

IN THE SUPREME COURT OF THE UNITED STATES

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MARTIN G. LEWIS, PETITIONER

v.

DEWAYNE HENDRIX, WARDEN

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained \* \* \* unless it \* \* \* appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e).

The question presented is whether petitioner is entitled to seek habeas corpus relief under Section 2241 based on his claim that his conviction for murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1), was invalid under Burrage v. United States, 571 U.S. 204 (2014), which construed the death-resulting provision in the federal drug trafficking statute, 21 U.S.C. 841(b)(1)(C), and concluded that it requires proof that drug use was "a but-for cause of the death or injury," 571 U.S. at 219.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. Lewis, No. 00-cr-1118 (May 15, 2003)  
(judgment)

United States v. Lewis, No. 00-cr-1118 (May 8, 2006) (judgment  
after remand)

Lewis v. United States, No. 07-cv-5678 (Sept. 18, 2012) (order  
denying motion to vacate)

Lewis v. United States, No. 07-cv-5678 (Nov. 3, 2015) (order  
denying motion to reopen)

United States v. Lewis, No. 00-cr-1118 (Sept. 24, 2020)  
(motion for compassionate release; pending)

United States District Court (M.D. Fla.):

Lewis v. Warden, No. 16-cv-508 (Dec. 12, 2016)

United States District Court (D. Or.):

Lewis v. Salazar, No. 18-cv-1091 (Dec. 20, 2018)

United States Court of Appeals (2d Cir.):

United States v. Riggi et al., Nos. 03-1235, 03-1303, 03-  
1327, 03-1334 (Dec. 6, 2004) (opinion and order  
remanding for resentencing)

Lewis v. United States, No. 12-4767 (Apr. 30, 2013) (order  
denying certificate of appealability)

Lewis v. United States, No. 15-30 (Mar. 9, 2015) (order  
denying authorization to file second or successive  
motion to vacate)

Lewis v. United States, No. 15-3902 (Feb. 26, 2016) (order  
denying certificate of appealability and dismissing  
appeal)

Lewis v. United States, No. 16-935 (Apr. 25, 2016) (order  
denying authorization to file second or successive  
motion to vacate)

Lewis v. United States, No. 17-2120 (July 28, 2016) (order denying authorization to file second or successive motion to vacate)

United States Court of Appeals (9th Cir.):

Lewis v. Salazar, No. 19-35018 (Nov. 13, 2020)

United States Court of Appeals (11th Cir.):

Lewis v. Warden, No. 17-10434 (Dec. 13, 2017)

Supreme Court of the United States:

Lewis v. United States, No. 13-6974 (Nov. 18, 2013)

Lewis v. United States, No. 15-9402 (Jan. 11, 2016)

IN THE SUPREME COURT OF THE UNITED STATES

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No. 20-7863

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 829 Fed. Appx. 239. The order of the district court (Pet. App. 5-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2020. A petition for rehearing was denied on January 22, 2021 (Pet. App. 16). The petition for a writ of certiorari was filed on April 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

In 2003, following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); one count of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); and one count of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). See Pet. App. 6. The district court sentenced him to life imprisonment. See ibid. The Second Circuit affirmed petitioner's convictions, but vacated his sentence in light of United States v. Booker, 543 U.S. 220 (2005). See Pet. App. 7. On remand, the district court again imposed a life sentence, and the Second Circuit affirmed. See ibid.

In 2007, petitioner filed a motion to vacate his convictions under 28 U.S.C. 2255, which the district court denied. See Pet. App. 7. Petitioner then moved for a certificate of appealability in the Second Circuit, and the court of appeals denied petitioner's motion. See ibid. This Court denied a petition for a writ of certiorari. 571 U.S. 1035.

In 2015 and 2016, petitioner requested authorization from the Second Circuit to file second or successive Section 2255 motions to assert claims based on Burrage v. United States, 571 U.S. 204 (2014). See Pet. App. 7-9. The Second Circuit denied both applications, see ibid., and this Court denied certiorari, 136 S. Ct. 2499.

In 2016, petitioner filed an application for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Middle District of Florida, where he was incarcerated. See Pet. App. 9. The district court denied petitioner's application, and the Eleventh Circuit dismissed his appeal from that order. See id. at 9-10.

In 2019, after being transferred to a federal penitentiary in Oregon, petitioner filed a second application for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the District of Oregon. Pet. App. 10. The district court dismissed the petition, id. at 10-15, and the Ninth Circuit affirmed, id. at 1-4.

1. In the early 2000s, petitioner was a member of the DeCavalcante crime family in New York and New Jersey. See Pet. App. 5; Massa v. United States, No. 00-cr-01118, 2011 WL 13193171, at \*1 (S.D.N.Y. Feb. 24, 2011) (describing background of DeCavalcante crime family in the course of addressing a motion for collateral review filed by one of petitioner's co-defendants). The DeCavalcante family was engaged in a wide range of criminal activities, including extortion, loansharking, illegal bookmaking, trafficking in stolen property and counterfeit goods, theft, robbery, and securities fraud. Massa, 2011 WL 13193171, at \*1. In 2002, petitioner was paid \$10,000 to murder Joseph Conigliaro, a member of a rival crime family. Pet. App. 5; C.A. E.R. 3-4. Petitioner shot Conigliaro multiple times in the head, neck, and

torso. Pet. App. 5-6. Conigliaro was still conscious when he was admitted to the hospital, but died later that day. Id. at 6.

A federal grand jury in the Southern District of New York indicted petitioner on one count of conspiring to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); one count of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); and one count of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). See Pet. App. 6. The grand jury also charged several co-conspirators in the same indictment. Ibid.

At trial, the government introduced surreptitiously recorded conversations in which petitioner described the murder. See 2009 WL 3029335, at \*3. In the recordings, petitioner said that he shot the victim "six times . . . in the face[;] . . . I didn't miss once." Ibid. (citation and internal quotation marks omitted); cf. Lewis, 2009 WL 3029335, at \*7 (noting that the autopsy revealed the victim was shot five times). Petitioner said that he used the money he received for the murder to buy furniture. Ibid. And he admitted that he would have been "on the run" if the victim had lived. Id. at \*6. In his defense, petitioner claimed that he was not part of the DeCavalcante crime family, that he did not fire the shots, and that he had boasted about the murder because he did not want other members of the conspiracy to think that he collected money for a murder committed by someone else. Id. at \*7, \*10, \*12.

Petitioner also sought to argue at trial that he could not be guilty of murdering Conigliaro because the primary cause of Conigliaro's death was "pneumopericardia," a medical condition whereby air enters the pericardium area around the heart. Pet. App. 6; C.A. E.R. 4, 106-107. According to petitioner's proposed expert witness, Conigliaro developed pneumopericardia at the hospital as a result of the interaction between a pre-existing condition and the medical staff's insertion of a breathing tube to resuscitate him after he was shot. Ibid. The proposed expert would also have testified that the procedure was not gross malpractice or negligence and that it would not have occurred if Conigliaro had not been shot. Pet. App. 6; C.A. E.R. 107. The proposed expert could not pinpoint a single cause of death and believed that Conigliaro died of a variety of causes. Pet. App. 6; C.A. E.R. 4, 107. The district court declined to admit testimony from the proposed expert, finding that "no reasonable juror could have reasonable doubt on the issue of causation." Pet. App. 6.

The jury found petitioner guilty on all three counts, and the district court sentenced him to life imprisonment. Pet. App. 6. The Second Circuit affirmed petitioner's convictions, rejecting his claim that the government had engaged in prosecutorial misconduct during closing argument. See 117 Fed. Appx. 142, 146. In the same unpublished opinion, the Second Circuit also rejected a claim, advanced by one of petitioner's co-defendants but not

petitioner, that the district court had erred in disallowing the defense argument that Conigliaro's negligent medical treatment caused Conigliaro's death. Id. at 144. The court of appeals explained that, for purposes of a charge of murder in aid of racketeering in violation of 18 U.S.C. 1959(a)(1), a defendant is deemed responsible for the proximate consequences of his actions. 117 Fed. Appx. at 145-146. The Second Circuit then vacated petitioner's sentence in light of Booker, supra, which was decided while petitioner's appeal was pending. See Pet. App. 7.

On remand, the district court again sentenced petitioner to life imprisonment, and the Second Circuit affirmed. See Pet. App. 7.

2. In 2007, petitioner filed his first motion to vacate his convictions under 28 U.S.C. 2255, arguing that he had received ineffective assistance of counsel. Pet. App. 7; 2009 WL 3029335. The district court denied petitioner's motion on the merits and declined to issue a certificate of appealability. 2009 WL 3029335, at \*1. Petitioner attempted to appeal the district court's order, but the Second Circuit denied his request for a certificate of appealability and dismissed his appeal. Pet. App. 7; 12-4767 C.A. Doc. 28 (Apr. 30, 2013). This Court denied a petition for a writ of certiorari. 571 U.S. 1035.

In 2014, this Court decided Burrage v. United States, 571 U.S. 204, which involved a provision of the Controlled Substances Act that enhances the statutory sentencing range for a defendant

who unlawfully distributes certain controlled substances when "death or serious bodily injury results from the use of such substance." 21 U.S.C. 841(a)(1) and (b)(1)(A)-(C); see Burrage, 571 U.S. at 206. The Court explained that "the 'death results' enhancement \* \* \* must be submitted to the jury and found beyond a reasonable doubt," 571 U.S. at 210 (citing Alleyne v. United States, 570 U.S. 99, 115 (2013), and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)), and 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," the death-resulting enhancement requires proof that the victim's use of the drug was "a but-for cause of the death or injury." Id. at 218-219.

In 2015, petitioner filed a pro se motion seeking authorization to file a second or successive Section 2255 motion, contending that he was actually innocent of murder on the theory that his actions did not cause Conigliaro's death under the standard announced in Burrage. 15-30 C.A. Doc. 6, at 1-3 (Feb. 10, 2015). The government did not file a response, and the Second Circuit denied petitioner's request, stating that Burrage "did not announce a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court within the meaning of [28 U.S.C.] 2255(h)(2)." 15-30 C.A. Doc. 25, at 1-2 (Apr. 30, 2015); see id. at 2 (stating that Burrage "was an application of the Supreme Court's holdings in Alleyne v. United States, [570

U.S. 99] (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000), neither of which have been made retroactive to cases on collateral review").

The following year, petitioner, acting pro se, again sought authorization from the Second Circuit to file a second or successive Section 2255 motion. This time, petitioner argued that this Court's decision in Montgomery v. Louisiana, 577 U.S. 190 (2016) -- which held that the bar on mandatory life imprisonment for juvenile offenders announced in Miller v. Alabama, 567 U.S. 460 (2012), constituted "a substantive rule of constitutional law," Montgomery, 577 U.S. at 208 -- required that Burrage be applied retroactively to his case. 16-935 C.A. Doc. 2, at 5-7 (Mar. 28, 2016). The Second Circuit again denied petitioner's request, explaining that Montgomery "did not discuss Burrage or the rules of law announced in that decision" and thus "did not make Burrage retroactive." 16-935 C.A. Doc. 17, at 1 (Apr. 25, 2016). Petitioner then filed a petition for a writ of certiorari, which this Court denied. 136 S. Ct. 2499 (2016).\*

3. Later in 2016, petitioner filed a pro se application for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Southern District of Florida, the district

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\* In 2017, the Second Circuit separately denied petitioner's request for authorization to file a second or successive Section 2255 motion asserting a claim under Johnson v. United States, 576 U.S. 591 (2015). See 17-2120 C.A. Doc. 26, at 1-2 (July 28, 2017). That claim is not at issue in the present petition for a writ of certiorari.

in which he was confined at the time. See 16-cv-508 D. Ct. Doc. 1, at 4-5 (Aug. 8, 2016). He again asserted that Burrage created a new constitutional right that would have allowed him to present the defense that he did not cause Conigliaro's death. Id. at 6. The district court dismissed the petition, stating that petitioner "pointed to no pertinent Supreme Court or Eleventh Circuit decision that applies to his case retroactively on collateral review." 16-cv-508 D. Ct. Doc. 3, at 5 (Nov. 7, 2016). Petitioner moved for reconsideration, which the district court denied. 16-cv-508 D. Ct. Doc. 7, at 1 (Dec. 12, 2016).

On appeal, the Eleventh Circuit denied petitioner's motion to proceed in forma pauperis. 17-10434 Order 3 (Nov. 1, 2017). The court explained that a federal prisoner generally cannot challenge his conviction or sentence through an application for a writ of habeas corpus under 28 U.S.C. 2241 unless a motion for postconviction review under 28 U.S.C. 2255 would be "inadequate or ineffective to test the legality of his detention," 28 U.S.C. 2255(e), and that under circuit precedent, "'a change in caselaw does not make a motion to vacate a prisoner's sentence inadequate or ineffective to test the legality of his detention'" within the meaning of 28 U.S.C. 2255(e). 17-10434 Order 3 (Nov. 1, 2017) (quoting McCarthan v. Director of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1080 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017)). Accordingly, the Eleventh Circuit classified petitioner's appeal as "frivolous." Id. at 4. The Eleventh

Circuit later dismissed the appeal for want of prosecution. 17-10434 Order 1 (Dec. 5, 2017).

4. In January 2019, after being transferred to a federal correctional facility in Oregon, petitioner filed a second habeas application under 28 U.S.C. 2241 in the District of Oregon. Pet. App. 5. Petitioner argued that the filing was different from his prior Section 2241 application because a separate district court in the Ninth Circuit had concluded, in an unpublished order in a case involving a defendant who was subject to enhanced penalties under 21 U.S.C. 841, that Burrage applied retroactively on collateral review. See Pet. App. 11-12 (discussing Terry v. Shartle, No. CV-15-107, 2017 WL 2240970 (D. Ariz. May 23, 2017)).

Applying Ninth Circuit precedent, the district court rejected petitioner's claim and dismissed his habeas corpus application, determining that "in light of the particular procedural history of [petitioner's] case, he fail[ed] to demonstrate that he has not had an unobstructed procedural opportunity to present his claim of innocence, and therefore he is unable to pass through the 'escape hatch' of § 2255(e)." Pet. App. 14; see id. at 12-13 (citing petitioner's filings in the Second and Eleventh Circuits and the Middle District of Florida). The court declined to address whether Burrage was retroactive on collateral review or to address the merits of petitioner's claim. Ibid.

The Ninth Circuit affirmed in an unpublished opinion. Pet. App. 1-5. The court stated that, under circuit precedent, Section

2255 "provides an 'inadequate or ineffective' remedy, allowing a petitioner to proceed under § 2241, when the petitioner: '(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim.'" Id. at 3 (quoting Harrison v. Ollison, 519 F.3d 952, 959 (9th Cir.), cert. denied, 555 U.S. 911 (2008)). But it reasoned that here, "[b]ecause [petitioner] ha[d] already had multiple opportunities to bring his Burrage claim," he could not "show that his remedy under § 2255 is inadequate or ineffective to test the legality of his detention." Id. at 4.

#### ARGUMENT

Petitioner renews his contention (Pet. 12-25) that the saving clause in 28 U.S.C. 2255(e) permits him to challenge his conviction for murder in aid of racketeering, in violation of 18 U.S.C. 1959(a), in an application for a writ of habeas corpus under 28 U.S.C. 2241, on the theory that his shooting of the victim did not cause the victim's death under the causation standard applied to the drug prosecution in Burrage v. United States, 571 U.S. 204 (2014). Further review is unwarranted. Although a circuit conflict exists on the scope of the Section 2255(e) saving clause, this Court has repeatedly denied petitions for writs of certiorari asking the Court to resolve that conflict, including a recent petition filed by the government, see United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420). The unpublished decision below does not alter or deepen the conflict that this Court has

repeatedly declined to review, and the same considerations that would have supported denial of the petitions in Wheeler and other cases would apply here as well. In any event, this case does not provide a suitable vehicle to resolve that conflict because petitioner would not be entitled to pursue his habeas petition even under the most prisoner-favorable interpretation of the saving clause adopted by the courts of appeals.

1. Under the saving clause, a federal prisoner may file a petition for a writ of habeas corpus only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). Two courts of appeals have determined that Section 2255(e) does not permit habeas relief based on an intervening decision of statutory interpretation. See McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1085-1092 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017); Prost v. Anderson, 636 F.3d 578, 584, 590 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012).

In contrast, nine other courts of appeals -- including the court below -- have held that, in at least some circumstances, the saving clause of Section 2255(e) allows a federal prisoner to file a habeas application under Section 2241 based on a retroactive decision of statutory construction. See United States v. Barrett, 178 F.3d 34, 50-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F.3d 361, 375-378 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251-252 (3d Cir. 1997); In

re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); Reyes-Quena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); Wooten v. Cauley, 677 F.3d 303, 306-307 (6th Cir. 2012); In re Davenport, 147 F.3d 605, 609-612 (7th Cir. 1998); Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); In re Smith, 285 F.3d 6, 7-8 (D.C. Cir. 2002); see also Abdullah v. Hedrick, 392 F.3d 957, 960-964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005). Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally all take the view that the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention," 28 U.S.C. 2255(e), if (1) an intervening decision of this Court has narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is not criminal; and (2) controlling circuit precedent squarely foreclosed the prisoner's claim at the time of his trial (or plea), appeal, and first motion under Section 2255. See, e.g., Stephens, 464 F.3d at 895; Reyes-Quena, 243 F.3d at 902-904; Jones, 226 F.3d at 333-334; Davenport, 147 F.3d at 608-612.

Notwithstanding that circuit conflict and its importance, this Court has recently and repeatedly declined to review the issue, including when raised by the government in Wheeler, supra (No. 18-420). E.g., Jackson v. Hudson, No. 20-911 (June 14, 2021); Davis v. Quay, No. 20-6448 (May 17, 2021); Williams v. Coakley,

141 S. Ct. 908 (2020) (No. 20-5172); Cray v. Warden, FCI Coleman, 141 S. Ct. 908 (2020) (No. 20-5132); Hueso v. Barnhart, 141 S. Ct. 872 (2020) (No. 19-1365); Higgs v. Wilson, 140 S. Ct. 934 (2020) (No. 19-401); Walker v. English, 140 S. Ct. 910 (2020) (No. 19-52); Quary v. English, 140 S. Ct. 898 (2020) (No. 19-5154); Jones v. Underwood, 140 S. Ct. 859 (2020) (No. 18-9495); Dyab v. English, 140 S. Ct. 847 (2020) (No. 19-5241). The circuit conflict does not warrant this Court's review in this case any more than it did when the government filed the petition in Wheeler.

2. In any event, this case would be a poor vehicle in which to review that conflict because, for at least three reasons, petitioner would not be entitled to relief under any circuit's view of the saving clause.

a. First, as noted, even the circuits that construe the saving clause most broadly generally have required a prisoner to show that a subsequently abrogated circuit precedent foreclosed his claim at the time of his conviction, direct appeal, and first motion under Section 2255. See, e.g., Allen, 950 F.3d at 1190; Wheeler, 886 F.3d at 429-434; Hill, 836 F.3d at 595-596; Brown, 696 F.3d at 640-641; Stephens, 464 F.3d at 895. Petitioner cannot satisfy that requirement.

Petitioner has not identified any Second Circuit precedent that foreclosed, at any relevant time, the claim he now seeks to assert in his Section 2241 application. Burrage 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," the death-results enhancement in 21 U.S.C. 841(b) requires proof that the victim's use of the drug was "a but-for cause of the death or injury." 571 U.S. at 218-219. Even assuming that holding could be imported into petitioner's racketeering murder case, his Burrage-based claim would, by analogy, succeed only if his repeated shooting of Conigliaro was neither "a but-for cause" nor an independently sufficient cause of Conigliaro's death. Id. at 219.

Petitioner, however, has not identified any Second Circuit precedent that foreclosed his proposed interpretation of the contours of racketeering murder at the time of his conviction, sentencing, resentencing, direct appeal, or first Section 2255 motion. He cites no precedential holding by the Second Circuit construing murder in aid of racketeering in violation of 18 U.S.C. 1959(a)(1) to apply to conduct that was neither a but-for cause nor an independently sufficient cause of the victim's death.

b. Second, even circuits that have construed the saving clause broadly require prisoners to show that they now stand convicted of conduct that is no longer criminal as a result of an intervening precedential decision. See, e.g., Stephens, 464 F.3d at 898; Reyes-Quena, 243 F.3d at 902-904; Jones, 226 F.3d at 333-334; Davenport, 147 F.3d at 608-612. Petitioner has failed to make that showing as well.

Petitioner points to Burrage as the sole intervening precedential decision supplying a basis for his claim. Pet. i. As noted, however, Burrage addressed exclusively the death-resulting provision in the federal drug trafficking statute, 21 U.S.C. 841, which increases the statutory sentencing range "if death or serious bodily injury results from the use of such substance." 21 U.S.C. 841(b) (1) (A)-(C). Petitioner, in contrast, was convicted of committing murder in aid of racketeering, in violation of 18 U.S.C. 1959(a) (1). That provision makes it a federal crime to commit a racketeering-related "murder[] \* \* \* in violation of the laws of any State or the United States." 18 U.S.C. 1959(a) (1).

Petitioner nowhere explains how this Court's decision in Burrage altered the interpretation of 18 U.S.C. 1959(a) (1) underlying petitioner's conviction. By its terms, this Court's decision in Burrage did not purport to alter the federal-law definition of murder as "the unlawful killing of a human being with malice aforethought," 18 U.S.C. 1111(a), which neither uses nor references Section 841's "death \* \* \* results" formulation. Nor did this Court's statutory construction of Section 841(b) (1) in Burrage alter the scope of murder under the law of the State in which petitioner committed his crime (New York), as incorporated for purposes of a racketeering prosecution. See 117 Fed. Appx. at 144 (discussing state law applicable to petitioner's offense). And while the Second Circuit has held that Section 1959(a) also

requires a killing to satisfy the generic definition of murder, see United States v. Carrillo, 229 F.3d 177, 183-184 (2000), neither Section 1959(a)(1) nor the Model Penal Code's definition of murder use the "death \* \* \* results" formulation that this Court construed in Burrage. See Model Penal Code § 210.1 (2009) ("(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being[;] (2) Criminal homicide is murder, manslaughter or negligent homicide."). Accordingly, petitioner cannot show that he stands convicted of conduct that Burrage has established is not a crime.

c. Third, petitioner has made factual concessions that affirmatively establish that the but-for causation requirement that he proposes would not change the result in this case. He has never meaningfully contested that his gunshots were a but-for cause of the victim's death, and he could not establish his actual innocence on that basis now. See Bousley v. United States, 523 U.S. 614, 622 (1998) (stating that in order to "establish actual innocence" for purposes of collateral review, a prisoner "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him") (citation and internal quotation marks omitted).

At trial, petitioner sought to argue that he had not murdered Conigliaro because the "primary cause" of Conigliaro's death was a "pneumopericardia" that occurred in the hospital while the victim

was being treated for the gunshot wounds. Pet. 8 (citation and internal quotation marks omitted). In the course of asserting that argument, petitioner proffered testimony from a proposed expert that Conigliaro's "forced air procedure" (i.e., intubation) "would not have otherwise occurred if Mr. Conigliaro had not been hospitalized as a result of being shot." C.A. E.R. 107. In other words, while petitioner contended that the multiple gunshots he inflicted on Conigliaro shortly before Conigliaro died were not the primary cause of death, he confirmed that those gunshots were a but-for cause of death.

Petitioner asserts (Pet. 6) that "neither the indictment nor the jury instructions required that [his] actions be proven as the but-for cause of the death of the deceased." But that complaint, if true, would point at most to a potential defect in the indictment or instructional error. Even the circuits that construe the saving clause most broadly have limited habeas relief to prisoners who can demonstrate actual innocence. See, e.g., Stephens, 464 F.3d at 898 ("In this circuit, a claim of actual innocence for purposes of the escape hatch of § 2255 is tested by the standard articulated by the Supreme Court in [Bousley].").

3. Petitioner contends (Pet. 13-15) that the Second Circuit's denials of authorization to file second or successive Section 2255 motions rendered Section 2255 "inadequate or ineffective to test the legality of [petitioner's] detention," 28 U.S.C. 2255(e), asserting (Pet. 4) that the government has taken

"inconsistent legal positions" regarding the retroactive application of Burrage. That contention lacks merit and does not warrant further review.

Petitioner's lack of success in seeking relief under Section 2255 is not attributable to "inconsistent legal positions" (Pet. 4) on the part of the government. As an initial matter, the government played no part in the Second Circuit's denial of petitioner's applications to file second or successive Section 2255 motions raising his current Burrage-based argument. The Second Circuit denied petitioner's motions without requesting or receiving a response from the government. See No. 15-30 (docket sheet); No. 16-935 (docket sheet).

More generally, no inconsistency exists between the Second Circuit's determination and the position the government has taken as to the retroactivity of Burrage in other cases. As petitioner observes (Pet. 13-14), the Department of Justice has taken the position that Burrage announced a substantive rule that applies retroactively on collateral review to cases involving Section 841's death-resulting enhancement. See, e.g., 19-35018 Gov't Letter (Aug 31, 2020). But the government's view that Burrage is retroactively applicable in certain cases involving the same statute that was at issue in Burrage itself in no way establishes that Section 2255 is "inadequate or ineffective to test the legality of [petitioner's] detention," 28 U.S.C. 2255(e), based on

his conviction for committing murder in aid of racketeering in violation of 18 U.S.C. 1959(a)(1). Cf. pp. 15-17, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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