

No. 20-1765

**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**

**SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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INTRODUCTION

Petitioner, Donald Harden, brings to the Court’s attention a recent decision from the Tenth Circuit, issued after his petition for certiorari was filed, that further reinforces the circuit split at issue here: *United States v. Moya*, 5 F.4th 1168 (10th Cir. 2021). *Moya* provides another example of a court recognizing the necessity of clarifying the “death-results” provision of the Controlled Substances Act when instructing a jury, by adding the but-for test required by *Burrage v. United States*, 571 U.S. 204 (2014). Because the Seventh Circuit here concluded that clarifying the statutory term was unnecessary when instructing a jury, *Moya* magnifies the circuit split.

ARGUMENT

A. *Moya* recognizes that a proper jury instruction includes the but-for test.

Like this case, the defendant in *Moya* sold heroin and was sentenced to life in prison based on the “death-results” section of the Controlled Substances Act (21 U.S.C. § 841(a)-(b)). *Moya*, 5 F.4th at 1176-77. And like this case, the evidence conflicted as to whether the heroin distributed by the defendant was the but-for cause of death. *Id.* at 1174-76 (discussing differing conclusions from expert witnesses). But unlike this case, the government in *Moya* did what the government did not do here: it proposed a jury instruction that included the but-for test. *Id.* at 1178.

The district court adopted the government's proposed instruction with the but-for test and instructed the jury as follows: "This standard is satisfied upon a finding by you that, *but for the victim's ingesting the [heroin] charged in Count 2 . . . , the victim would not have died.*" *Id.* at 1179 (emphasis added). The Tenth Circuit determined that this instruction "clarified that the 'death results' language requires but-for causation." *Id.*

On appeal, the defendant argued that the instruction misled the jury because, among other things, it did not include a but-for finding as a separate element of the crime. *Id.* at 1179-80. The Tenth Circuit rejected that argument because neither *Burrage* nor its own precedent required the but-for test to be identified as a separate element. *Id.* Rather, what mattered was that the instruction, when read "as a whole," ensured that the jury understood that they needed to find that the heroin distributed by the defendant was the but-for cause of death. *Id.* at 1180.

The Tenth Circuit explained that the jury instruction adequately defined the statutory term, "resulted from," by clarifying it to include the but-for test:

Here, the instructions explained that "resulted from" means that "but for" [the victim's] injecting the heroin he received from [the defendant] he wouldn't have died. (citation omitted). That set forth the applicable standard. Reading the instruction for count 2 as a whole, we have no doubt that the jury would have understood that to convict [the

defendant], it was *required to find that the heroin was the but-for cause of [the victim's] death.*

Id. at 1180 (emphasis added). And in contrast to the Seventh Circuit's view that the statutory term "results from" needed no definition, the court recognized that "[i]ndeed, criminal-statute elements often contain terms needing defining." *Id.* (internal citations omitted).

Further, when rejecting the defendant's sufficiency of the evidence argument, the Tenth Circuit again emphasized the importance of instructing the jury to find that the heroin supplied by the defendant was the but-for cause of death:

The district court, the parties, and the jury all understood that the government had the burden of proving that the heroin was the but-for cause of [the victims] death. The trial centered on that very issue. *Thus, we know that the jury was convinced that heroin was the but-for cause of [the victim's] death.*

Id. at 1187 (emphasis added). In other words, it was precisely the clarifying but-for instruction that gave the Tenth Circuit the confidence to affirm the jury's verdict despite the competing evidence of causation.

B. *Moya* joins *MacKay*, *Feldman*, and *Santillana* in deepening the circuit split.

The words "but for" were never mentioned at Harden's trial. But the Seventh Circuit determined that the jury did not need to hear any mention of

but-for causation as long as they received an instruction with the undefined statutory term. As discussed in Harden’s petition, decisions from three circuits have reached the opposite conclusion and have held that the but-for standard must be explicitly included when instructing a jury for a death-results conviction. Pet. at 7-17 (discussing *United States v. MacKay*, 610 Fed. Appx. 797 (10th Cir. 2015), *United States v. Feldman*, 936 F.3d 1288 (11th Cir. 2019), and *Santillana v. Upton*, 846 F.3d 779 (5th Cir. 2017)).

The *Moya* decision aligns squarely with these three decisions. And like these three decisions, *Moya* conflicts directly with the Seventh Circuit’s decision. Here, the Seventh Circuit was untroubled by a jury instruction with no mention of but-for cause. In sharp contrast, the court in *Moya* took special care to emphasize that the instruction properly clarified and defined the statutory term by adding the but-for standard. 5 F.4th at 1179-80. In fact, the Tenth Circuit emphasized that such a clarification ensured that the jury understood and applied the correct law. *Id.* at 1180, 1187.

Not only does *Moya* reinforce the circuit split, it also highlights why resolving this conflict matters and why it should be resolved here. In *Moya*, the government proposed a jury instruction that added the but-for standard. In this case—which parallels *Moya* with its conflicting evidence of causation—the government did not do so.

Death-enhanced sentences impose some of the most severe of all punishments—both Harden and

Moya received life sentences. When the government seeks such sentences, it must do so with consistent jury instructions that are not at odds with each other, as they were in this case and *Moya*. And such contrary instructions may continue so long as the law remains unsettled. Here, when *Moya* and three other circuit court decisions have emphasized the importance of defining the statutory term with the but-for test, and the Seventh Circuit has determined that the statutory term may be left undefined, this Court should intervene.

◆

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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