841(b)(1)(C)'s "death results" enhancement, which increased the minimum and maximum sentences to which Burrage was exposed, is an element that must be submitted to the jury and found beyond a reasonable doubt. Had all the relevant facts in the Certificate of Analysis and the reports been presented in the finding of facts at Hatt's plea agreement hearing, it should have been argued that the "but-for" cause of death was not proven beyond reasonable doubt and should not have resulted in a penalty enhancement.

Further, because the Controlled Substances Act does not define “results from,” the Court found the phrase should be given its ordinary meaning. In light of the phrase imposing a requirement of actual causality, i.e., proof “that the harm would not have occurred” in the absence of – that is, but for – the defendants conduct”, the Court declined to adopt the government’s interpretation of “results from” meaning that use of a drug distributed by the defendant need only contribute to an aggregate force, e.g., mixed-drug intoxication that is itself a but-for cause of death. The Court determined in that case that there was no need to address a special rule developed for cases in which multiple sufficient causes independently, but concurrently, produce death, since there was no evidence that the heroin use was an independently sufficient cause of his death.

In the government’s own position on sentencing in Hatt’s case, the government cited the bench trial in *United States v. Antowan Thorne*, Crim. Case No. 1:14cr165, which involved the heroin overdose death of a young woman. The defendant was acquitted after trial of Conspiracy to Distribute 100 grams or More of Heroin Resulting in Death but found guilty of the lesser included offense of Conspiracy to Distribute 100 Grams or More of Heroin, in violation of 21 U.S.C. §§ 846 and 841(a)(1). The death enhancement was not applied in that case. The victim in that case died from heroin combined with a common antihistamine. Thorne was sentenced to 25 years. In Hatt’s case, the cause of death was “Combined ethanol and heroin poisoning with recent cocaine use contributing”, so that the death enhancement should not have been applied here.

The only narcotic Hatt was responsible for was the heroin. Based on causation, Hatt only caused the death if the result would have happened in the absence of his conduct. The medical examiner clearly stated in her report that death was due to the combined effects of alcohol and heroin poisoning with recent cocaine use contributing. When multiple concurrent acts operate together, the test is whether each was alone independently sufficient to cause the result (the substantial factor test). Since Hatt was encouraged to take the plea deal which his attorney misrepresented and did not challenge the enhanced charge, Hatt did not have the opportunity to question the medical examiner or provide his own expert witnesses in court. When pretrial negotiations lead to the entry of a guilty plea in court, the plea is not only an admission of guilt but also a waiver of important constitutional rights. A guilty plea constitutes "waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted beyond all reasonable doubt." (*Santobello v. New York*, 404 U.S. at 264))

Since Hatt trusted that counsel had discussed the sentence recommendation with the Government and that this was accurate, had not been informed about the burden of proof necessary for the death enhancement charge, and that the finding of fact in the plea agreement ("But for the heroin in her system, and with all other facts remaining the same, Beaudry would not have died that night.") was not supported in the discovery, Hatt would not have pled guilty to the charge of distribution of heroin resulting in death. Given these facts, Hatt contends that he

was not fully informed and did not have the knowledge to have “knowingly” accepted the plea agreement but would have pleaded to a lesser offence or requested a trial.

Hatt concedes that sufficient evidence supports his conviction for the underlying crime of distribution of a controlled substance. Hatt is requesting the Court to grant certiorari and vacate his guilty plea and sentence.

With the increasing number of drug cases of distribution resulting in death that are being prosecuted, the Court needs to provide clarity in cases that involve multiple drug use and death. The Court should address causation and how to distinguish independently sufficient cause when multiple drugs are present. When the cause of death is combined drug interaction, what is needed to determine criminal liability? There is considerable variation in how circuit courts interpret this.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gregory G. Hatt

Signature _____



Date: _____

9/26/18

(Resubmitted)