No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WARREN EVANS, JR.,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven R. Minor
ELLIOTT LAWSON & MINOR
110 Piedmont Ave., Suite 300
Bristol, VA 24201
Telephone: (276) 466-8400
Fax: (276) 466-8161
Email: sminor@elliottlawson.com
Counsel for Petitioner Warren Evans, Jr.

QUESTIONS PRESENTED:

1. Whether application of the deadline for filing a Notice of Appeal under the Federal Rules of Appellate Procedure violates the appellant's right to counsel under the Sixth Amendment, when the failure to file a timely appeal was caused by counsel's failure to file in violation of the appellant's right to effective assistance of counsel under this Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

2. Whether the causation requirement for the application of the statutory sentence enhancement under 21 U.S.C. § 841(b)(1)(c) is not satisfied when the toxicology evidence shows that the cause of injury or death was lethal levels of two drugs, only one of which was connected with the defendant.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly-held corporations with an interest in the case.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

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.

OPINION BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the United States court of appeals decided the case below was September 27, 2019.

No petition for hearing was filed in the case.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

On Question 1, the constitutional and statutory provisions involved are these:

Rule 4(b)(1), Federal Rules of Appellate Procedure: "Time for filing a Notice of Appeal. — (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of: (i) the entry of either judgment or the order being appeal …."

The Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

On Question 2, the constitutional and statutory provisions involved are these:

21 U.S.C. § 841(b)(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 …."

STATEMENT OF THE CASE

Mr. Evans was indicted in 2015 on two counts. Count 2 involved a conspiracy to distribute heroin, the use of which resulted in serious bodily injury or death to "R.F.L.," in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C).

In 2016, the Government and Mr. Evans signed a written Plea Agreement. Along with the Plea Agreement, the Government filed a "Redacted Statement of Facts." In this statement, the Government represented that the Medical Examiner's report for "R.F.L." determined the cause of death to be "[a]cute combined heroin and cocaine poisoning." Appendix B. The report noted a "lethal level" of morphine, but that "[a]lso present and contributing to death was cocaine." Appendix B. The Redacted Statement of Facts recited expert opinions that the level of cocaine was consistent with use earlier on the day of death and the level of morphine "would surely be enough to cause at least serious bodily injury to a person." Appendix B. The combination of drugs caused R.F.L.'s death. She might have died from one or the other if there had been no combination. There was no opinion that R.F.L. would not have died "but for" the heroin. There was no opinion that the

cocaine was not a substantial cause of R.F.L.'s death. Nothing in the record links Mr. Evans with the cocaine in R.F.L.'s system at the time of her death.

In accordance with the Plea Agreement, Mr. Evans entered a plea of guilty to Counts 1 and 2. In the final order, on Count 2, District Judge Urbanski found Mr. Evans guilty of conspiracy to distribute heroin, the use of which resulted in the serious bodily injury or death of R.F.L., Appendix C, and sentenced him accordingly.

On March 22, 2019, the Clerk of the United States Court of Appeals wrote to the Clerk of the District Court, indicated Mr. Evans' "Motion Requesting to File Belated Direct Appeal ...." Appendix D, had been received and was construed as a notice of appeal and forwarded to the District Court for disposition. In his Motion/Notice of Appeal, Appendix D, Mr. Evans stated two claims related to the ineffective assistance of his trial counsel. One was that he asked his counsel to file an appeal but counsel failed to do so. The other was that counsel failed to advise him that the conclusions of the autopsy report for R.F.L. showed that her death failed to meet the causation standard adopted by the Supreme Court in *Burrage v. United States*, 571 U.S. 204 (2014) in

its interpretation of 21 U.S.C. § 841(b)(1)(C). The undersigned counsel was appointed to represent Mr. Evans for his appeal.

On appeal, the United States moved to dismiss on the grounds that Mr. Evans' appeal was not timely filed. In response, Mr. Evans asserted that consistent with the rulings of this Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) and *Garza v. Idaho*, 139 S.Ct. 738 (U.S. Feb. 27, 2019), and the requirements of the Sixth Amendment, and the analogous rulings of the many state courts which have addressed similar circumstances, Mr. Evans' direct appeal should be allowed to proceed despite the failure to meet the deadline for filing a notice of appeal, so long as Mr. Evans can prove that a notice of appeal would have been timely filed but for the ineffective assistance of Mr. Evans' trial counsel, because Mr. Evans has "made it luminously clear that he was dissatisfied with the sentence imposed and interested in whatever relief might be available." *Rojas-Medina v. United States*, 924 F.3d 9, 17 (1st Cir. 2019). The United States Court of Appeals for the Fourth Circuit granted the motion to dismiss filed by the United States and dismissed the appeal by its order entered on September 27, 2019. Appendix A.

REASONS FOR GRANTING THE PETITION

1. The Petition should be granted on Question 1 this Court continues to expand its recognition that in those cases where a defendant has a right to counsel, that right extends through the filing of an appeal. The next step in the progression from *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) to *Garza v. Idaho*, 139 S.Ct. 738 (U.S. Feb. 27, 2019) is the recognition that a defendant's right to appeal cannot be waived by his counsel's failure to file a notice of appeal in a case where the defendant instructed counsel to appeal and a notice of appeal would have been filed but for counsel's failure to file.

Appellate review, where it is allowed by statute, is an "integral part" of the process for finally adjudicating the guilt or innocence of a criminal defendant. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The Sixth Amendment guarantees effective assistance of counsel in pursuing an appeal where one is allowed. The decision to pursue an appeal belongs to the client, *Jones v. Barnes*, 463 U.S. 745, 751 (1983), and the Sixth Amendment protects the client from being deprived of the benefit of that choice by the ineffective assistance of his counsel.

Specifically, where an appeal of right is allowed by statute, and the client is deprived of "the entire judicial proceeding itself" by counsel's unreasonable failure to file a timely notice of appeal, prejudice is presumed if the client can show that "he would have timely appealed," regardless of the likelihood of success on appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). In *Garza v. Idaho*, 139 S.Ct. 738 (Feb. 27, 2019), this Court extended its holding in *Flores-Ortega*, that counsel's failure to file a timely appeal when asked to do so by the client is presumed to violate the client's right to effective assistance of counsel regardless of the merits of the appeal, to cases where the client has expressly waived his some or all of his rights to appeal as part of a plea agreement before the trial court. The trend in this Court's decisions is towards recognizing that the right of direct appeal is too important to be waived through the counsel's failure to file.

The state courts have been willing to take this step, based on *Flores-Ortega*. Appellate courts in some states have recognized that "the strict application of filing deadlines must be balanced against a defendant's state constitutional right to appeal," with the result that belated or "out-of-time" direct appeals are allowed, sometimes decades

after the final order, so long as the defendant can prove that he would have taken a timely appeal but for the ineffective assistance of counsel. *See*, *e.g.*, *Ringold v. State*, 304 Ga. 875, 879, 823 S.E.2d 342, 346 (2019) (citing *Flores-Ortega*); *State v. Chetty*, 184 Wash. App. 607, 613, 338 P.3d 298, 301 (2014) (also citing *Flores-Ortega*); *People v. Syville*, 15 N.Y.3d 391, 399, 938 N.E.2d 910, 915 (2010) (also citing *Flores-Ortega*); *State v. Patton*, 287 Kan. 200, 223-225, 195 P.3d 753, 768-769 (2008) (also citing *Flores-Ortega*); *Manning v. State*, 2005 UT 61, ¶ 31, 122 P.3d 628, 636 (2005). Consistent with these decisions, this Court should decide whether it agrees with the several states that have applied *Flores-Ortega* in this way, to allow belated appeals.

2. The Petition should be granted on Question 2 to resolve a split between the United States Court of Appeals on the application of this Court's decision in *Burrage*. In *Burrage*, the Supreme Court addressed the question of "whether the mandatory-minimum provision" in 21 U.S.C. § 841(b)(1)(C) "applies when use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim's death or injury." It 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 under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Burrage*, 571 U.S. at 218–19. In Burrage's case, the medical experts were unable to say whether the victim would have lived if he had not taken the heroin.

Applying *Burrage*, the Seventh Circuit in *Gaylord v. United States*, 829 F.3d 500 (7th Cir. 2016), found that the record was sufficient to raise an issue of whether "counsel performed deficiently by failing to provide [the defendant] with the postmortem and forensic pathology reports and not challenging the application of the 'death results' enhancement to his sentence." As in Mr. Evans' case, the cause of death was a combination of opioids and cocaine, without evidence that either was the but-for cause. "In other words, even without the oxycodone, the cocaine concentration may have been enough to result in Evins's death." *Gaylord*, 829 F.3d at 507. The Seventh Circuit held that the forensic pathology report did not state that the oxycodone from the defendant was an independently sufficient cause of death, only that it could have independently caused the victim's death.

In *dicta*, this Court in *Burrage* acknowledged a possible exception to the requirement of but-for causation, for an "independently sufficient cause," but concluded that "[w]e need not accept or reject the special rule developed for those cases." This possible exception remains undeveloped. As the Seventh Circuit explained in *Gaylord*, "the *Burrage* Court stopped short of accepting or rejecting a special rule for independently sufficient causes." *Gaylord*, 829 F.3d at 508 n.3. "*Burrage* did not address whether evidence that the drug in question was an independent, sufficient cause of death would be legally adequate – even if the drug was not a but for cause of death." *United States v. Ewing*, 749 Fed. App'x 317, 327 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 855 (2019). In *Ewing*, the Sixth Circuit noted that it had recognized such an exception in a prior unpublished opinion, *United States v. Allen*, 716 Fed. App'x 447, 450 (6th Cir. 2017). In conflict with these conclusions, the Eighth Circuit has held that "*Burrage* explicitly carved out an exception for cases where there are multiple independently sufficient causes." *United States v. Seals*, 915 F.3d 1203, 1206 (8th Cir. 2019).

The Petitioner asks this Court to grant *certiorari* to resolve the conflict between the reasoning and the outcome of the Seventh Circuit's

decision in *Gaylord* and the broader holdings of the Eight Circuit in *Seals* and the Sixth Circuit in *Allen*. This Court should not expand beyond the holding that "results from" means "but for," until the Congress says otherwise. The rule of lenity requires this Court to resolve any ambiguity in the meaning of "results from" in favor of the defendant and against the Government. In *Burrage* itself, the majority and concurring opinions both made reference to the "rule of lenity." "Especially in the interpretation of a criminal statute subject to the rule of lenity, ... we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage*, 571 U.S. at 216. "I do agree that 'in the interpretation of a criminal statute subject to the rule of lenity," where there is room for debate, one should not choose the construction "that disfavors the defendant.'" *Id*. at 219 (Ginsburg, J., concurring).

Where there are two lethal drugs in the victim's system, one distributed by the defendant and one not, and the combination caused the death, it cannot be said that the death "results from" one or the other. The only way for the statutory enhancement to apply to the Petition is for the courts to go beyond the holding in *Burrage* and

conclude that "results from" means something other than "but-for causality." As this Court observed in *Burrage*, the Congress could have "adopted a modified causation test tailored to cases involving concurrent causes," but it "chose instead to use language that imports but-for causality."

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Date: December 23, 2019.

WARREN EVANS, JR.

Petitioner

By: _____
Counsel

Steven R. Minor
ELLIOTT LAWSON & MINOR
110 Piedmont Ave., Suite 300
Bristol, VA 24201
Telephone: (276) 466-8400
Fax: (276) 466-8161
Email: sminor@elliottlawson.com
Counsel for Petitioner Warren Evans, Jr.