No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTOINE WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the "special rule" exception to but-for causation mentioned in *dicta* in *Burrage v. United States*, 571 U.S. 204 (2014) is inapplicable to an enhancement pursuant to 21 U.S.C. § 841(b)(1)(C)?

II. Whether *Burrage v. United States*, 571 U.S. 204 (2014) requires that a forensic pathologist give an opinion as to "but-for" causation by using the phrase "but-for" during a 21 U.S.C. § 841(b)(1)(C) prosecution?

LIST OF PARTIES

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

RELATED CASES

Related cases that arose from the same trial court case as the case in this Court include:

1. *United States v. Alexander Campbell*, Appeal No. 18-4130, Trial Court No. 16:cr:00051-CCB-2;

2. *United States v. Antonio Shropshire*, Appeal No. 18-4135, Trial Court No. 16:cr:00051-CCB-3;

3. *United States v. Glen Kyle Wells*, Appeal No. 18-4148, Trial Court No. 16:cr:00051-CCB-5;

4. *United States v. Omari Thomas*, Appeal No. 18-4118, Trial Court No. 16:cr:00051-CCB-4; and

5. *United States v. Momodu Bondeva Kenton Gondo*, Trial Court No. 16:cr:00051-CCB-6.

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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

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to the petition and is published. The order of the United States Court of Appeals for the Fourth Circuit denying rehearing *en banc* appears at Appendix B to the petition. The order of the United States District Court for the District of Maryland overruling Petitioner's objection to testimony about "but-for" causation appears at Appendix C to the petition. The order of the United States District Court for the District of Maryland denying Petitioner's proposed jury instructions appears at Appendix D to the petition.

JURISDICTION

The District Court in the United States District Court for the District of Maryland, Northern Division, had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction over the appeal of Petitioner's sentence pursuant to 28 U.S.C. §1291 and 18 U.S.C. § 3742. That court issued its opinion on June 24, 2020. Petitioner filed a petition for rehearing *en banc* on

July 8, 2020 and the Fourth Circuit stayed the mandate. On July 22, 2020, the Fourth Circuit denied the petition for rehearing *en banc*. The Fourth Circuit issued the mandate on July 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOVLED

The statutory provision involved is 21 U.S.C. § 841(b)(1)(C). This provision appears at Appendix E to this petition.

QUESTIONS PRESENTED

I. **Whether the "special rule" exception to but-for causation mentioned in *dicta* in *Burrage v. United States*, 571 U.S. 204 (2014) is inapplicable to an enhancement pursuant to 21 U.S.C. § 841(b)(1)(C)?**

II. **Whether *Burrage v. United States*, 571 U.S. 204 (2014) requires that a forensic pathologist give an opinion as to "but-for" causation by using the phrase "but-for" during a 21 U.S.C. § 841(b)(1)(C) prosecution?**

STATEMENT OF THE CASE

Petitioner was indicted on February 17, 2016 by the Grand Jury for the United States District Court for the District of Maryland in a two count indictment charging him with Count One: Distribution of a Controlled Dangerous Substance, to wit: heroin, resulting in death, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and with Count Two: Distribution of a Controlled Dangerous Substance, to wit: heroin, in violation of 21 U.S.C. § 841(a)(1).

A superseding indictment was returned on August 31, 2016 charging Petitioner and Alexander Campbell ("Campbell") with Count One: Conspiracy

to Distribute and Possess with Intent to Distribute Heroin, in violation of 21 U.S.C. §§ 841, 846. Count Two charged Petitioner with Possession with Intent to Distribute and Distribution of Heroin resulting in Death, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). Counts Three and Four charged Campbell with Possession with Intent to Distribute and Distribution of Heroin, in violation of 21 U.S.C. § 841.

A second superseding indictment was returned on November 17, 2016 charging Petitioner, Campbell, Antonio Shropshire ("Shropshire"), and Omari Thomas ("Thomas") with Count One: Conspiracy to Distribute and Possess with Intent to Distribute Heroin, in violation of 21 U.S.C. §§ 841, 846. Count Two charged Petitioner with Possession with Intent to Distribute and Distribution of Heroin resulting in Death, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). Count Three charged Shropshire with Possession with Intent to Distribute and Distribution of Heroin, in violation of 21 U.S.C. § 841. Counts Four and Five charged Campbell with Possession with Intent to Distribute and Distribution of Heroin, in violation of 21 U.S.C. § 841.

A third superseding indictment was returned on February 23, 2017 charging Petitioner, Campbell, Shropshire, Thomas, Glen Wells ("Wells"), and Momodu Gondo ("Gondo") with Count One: Conspiracy to Distribute and Possess with Intent to Distribute Heroin, in violation of 21 U.S.C. §§ 841, 846. Count Two charged Petitioner with Possession with Intent to Distribute and Distribution of Heroin resulting in Death, in violation of 21 U.S.C. §§

841(a)(1), (b)(1)(C). Count Three charged Shropshire with Possession with Intent to Distribute and Distribution of Heroin, in violation of 21 U.S.C. § 841. Counts Four and Five charged Campbell with Possession with Intent to Distribute and Distribution of Heroin, in violation of 21 U.S.C. § 841. Count Six charged Gondo with Possession with Intent to Distribute Heroin, in violation of 21 U.S.C. § 841. Count Seven charged Shropshire with Possession with Intent to Distribute Heroin and Cocaine, in violation of 21 U.S.C. § 841.

On October 16, 2017, a jury trial of Petitioner commenced.

On October 31, 2017, the jury returned a verdict convicting Petitioner of Counts One and Two of the third superseding indictment.

On April 6, 2018, Petitioner was sentenced as to Counts One and Two to 264 months imprisonment to run concurrent with one another, was placed on supervised release for five years, and was ordered to pay a special assessment of $200.00.

On April 12, 2020, an appeal to the judgment and sentence was timely filed.

On June 24, 2020, the United States Court of Appeals for the Fourth Circuit affirmed Petitioner's convictions and sentence.

On July 8, 2020, Petitioner filed a petition for rehearing *en banc* and the Fourth Circuit stayed the mandate.

On July 22, 2020, the Fourth Circuit denied the petition for rehearing *en banc*. The Fourth Circuit issued the mandate on July 31, 2020.

STATEMENT OF FACTS

Between December 27, 2011 and December 28, 2011, a nineteen-year-old woman, J.L., consumed one gram of heroin, smoked K2 spice, used clonazepam, and subsequently died.

J.L.'s acquaintance, Kenneth Diggins ("Diggins"), testified for the Government as a cooperating witness. Diggins testified that he purchased the heroin from Petitioner, and then provided it to J.L. to use.

At autopsy, toxicology screens were performed on J.L. which indicated that J.L. tested positive for Morphine, 0 6-Monoacetylmorphine, Dextromethorphan, Codeine, Quinine, 7-amino clonazepam, Acetaminophen, and Aspirin. J.L. was not tested for K2 spice or marijuana at autopsy, though Diggins testified to J.L.'s use of those substances December 27-28, 2011.

Toxicologist Barry Levine, M.D., testified that the inactive metabolite 7-amino clonazepam indicates that the clonazepam had been taken by J.L. Clonazepam is not stable post-mortem because the blood continues to break it down. Dr. Levine testified that 0 6- Monoacetylmorphine is a marker of heroin use. Because it was identified in the urine, it indicates that J.L. used heroin as opposed to having used morphine. Dr. Levine testified that the free morphine in the blood was 340 micrograms per liter of blood which indicates that the heroin was active, meaning that it came from usage. Dr. Levine testified that the positive read for Codeine could either mean that Codeine was used, or that it was a breakdown product from the heroin usage.

Dr. Levine testified that "[i]n the absence of any trauma or natural disease process, as indicated by the Medical Examiner, a free morphine concentration of 340 micrograms per liter can account for death."

Dr. Levine testified that he was not aware of any deaths from K2 spice without other contributing causes to death. Dr. Levine did not agree that K2 spice on its own could cause a person's death. However, Dr. Levine acknowledged that in the absence of knowing what other drugs might have been in J.L.'s system that were not tested for, Dr. Levine could not know the affects the K2 spice would have on J.L.'s body.

Medical Examiner Pamela E. Southall, M.D., testified as an expert in the area of forensic pathology. Dr. Southall testified that the cause of death of J.L. was "heroin intoxication." Dr. Southall testified that she arrived at this conclusion by relying on the morphine in combination with metabolite, 6-Monoacetylmorphine, in the urine, informing Dr. Southall that there was heroin in J.L.'s body.

Dr. Southall's conclusion that the cause of death for J.L. was heroin intoxication was based on the presence of heroin in J.L.'s bloodstream, and the absence of any other findings or causes of death.

Over objection, the Government asked Dr. Southall, "What was the *but-for cause of J.L.'s death*?" (Emphasis added). Dr. Southall answered, "The cause of death was heroin intoxication." The Government then asked, "And

put another way, *but for the heroin* that J.L. took, would she have lived?" (Emphasis added) Dr. Southall answered, "[Y]es. My opinion is yes."

On cross-examination, Dr. Southall testified that K2 spice was not tested for in this case at the time of autopsy, and that Dr. Southall did not know that J.L. had used K2 spice two times prior to her death. Dr. Southall testified that she had performed autopsies where K2 spice contributed to the cause of death. Dr. Southall testified that there is no way to predict how a particular person is going to react if K2 spice and heroin are within the body at the same time.

The district court instructed the jury that:

> The final element that the Government must prove beyond a reasonable doubt is that the drugs distributed by the defendant resulted in the death of another.
>
> In order to establish that the drugs distributed by the defendant resulted in the death of J.L., the Government must prove that J.L. died as a consequence of her use of the drugs that the defendant distributed on or about the date alleged in the indictment.
>
> This means that the Government must prove beyond a reasonable doubt that but for the use of the drugs that the defendant distributed, J.L. would not have died.
>
> The Government is not required to prove that the drugs distributed by the defendant to J.L. did not combine with other factors to produce death so long as the other factors alone would not have done so if, so to speak, the drugs distributed by the defendant were the straw that broke the camel's back.
>
> Put another way, the Government must prove that in the absence of the heroin, had J.L. not taken the heroin, she would not have died.

The district court declined to give Petitioner's three proposed jury instructions:

> 1. If there were multiple sufficient causes independently, but concurrently, that could have produced death, then you must be convinced beyond a reasonable doubt that but for heroin distributed by Antoine Washington that J.L. would not have died.
>
> 2. It is the Government's burden to prove beyond a reasonable doubt that there were not other concurring sufficient causes, other than the heroin that the government alleged was distributed by Antoine Washington, that could have caused the death of J.L.
>
> 3. The Government must prove, beyond a reasonable doubt, that the heroin found in J.L.[*sic*] system was the "but for" cause of J.L.'s death and not merely a contributing or a significant actor in producing the death of J.L.

The jury convicted Petitioner of Count One: Conspiracy to Distribute and Possess with Intent to Distribute Heroin, in violation of 21 U.S.C. §§ 841, 846, and Count Two: Possession with Intent to Distribute and Distribution of Heroin resulting in Death, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C).

Petitioner challenges his conviction as to Count Two.

REASONS FOR GRANTING THE PETITION

I. In *Burrage v. United States*, 571 U.S. 204 (2014), this Court "stopped short of accepting or rejecting a special rule for independently sufficient causes"[1] of death as an exception to the requirement of but-for causation pursuant to 21 U.S.C. § 841(b)(1)(C). The time has come for this Court to declare in no uncertain terms that the "special rule" exception is inapplicable to 21 U.S.C. § 841(b)(1)(C).

[1] *Gaylord v. United States*, 829 F.3d 500, 508, n. 3 (7th Cir. 2016).

Petitioner was convicted of distributing heroin which resulted in the death of J.L., in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). The "death results enhancement" of 21 U.S.C. § 841(b)(1)(C), provides that "if death or serious bodily injury results from the use of such substance" distributed by the person, the person shall be sentenced not less than twenty years.

In *Burrage v. United States*, 571 U.S. 204 (2014), this Court determined that the "death results enhancement" of 21 U.S.C. § 841(b)(1)(C), requires "but-for" causation to be established. *Id.* at 214 ("[I]t is one of the traditional background principles 'against which Congress legislate[s],' that a phrase such as 'results from' imposes a requirement of but-for causation.'") (internal citation omitted).

This Court focused on the plain language of the statute, reasoning that "Congress could have written § 841(b)(1)(C) to impose a mandatory minimum when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done," but that is not what Congress chose to do. *Id.* at 216. This Court noted that the "death results" enhancement is a criminal statute subject to the rule of lenity, further bolstering a finding that the statute's meaning should not deviate from its "ordinary, accepted meaning." *Id.* Lenity for a criminal defendant means that the causation standard would be higher, resulting in a "but for," rather than "contributing cause" standard. By requiring a "but for" causation standard, this Court

narrowed the scope of the statute to eliminate cases where a defendant's actions were a contributing cause, but not the "but for" cause of a person's death.

In response to the Government's argument that courts have not always required strict but-for causality, this Court said that "[t]he most common (though still rare) instance of this occurs when multiple sufficient causes independently, but concurrently, produce a result." *Id.* at 214 (internal citations omitted). This Court expressed that it "need not accept or reject the special rule developed for these cases, since there was no evidence here that Banka's heroin use was an independently sufficient cause of his death," and therefore, this Court did not opine on the validity of the exception. *Id.* at 215.

Since *Burrage*, lower courts have taken judicial liberties in interpreting but-for causation to be expanded to include the special rule exception that was commented upon in *dicta* by this Court. *See*, *e.g.*, *United States v. Snider*, 180 F.Supp.3d 780, 794, 796 (D. Or. 2016) ("The *Burrage* decision strongly implies, however, that the but-for standard ordinarily applicable under 21 U.S.C. § 841(b)(1)(C) either does not apply to or may encompass a situation when use of a drug distributed by a defendant is independently sufficient to cause death despite the presence of other concurrent sufficient causes…*Burrage* left open the possibility that a defendant may be guilty under 21 U.S.C. § 841(b)(1)(C) when use of a drug distributed by the defendant is one of several sufficient cause of death. The

Court is not aware of any Ninth Circuit case to the contrary."); *United States v. Volkman*, 797 F.3d 377, 395 (6th Cir. 2015) (explaining that the government was not required to prove that the drugs distributed by the defendant were "the *only* cause of death. On the contrary, but-for causation exists where a particular controlled substance, here, oxycodone – 'combines with other factors' – here, *inter alia*, diazepam and alprazolam – to result in death.").

In Petitioner's case, the Fourth Circuit found that "[a]lthough the Supreme Court determined that this special circumstance did not apply in Burrage's case, it ***made clear*** that the special circumstance ***would permit*** a jury to find causation when two sufficient causes independently and concurrently caused death." *United States v. Campbell*, 963 F.3d 309, 316 (4th Cir. 2020) (emphasis added);

Petitioner was aggrieved by the Fourth Circuit's reliance on the special rule *dicta* in *Burrage* because the Fourth Circuit used the *dicta* as grounds to affirm the district court's rejection of Petitioner's proposed jury instructions:

> [Petitioner] claims his proposed instructions are required by the Supreme Court's decision in *Burrage*. Not so. Though *Burrage* held that but-for causation was generally required to prove that death resulted, the Supreme Court acknowledged that but-for causation might *not* be required in the special circumstance where evidence establishes that multiple sufficient causes independently, but concurrently, caused death.

Id. at 316 (citing 571 U.S. at 214).

The Fourth Circuit recounted this Court's illustration about a victim who is simultaneously stabbed and shot by different assailants, *id.* (citing 571 U.S. at 314-15), and then concluded that

> [Petitioner's] first two proposed instructions seek to turn this special rule on its head. For example, his second proposed instruction suggests that, where two sufficient causes independently and concurrently cause death, a jury could *not* find causation is established: 'It is the government's burden to prove beyond a reasonable doubt that there were not other concurring sufficient causes.' But this misreads *Burrage*.

Id. (citing Petitioner's proposed instruction).

Petitioner avers that it is the Fourth Circuit that turned this Court's *dicta* in *Burrage* on its head by finding that this Court "made clear" that a special rule exception may satisfy traditional but-for causation requirements, when this Court did not reach a decision on the general propriety of an independent-cause exception to actual causation.

Respectfully, such an exception should not be applied to this criminal statute. A criminal statute is "subject to the rule of lenity," as this Court reasoned in *Burrage*, thus, requiring that any ambiguity in the text be interpreted in favor of the defendant. *Burrage*, 571 U.S. at 216 (citing *Moskal v. United States*, 498 U.S. 103, 107-08 (1990)).

After *Burrage*, this Court reminded in *Paroline v. United States*, 572 U.S. 434, 453 (2014), that courts should not "interpret[ ] criminal statutes where there is no language expressly suggesting Congress intended that approach." (citing *Burrage*, 571 U.S., at –, 134 S.Ct., at 890-91). This Court

cautioned that "[l]egal fictions developed in the law of torts cannot be imported into criminal [cases] and applied to their utmost limits without due consideration of these differences." *Id.* at 453. This Court characterized the "alternative causal tests" required under criminal restitution statutes as making use of "a kind of legal fiction or construct." *Id.* at 450.

Before *Burrage*, this Court likewise rejected alternative causal tests such as the "contributing factor" or "motivating factor" standard as a replacement for but-for causation. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009) (in order to qualify as the "but-for" cause, the alleged cause must be "the 'reason' that the employer decided to act.").

The "rare," "special rule," "exceptions" to but-for causation are not embodied in the text of 21 U.S.C. § 841(b)(1)(C), are not seen in other federal criminal statutes, and have not been held by this Court to be applicable to criminal cases.

In *Burrage*, the Government tried appealing to a less demanding line of authority in which an act is a cause-in-fact if it was a "substantial" or "contributing" factor in producing a given result. *Id.* at 215. But this Court expressly rejected this approach and concluded,

> We decline to adopt the government's permissive interpretation of § 841(b)(1). The language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed. Congress could have written § 841(b)(1)(C) to impose a mandatory minimum when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes…It chose

> instead to use language that imports but-for causality. 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.

Id. at 216 (internal citations omitted).

The language in *Burrage* should have made clear that the Government cannot merely prove that a substance was a contributory cause of death in order to attach the twenty year mandatory minimum death results enhancement.

In *United States v. Alvarado*, 816 F.3d 242 (4th Cir. 2016), the Fourth Circuit determined that

> [W]here the record might suggest that the decedent ingested heroin but might have died nonetheless from the effects of other substances, a court's refusal to clarify the phrase 'results from' might become a problem. In such an ambiguous scenario, a jury, without a clarifying instruction, might be allowed to apply the penalty enhancement under § 841(b)(1)(C) even if heroin was not a but-for cause of death. To foreclose such an erroneous finding, *the court would likely have an obligation to explain that a drug that plays a nonessential contributing role does not satisfy the results-from causation necessary to apply the enhancement.*

816 F.3d at 249 (emphasis added).

Yet, in the current case, the Fourth Circuit found that "[t]he district court's instructions made clear that the government had to prove that 'but for the use of the drugs that the defendant distributed, J.L. would not have died." 963 F.3d at 316. Failing to clarify the "results from" phrase "to explain

that a drug that plays a nonessential contributing role does not satisfy the results-from causation" standard, is contrary to *Alvarado* and to *Burrage*.

Petitioner's case presented evidence that could have allowed a jury to find that heroin was merely a contributing cause of death because the jury heard that J.L. had used clonazepam and K2 spice in combination with the heroin on the day that she died. The medical examiner testified that she had performed autopsies where K2 spice contributed to the cause of death and that there was no way to predict how a particular person is going to react if K2 spice and heroin are concurrently active within the body. The medical examiner acknowledged that K2 spice was not part of her differential diagnosis because she had no information at the time of autopsy that J.L. had used K2 spice twice on the day of her death, as J.L. had not been tested for K2 spice at autopsy.

In the six years since *Burrage* was decided, Congress did not re-write the statute to include an exception to "but-for" causation to permit substances that "contributed to," were a "substantial factor," or resulted in "two independently sufficient causes of death" to satisfy the "results from" language of the statute. The plain language of the statute continues to mandate that the defendant's conduct be a "but-for" cause of death, and precludes a finding of liability conditioned on an exception.

In the current case, although the Government did not request a special rule instruction, Petitioner's proposed instruction was requested

because the jury heard evidence that K2 spice and clonazepam may have been independently sufficient causes of death, or alternatively, that the heroin may have been a non-essential contributing cause of death.

Petitioner's proposed jury instructions one and two, would have instructed the jury that even if they find that there were multiple sufficient causes occurring concurrently – clonazepam, K2 spice, heroin, and possibly Codeine – that Petitioner could not be convicted unless the jury found that the heroin distributed by Petitioner was the but-for cause of death.

Petitioner was also denied proposed jury instruction three which would have instructed the jury that "[t]he Government must prove, beyond a reasonable doubt, that the heroin found in J.L. [*sic*] system was the 'but for' cause of J.L.'s death and not merely a contributing or a significant actor in producing the death of J.L."

Despite this Court's attempt to narrow the scope of the statute, the *Burrage* decision has led to little, if any, actual change in the statute's application. The causation requirement has remained broad.

This Court should now make clear that it is rejecting the special rule exception to but-for causation for this statute, reminding the lower courts that Congress may enact an exception to but-for causation, but the courts must not do so in its stead. Otherwise, lower courts will continue to water down strict but-for causality in death results prosecutions to allow a conviction where there may be evidence of two independently sufficient

causes of death, because of this Court's *dicta* in *Burrage*, or where there may be evidence that the drug was merely a contributing or substantial factor, contrary to the holding of *Burrage*.

II. *Burrage* does not require that the medical examiner use "but-for" terminology that tracks the language of the jury instructions.

During trial the Government asked the medical examiner, "So is it your opinion, Dr. Southall, that the but-for cause of J.L.'s death was heroin?" Defense counsel objected to this question arguing that the Government "is using the specific term that is found in the jury instructions and in the case law that has legal-conclusion significance." The Government responded that

> [T]he Supreme Court in *Burrage* specifically said that a Medical Examiner *has to testify* that the cause of death was --that the substance charged was the but-for cause of death. The ultimate issue is whether the defendant distributed the heroin, but, I mean, the Supreme Court's opinion requires that.

(Emphasis added).

The district court overruled the Petitioner's objection and the Fourth Circuit held that the district court acted within its discretion in permitting the medical examiner to testify that "but for the heroin J.L. took [she would] have lived." 963 F.3d at 315.

If the Fourth Circuit's opinion is upheld, it will permit the Government in every death results prosecution in that Circuit to by-pass the jury's application of the facts to the law, by having an expert witness testify that but-for causation has been established, thereby crossing "[t]he line between a permissible opinion on an ultimate issue and an impermissible legal

conclusion." *Id.* at 314 (citing *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006)). The Fourth Circuit's holding makes no attempt to avoid a response that constitutes a mere legal conclusion, and instead creates a blanket rule that is sure to smother the jury's independent fact-finding in these areas.

Petitioner submits that this Court did not specifically say that a medical examiner "has to testify" to the specific terms found in the jury instructions which have legal-conclusion significance. Though the Government must prove but-for causation, that does not permit the Government to simply use its witness to parrot the jury instructions.

Suitable alternatives to "but for" language include phrases like "because of," "based on," or "had the decedent not consumed heroin, would she have lived?"

Consideration by this Court is necessary to determine whether *Burrage requires* the question to be posed to the medical examiner using the terminology of the jury instructions, or whether, instead, the better practice is to avoid a response that constitutes a mere legal conclusion.

CONCLUSION

Petitioner respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted,

/s/ Megan E. Coleman

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Date: October 19, 2020