No. _____

In The Supreme Court of the United States

DONALD S. HARDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

E. KING POOR
Counsel of Record
JAMES I. KAPLAN
STEPHANIE M. MOON
QUARLES & BRADY LLP
300 North LaSalle Street
Suite 4000
Chicago, IL 60654
(312) 715-5000
king.poor@quarles.com

JAMES E. GOLDSCHMIDT
QUARLES & BRADY LLP
411 East Milwaukee Avenue
Suite 2400
Milwaukee, WI 53202
(414) 277-5000

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Burrage v. United States*, 571 U.S. 204 (2014), the Court settled a conflict over the meaning of the "death-results" language in the Controlled Substances Act (21 U.S.C. § 841(a)-(b)) (Act). Rejecting a lesser standard of proof that the drugs distributed by a defendant need only have been a "contributing cause" of death, the Court required a higher test of "but-for" causation.

Here, a jury found that a tenth of a gram of heroin supplied by the petitioner, Donald Harden, caused a person's death. Based on the death-results provision of the Act, Harden was sentenced to life in prison.

In his post-conviction proceeding, Harden argued that his counsel was ineffective by agreeing to a jury instruction with no mention of but-for causation. Since *Burrage*, the Fifth, Tenth, and Eleventh Circuits have required jury instructions that include the but-for test. Here, the Seventh Circuit did not. Though the Seventh Circuit recognized that the evidence of causation conflicted, and in fact was "weak," it still held that a but-for instruction was unnecessary.

This question is presented for review:

For a death-results sentence under the Controlled Substances Act, must a jury be instructed as to but-for cause if the evidence of causation is conflicting?

RELATED CASES

Cases Related to Post-Conviction Proceedings

Harden v. United States, No. 19-C-1503, United States District Court for the Eastern District of Wisconsin. Judgment entered on December 31, 2019.

Harden v. United States, No. 20-1154, United States Court of Appeals for the Seventh Circuit. Judgment entered on January 21, 2021.

Cases Related to Trial and Direct Appeal

United States v. Harden, No. 1:16-cr-00035, United States District Court for the Eastern District of Wisconsin. Sentence and judgment entered on February 6, 2017.

United States v. Harden, No. 17-1270, United States Court of Appeals for the Seventh Circuit. Judgment entered on June 20, 2018.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The district court's opinion is unreported. App. 17. The Seventh Circuit's opinion is reported at *Hardin v. United States*, 986 F.3d 701 (7th Cir. 2021). App. 1.

JURISDICTION

The Seventh Circuit's judgment was entered on January 21, 2021. App. 16. Based on the Court's March 19, 2020 order, the time to petition for certiorari was extended to June 21, 2021. This petition is timely and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The "death-results" language of the Controlled Substances Act at issue in *Burrage* is essentially identical to that used to sentence Harden to life in prison. 21 U.S.C. § 841(b)(1)(B)-(C). It states in pertinent part that a life sentence may be imposed "if death or serious bodily injury *results from* the use of such substance" (emphasis added).[1]

[1] Section 841(b)(1) at subsections A, B, and C, each include their own "death-results" provisions, depending on the quantity and type of drug distributed. In *Burrage*, the defendant was sentenced under § 841(b)(1)(C), while in this case, Harden was sentenced under § 841(b)(1)(B). The relevant "death-results" language in each is essentially identical.

STATEMENT OF THE CASE

A. The Seventh Circuit recognized that the evidence of causation was conflicting and "weak."

The government's case against Harden centered on (1) a conspiracy to distribute heroin (which he does not now contest) and (2) that a tenth of a gram of the heroin that he sold to another dealer caused the victim's death. App. 1, 3. The evidence at Harden's trial showed that on September 4, 2014, Kyle Peterson sold a tenth of a gram of heroin to his friend, Fred Schnettler. App. 2-3. Schnettler later died from a heroin overdose sometime after 10:20 p.m. that same evening. App. 6 (final text message). Peterson obtained the heroin that he gave to Schnettler from another drug dealer (Brandi Kniebes-Larsen) who bought it from Harden. App. 2, 4.

The timing of when Peterson gave Schnettler the heroin was critical because the government's expert testified that it would be "a little bit surprising" that a tenth of a gram of heroin taken around 5:00 p.m. could have caused death over five hours later. App. 3. The only contemporaneous evidence of the time of delivery came from text messages between Peterson and Schnettler shortly after 5:00 p.m. on September 4 when Schnettler complained at 5:15 p.m. that he had already used almost all the heroin and he was "not even high." App. 4.

Peterson and Schnettler continued texting over the next two hours and Schnettler tried calling him for another hour after that, with his last call to Peterson at 8:53 p.m. App. 6. Also, it is undisputed that Peterson made only one delivery of heroin to Schnettler on September 4. App. 4-5. The following day, after Schnettler died, Peterson told the police that he had delivered the heroin around 5:00 p.m. Dist. Ct. Doc. 62, Tr. 65-66.

At Harden's trial, Peterson changed his story of when he delivered the heroin. He now claimed that he delivered the heroin sometime between 7:00 and 8:00 p.m. on September 4. App. 6. That was not only directly contrary to what Peterson had told the police, it also contradicted the text messages immediately after 5:00 p.m. when Schnettler compared what Peterson had given him the night before with what he had just delivered and told him that it was so weak that he had used almost all of it and "I'm not even high." App. 4 (text messages at 5:09 p.m. and 5:15 p.m.).

In addition to the conflicting evidence of when Peterson made his one delivery to Schnettler on September 4, the government's expert did not testify that the Harden-supplied tenth of a gram—even if ingested as late as between 7:00 and 8:00 p.m.—would have been fatal sometime after 10:20 p.m. In fact, the expert never testified that Schnettler would have lived had he not taken Harden's one tenth of a gram. The expert simply testified to what was undisputed: that Schnettler died from a heroin overdose. App. 3.

Further, even though Schnettler had complained that after taking almost all of the heroin it was so weak that he could not get high, the government offered no evidence of the heroin's potency or purity. What is more, the dealer to whom Harden had sold his heroin, Kniebes-Larsen, testified that she and her niece both injected .25 grams of the same heroin that she bought from Harden—an amount two and a half times as much as the .1 gram that Peterson sold to Schnettler—and they suffered no ill effects. Dist. Ct. Doc. 62, Tr. 130-31; 146-47. Kniebes-Larsen also testified that the heroin from Harden that she used was "junk." *Id.*, Tr. 163-65.

The undisputed evidence also showed that the Harden-supplied heroin that Peterson delivered on September 4 was not Schnettler's only recent source of heroin. Peterson testified that the day before, on September 3, he sold Schnettler heroin that was not supplied by Harden, but by "another friend." Dist. Ct. Doc. 62, Tr. 56. The heroin from this other dealer that Peterson gave Schnettler on the 3rd was "of a yellowish color." *Id.* The heroin from Harden that Peterson sold to Schnettler on the 4th was "dark grey in color." *Id.* at 52-53.

In affirming Harden's conviction on direct appeal, the Seventh Circuit recounted the conflicting evidence as to whether the Harden-supplied tenth of a gram could have been the but-for cause of death and recognized that "a rationale trier of fact could have reached the opposite conclusion." *United States v. Harden*, 893 F.3d 434, 447 (7th Cir. 2018). And when affirming the

dismissal of Harden's post-conviction motion, the Seventh Circuit again reviewed the conflicting evidence of causation and noted that it had "previously recognized that this evidence was weak." App. 15.

B. Harden's counsel agrees to a jury instruction with no mention of but-for cause.

In *Burrage*, both the district court and the Eighth Circuit interpreted the "death-results" language in the Controlled Substances Act to mean that the government could rely on a jury instruction with a lesser standard of proof—that is, whether the drugs supplied by the defendant were merely a "contributing cause" of death. 571 U.S. at 208. This Court rejected that interpretation and held that unless the drug distributed by a defendant was "an independently sufficient cause" of death, the government must prove that the drug was the "but-for" cause of death. *Id.* at 218. Here, the trial in November 2016 took place almost three years after *Burrage* was decided.

In this case, the government requested a special-verdict question with no mention of but-for causation that asked: "Did the death of Frederick J. Schnettler result from his use of heroin distributed by defendant Donald S. Harden?" App. 7. Harden's counsel made no objection to this question nor to the district court's additional instruction that also did not refer to but-for causation and only asked the jury to find if Schnettler had died as a "result of the use of heroin distributed by [Harden]." *Id.*

Also, during closing argument, neither the government nor defense counsel made any mention of but-for causation. Dist. Ct. Doc. 63, Tr. 57-78. Indeed, the words "but-for cause," or any similar explanation of the but-for test, were never mentioned during the entire trial. The jury returned a special verdict finding that Schnettler had died as a "result of" the heroin distributed by Harden. App. 7. Based on that finding, the district court sentenced Harden to life in prison. *Id.*

C. The Seventh Circuit holds that a but-for instruction was unnecessary.

After Harden's conviction was affirmed in his direct appeal, he filed a motion for post-conviction relief under 28 U.S.C. § 2255. App. 2. In this motion, Harden argued that he was denied effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), because his counsel agreed to a jury instruction with no mention of but-for cause. App. 8-9.[2] The district court ruled that the instruction did not need to refer to but-for causation because the ordinary meaning of "results from" included but-for cause. *Id.*

On appeal, Harden argued that since the Eighth Circuit in *Burrage* read the "death results" language to mean a lesser standard, that of "contributing cause,"

---

[2] Harden also argued that his counsel was ineffective because he did not present an expert witness to address whether the tenth of a gram of heroin supplied by Harden could have been the but-for cause of death. App. 13. That issue is not part of this petition.

the average juror could not be expected to do what the Eighth Circuit was unable to do—interpret the statutory language as requiring but-for causation. 7th Cir. Doc. 17 at 13 ("no reason to believe that jurors would be any less likely to make that same mistake"). The Seventh Circuit rejected this argument, contending that the instruction here needed no elaboration since it was a "correct statement of the law." App. 10. The court reasoned that because the instruction here did not refer to a lesser standard, such as "contributing cause" as in *Burrage*, the statutory "death-results" language alone was enough. App. 10-11. In the alternative, the court ruled that even if the instruction was "deficient," it did not matter, since Harden could not show prejudice from the jury receiving such an incorrect instruction. App. 12-13.

REASONS FOR GRANTING THE WRIT

A. The Seventh Circuit's decision creates a split with the Tenth, Eleventh, and Fifth Circuits.

1. The decision conflicts with the Tenth Circuit's decision requiring a but-for instruction.

In *United States v. MacKay*, 610 Fed. Appx. 797 (10th Cir. 2015) (Gorsuch, J.), the Tenth Circuit held that after *Burrage*, a jury instruction must do more than merely repeat the statutory term that death "results from" without referring to the but-for test. This

decision was the second of two appeals and the district court's opinion on remand after the first appeal is helpful in understanding the decision in the second appeal. *United States v. MacKay*, 20 F.Supp.3d 1287 (D. Ut. 2014).

In *MacKay*, the defendant received a death-enhanced sentence based on an instruction that repeated the statutory results-from term without referring to but-for cause. *Id.* at 1291. The Tenth Circuit affirmed the conviction on the grounds that there was sufficient evidence to prove that the drugs that the defendant supplied were the cause of death, but remanded for resentencing on another issue. *United States v. MacKay*, 715 F.3d 807, 825 (10th Cir. 2013). After that decision, the Court decided *Burrage.*

On remand, the defendant argued that under *Burrage* an instruction with no mention of but-for causation was error. *MacKay*, 20 F.Supp.3d at 1295. The government countered with two arguments: (1) *Burrage* did not apply because the instruction did not include the less-demanding "contributing cause" standard at issue in *Burrage* and (2) because *Burrage* held that the plain meaning of "results from" is "but-for," it was "safe to assume that the jury in this case must have arrived at the same definition." *Id.*

The district court rejected both arguments:

> In effect the Government asks the Court to find the statutory interpretation skills of the common layperson juror equal to those of Justice Scalia [the author of *Burrage*]. The Court

> is unable to make such a finding when this Court, the district court in *Burrage*, and the Eighth Circuit, all failed to correctly deduce the plain meaning of "resulting from."

Id. The court concluded that an instruction limited to the statutory language failed because "[s]imply providing jurors with the 'resulting from' language, without more, is not acceptable in light of *Burrage*." *Id.* It then vacated the death-enhanced sentence. *Id.*

The government appealed and the Tenth Circuit affirmed in a decision authored by then-Judge Gorsuch. *MacKay*, 610 Fed. Appx. at 798. The government argued that the mandate rule prevented the district court from reconsidering the defendant's guilt under a death-enhanced sentence. The court disagreed because *Burrage* was such a significant change in the law that it was an exception to the mandate rule and the jury could have "easily" misunderstood the meaning of "results from":

> [T]he district court gave the jury no guidance on what the government must prove to show that a death "resulted from" the drugs in question. Without any guidance on that score, the jury easily could have understood the term as suggesting a lesser causation standard than *Burrage* demands—perhaps along the lines of a "substantial factor" in or "contributing to" the victim's death. Indeed, before *Burrage* a long line of cases required only this lesser level of proof in similar circumstances.

Id. at 799 (citations omitted).

Here, however, the Seventh Circuit took the opposite approach. First, it relied on the same basic argument that the government put forward in *MacKay*—that merely repeating the statutory term "results from" was sufficient, so long as the instruction did not also refer to a lesser standard such as "contributing cause." App. 10. Yet as the court in *MacKay* recognized, by simply defaulting to "results from," the jury would have "no guidance" and it could "easily" have misconstrued "results from." 610 Fed. Appx. at 799.

Further, the Seventh Circuit's decision suggests that district courts may be on safer ground by rejecting instructions that provide *Burrage*'s guidance to the jury. That cannot be the correct rule. If a lesser standard is included in an instruction, then such a mistake may be identified and corrected as it was in *Burrage*. But with no mention of but-for cause at all, as in this case, it will be unknown if the jury mistakenly read "results from" to mean a lesser standard. After all, that is exactly how the Eighth Circuit construed "results from." As a result, *Burrage* cannot be read to assume that a jury would *not* make the same mistake that the Eighth Circuit made.

The Seventh Circuit offered only one way to distinguish *MacKay*: that it involved more than one drug—what it referred to as a "mixed-toxicity" case. App. 12. But *Burrage* cannot be read so narrowly. First, though the victim in *Burrage* had taken multiple drugs, the decision nowhere suggests that its holding is limited to cases involving more than one drug. Rather, the Court focused on the "ordinary meaning" of

"results from" and determined that it required "but-for" cause—what it also referred to as the "straw that broke the camel's back." *Burrage*, 571 U.S. at 211. The Court concluded that unless the drugs at issue were "an independently sufficient cause" (a "rare" situation and one that the government has never argued here), the government has the burden of proving but-for causation. *Id.* at 218-19.

The Court in *Burrage* also noted that the government's experts were unwilling to say that the victim would have lived had he not taken the defendant's heroin. *Id.* at 215. The same may be said of this case: the government's expert never testified that Schnettler would have lived if he had not taken the Harden's tenth of gram.

The but-for test serves an identical function whether a victim has taken one drug from multiple sources or more than one drug. Here, the undisputed evidence showed that Peterson sold Schnettler yellow heroin from another dealer on September 3 and dark-grey heroin from Harden on September 4. Dist. Ct. Doc. 62, 52-53, 56. Contending, as the Seventh Circuit does here, that *Burrage* only applies to mixed-toxicity cases means that the but-for test would never apply to cases in which different dealers supplied different batches of the same drug. Nowhere does *Burrage* suggest that.

Instead, *Burrage* is grounded on the basic question of but-for causation. That question does not turn on whether the case involves one drug or more than one, but on whether the evidence of causation is conflicting.

The Seventh Circuit's attempt to distinguish *MacKay* based on whether the victim took more than one drug ignores why the but-for test is critical: to resolve conflicting evidence of causation. Here, the conflicting evidence of causation was undeniable. The Seventh Circuit recognized it as "weak." App. 15.

In *MacKay*, the court would not allow a death-enhanced sentence to be imposed if the jury received a results-from instruction alone which gave it "no guidance." 610 Fed. Appx. at 799. Yet the Seventh Circuit permitted just that. Such a decision is completely at odds with *MacKay*.

2. The decision conflicts with Eleventh Circuit authority requiring a but-for verdict.

The Seventh Circuit's opinion also conflicts with the Eleventh Circuit's decision in *United States v. Feldman*, 936 F.3d 1288 (11th Cir. 2019). In *Feldman*, the jury's special verdict, like the instruction in *MacKay*, referred only to the statutory "results from" language without referring to but-for cause. *Id.* at 1320-21. As a result, the Eleventh Circuit reversed the death-results sentence as contrary to *Burrage*. *Id.* at 1321-22.

In *Feldman*, a doctor was convicted of distributing a variety of drugs which resulted in the death of three of his patients. *Id*. at 1308. The court found that the evidence at trial was sufficient to prove that "but for" the drugs that the defendant supplied, the victims would have lived. *Id.* at 1320. But the court still reversed the death-enhanced sentence because "the

special verdict in this case failed to establish that the jury *actually found* that the [drugs supplied by the defendant] were but-for causes of the victims' deaths." *Id.* (emphasis in opinion).

The court pointed out that though one question in the special verdict mentioned the but-for test, that question combined both drugs that could trigger a death-enhanced sentence with those that could *not*. *Id.* On the other hand, the final question "attempted to disaggregate the drugs to seek a finding as to which specific drugs caused the death." *Id.* That question, however, did *not* refer to the but-for test. *Id.* Hence for any drugs that could produce a death-enhanced sentence, this question only tracked the "resulted from" language of the statute. The court held that was error. *Id.* at 1320-21.

The court explained that "this [special verdict] question entirely omitted any mention of but-for causation and failed to make clear to the jury that absent a finding that the victim would not have died had he not used a particular drug, the jury could not conclude that the victim's death resulted from that drug." *Id.* Failing to explain the meaning of "resulted from" was pivotal because, as the court reasoned, "the verdict form's failure to spell out what 'resulted from' meant in the critical and final question raises a significant concern that the jury was unaware of that phrase's meaning as it pertains to whether death resulted from a specific drug." *Id.* at 1321.

The court also noted that it might have come to a different conclusion if the instruction had explained that "resulted from" required the jury to find that, but for ingesting a particular drug, the victim would have not have died. *Id.* But the district court gave no such instruction. *Id.* In addition, the court pointed out that, as in this case, neither the government nor defense counsel made any mention of but-for causation in their closing arguments to the jury. *Id.* The court concluded that the "sentencing enhancement cannot stand." *Id.* at 1322.

The court in *Feldman* did not tolerate guessing at whether the jury interpreted the words "resulted from" to mean a lesser standard, such as "contributing cause," as the Eighth Circuit interpreted that term to mean in *Burrage.* Rather, as in *MacKay*, the Eleventh Circuit insisted on clarity. That required the but-for test to be explicit. It was not enough to leave to happenstance whether a jury might be able to divine but-for causation from the term "resulted from." Here, however, the Seventh Circuit was willing to affirm a life sentence without knowing if the jury did what the Eighth Circuit did in *Burrage* and misinterpreted that same term. All that makes the Seventh Circuit's decision directly contrary to *Feldman.*

3. The decision conflicts with Fifth Circuit authority requiring a but-for instruction.

The Fifth Circuit also rejected the same argument at the center of the Seventh Circuit's reasoning

here—that simply repeating the statutory term "results from" was an adequate jury instruction. In *Santillana v. Upton*, 846 F.3d 779 (5th Cir. 2017), as in *MacKay* and *Feldman*, the Fifth Circuit also insisted on an instruction that stated the but-for test explicitly.

In *Santillana*, the petitioner sought a writ of habeas corpus arguing that *Burrage* applied retroactively, and that if the but-for standard applied to her case, she was "actually innocent." *Id.* at 781. The government argued that even if *Burrage* applied retroactively, the defendant still could not prove that she was convicted of a "nonexistent offense." *Id.* at 784. The court explained that to determine whether a petitioner was convicted of a nonexistent offense, "we must look to what the factfinder actually decided." *Id.*

The court focused on the fact that neither the indictment nor the jury instructions mentioned the but-for standard and merely referred to "resulted in" for the indictment and "resulted from" for the instruction. *Id.* at 785. The court held that was inadequate: "Based on the indictment and instruction, we cannot say that the jury found that methadone [the drug the petitioner supplied] was the but-for cause of death. . . . [W]e cannot say that what the jury *did* find was criminal activity." *Id.* (emphasis in opinion). Again, as in *MacKay*, the court was concerned that the jurors may have done what the Eighth Circuit did in *Burrage* by reading "results from" to mean a lesser standard: "It is possible that [the jury] found that methadone was merely a contributing cause of death, the exact problem in *Burrage*." *Id.*

As it did when attempting to distinguish *MacKay*, the Seventh Circuit maintained that *Santillana* may be distinguished as another "mixed-toxicity" case. App. 12. In doing so, the Seventh Circuit referred to the Fourth Circuit's decision in *United States v. Alvarado*, 816 F.3d 242 (4th Cir. 2016). App. 12. It described that case as one in which the court "approved an unadorned 'death-results' instruction like the one in this case and commented only that in a mixed-toxicity case (like the other two that Harden cites [*MacKay* and *Santillana*]), 'a court's refusal to clarify the phrase 'results from' might become a problem.'" App. 12 (quoting *Alvarado*, 816 F.3d at 248-49).

But this quote from *Alvarado* warrants closer examination, since it did not depend on whether the victim took one or more drugs. Instead, the court in *Alvarado* relied on the evidence of causation being undisputed. Even though the victim had taken other drugs, this undisputed evidence showed that he would not have died "but for" the heroin that the defendant had supplied: "The *only* evidence presented was that, but for the heroin [supplied by the defendant], death would not have resulted." *Id.* at 249 (emphasis in opinion).

The evidence of causation in *Alvarado* contrasts sharply with what the Seventh Circuit recognized here: that the evidence was very much in conflict. In fact, it acknowledged that any evidence that Harden's tenth of a gram was the but-for cause was "weak." App. 15. As a result, a but-for instruction in this case was crucial. Without such an instruction, it is pure

speculation whether the jury applied the correct but-for standard or a lesser one.

In *Santillana*, as in *MacKay* and *Feldman*, the court did not allow a death-enhanced sentence to rest on such speculation. But the Seventh Circuit did. And by doing so, its decision conflicts with the decisions in each of these three circuits.

B. This circuit split is ripe and delaying its resolution will only sow confusion in similar death-enhanced cases.

This case presents the right vehicle to settle this circuit split. First, this division of authority is mature. In the seven years since *Burrage* was decided, the three circuits discussed above have all held that failing to mention but-for causation deprives a jury of the very guidance that *Burrage* requires.

And this circuit split has far-reaching consequences. Death-enhanced sentences under the Controlled Substances Act are lengthy, and as in this case, may result in life in prison. Before the law imposes such a sentence, it must be clear that the jury has been properly instructed as to the but-for test. Defaulting to the bare statutory term of "results from" can only perpetuate the same problem that gave rise to *Burrage*. Since the Eighth Circuit and the district court, as well as the Solicitor General in *Burrage*, all read "results from" to include "contributing cause," what is to prevent the average juror from doing the same? Jurors do not of course receive a copy of the *Burrage* decision and

it is completely unrealistic to assume that they would be able to do what judges and lawyers failed to do when interpreting the same language.

Imposing life sentences should not depend on the fortuity of whether a particular juror may or may not have done what the Eighth Circuit did in *Burrage*. Our system of justice has never tolerated that. Indeed, the Court has squarely rejected that a defendant may be convicted based on a jury misreading an instruction to relieve the government from its burden of proof. *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985) ("It is clear that a reasonable juror could easily have viewed such an instruction as mandatory," quoting *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979)). Neither should the Court accept a results-from instruction that both the bench and bar in *Burrage* demonstrated they misread.

If there is a "reasonable likelihood" that a jury has misconstrued an instruction, then that instruction was improper and the verdict must be set aside. *See Boyde v. California*, 494 U.S. 370, 380 (1990) (establishing a "reasonable likelihood" standard to test if a jury misapplied an instruction). Since the lower courts and the government lawyers in *Burrage* all misconstrued the meaning of "results from," there is at least "reasonable likelihood" that the average juror would do the same. In fact, the same word that both the Court in *Francis* and Tenth Circuit in *MacKay* used applies in this case: "easily"—a jury could have easily have misapplied the instruction here. *Francis*, 471 U.S. at 315-16 ("a reasonable juror could easily have viewed such an instruction as mandatory"); *MacKay*, 610 Fed. Appx. at 799

("the jury easily could have understood the term [resulted from] as suggesting a lesser causation standard than *Burrage* demands").

The circuit split here also creates two different standards for imposing death-enhanced sentences in different parts of the country. A defendant facing a death-enhanced sentence in Denver, Atlanta, or New Orleans or elsewhere in the Tenth, Eleventh, or Fifth Circuits may rely on a jury instruction that spells out the but-for test clearly. A defendant in Chicago or elsewhere in the Seventh Circuit cannot.

Finally, the key facts to resolve this division of authority are straightforward and undisputed: (1) the government only offered evidence that Peterson made one delivery of Harden's tenth of a gram of heroin, (2) the Seventh Circuit admitted that the causation evidence was "weak," and (3) despite such weak evidence, the district court gave a jury instruction that defaulted to the statutory "results-from" language with no mention of the but-for standard.

Delaying a resolution of this issue will mean that death-enhanced sentences may continue to be imposed—even when the causation evidence conflicts—with jury instructions that say nothing of the but-for test. That means that even life sentences may hinge on something akin to guessing at whether a jury did what the Eighth Circuit did in *Burrage*. This Court has never allowed that. And it should intervene now to prevent *Burrage* from being drained of its meaning when juries are instructed as to death-enhanced sentences.

C. Claiming that a deficient instruction here would not cause prejudice conflicts with this Court's precedent.

After spending most of its analysis discussing why the jury instruction here was consistent with *Burrage*, the Seventh Circuit offers an alternative rationale in its final paragraph: that even if the instruction was deficient, it did not result in "prejudice" under the second prong of *Strickland*, 466 U.S. at 687. App. 12.[3]

But the court's no-prejudice rationale is contrary to *Strickland* itself. In *Strickland*, the Court explained that establishing prejudice does not require a defendant to show that counsel's deficient performance "more likely than not altered the outcome of the case." *Id*. at 693. Rather, the defendant need only show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Id.* at 694. The Court also recognized that such a reasonable probability is more likely if the evidence supporting a judgment is weak: "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

To be sure, failing to challenge a faulty jury instruction may not be prejudice if the evidence of guilt

---

[3] The Seventh Circuit did not find that agreeing to an incorrect instruction would satisfy the performance prong of *Strickland*. 466 U.S. at 694-95. And it could not. *See Francis*, 471 U.S. at 315-17 (deficient performance for counsel not to object to instruction that confused jury about defendant's central defense).

is overwhelming. *See Shelton v. Mapes*, 821 F.3d 941, 948 (8th Cir. 2015) (counsel's failure to object to incorrect instruction not prejudice under *Strickland* because the evidence against the defendant was "overwhelming"). But if the failure to object to an instruction relates to an issue only weakly supported, a court may indeed find prejudice. *Breakiron v. Horn*, 642 F.3d 126, 140 (3d Cir. 2011) (failure to request an instruction on lesser-included offense resulted in prejudice under *Strickland* because prosecution's evidence "was not particularly strong and was far from overwhelming").

Here, the evidence of causation was far from overwhelming. By the Seventh Circuit's own admission, it was "weak." App. 15. With such undeniably weak evidence, the reasonable probability of prejudice is plain. Further, *Strickland* noted that the prejudice analysis presumes that a judge or jury "acted according to law." 466 U.S. at 694. Yet if a judge or jury do not act "according to law," that is, by applying the wrong law, then that presumption disappears.

Despite this, the Seventh Circuit offered two reasons why relying on a "results-from" instruction alone would not cause prejudice. Neither is convincing. First, the court maintained that so long as the instruction was not modified with a lesser standard such as "contributing cause," it could not cause prejudice. App. 12. That does not follow. Including a lesser standard such as "contributing cause" may be readily identified and corrected. But an instruction referring only to "results from" is worse. The statutory language by itself offers

no clue as how a jury may have interpreted it and leaves the jury to puzzle about the meaning of "results-from" in the same way that led the lawyers and judges in *Burrage* to misconstrue that same term. *See Francis*, 471 U.S. at 322 ("[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict").

The Seventh Circuit also maintained that because the jury heard evidence about the competing timelines of when Peterson delivered the heroin on September 4, this too avoids any prejudice. App. 12-13. Again, that does not follow. At most, the competing timelines only mean that there was sufficient evidence to support the verdict. But as the court explained in *MacKay*, evidence sufficient to support a verdict is "entirely different" from the requirement that a jury receive a correct instruction:

> [A]n erroneously instructed jury is an entirely different and independent problem than a record lacking legally sufficient evidence to support a conviction, though of course either one can lead to a verdict's undoing. Coming at the point from another angle: a defendant is generally entitled to a conviction supported by both a properly instructed jury and by legally sufficient evidence. . . . The government's argument in this court simply conflates these independent concepts and legal demands.

610 Fed. Appx. at 799. Again, as *MacKay* recognized, an erroneously instructed jury has "no guidance" and "easily could have understood the term as suggesting

a lesser causation standard than *Burrage* demands." *Id.*

The Seventh Circuit's no-prejudice arguments, especially in the face of evidence that is admittedly weak, cannot be squared with *Strickland*. Moreover, such alternative arguments do not resolve the circuit split here or make resolving that split any less urgent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

E. KING POOR
Counsel of Record
JAMES I. KAPLAN
STEPHANIE M. MOON
QUARLES & BRADY LLP
300 North LaSalle Street
Suite 4000
Chicago, IL 60654
(312) 715-5000

JAMES E. GOLDSCHMIDT
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2400
Milwaukee, WI 53202
(414) 277-5000