

No. 20-7863

IN THE SUPREME COURT
OF THE UNITED STATES

MARTIN G. LEWIS,

Petitioner,

v.

DEWAYNE HENDRIX,

Respondent.

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

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The government’s brief demonstrates the urgent need for the Court to grant the writ of certiorari to address the government’s unfair procedural advantage from taking inconsistent legal positions under the “inadequate or ineffective” standard of 28 U.S.C. § 2255(e). The government’s rewrite of the question presented fails to mention the government’s inconsistent positions and the consequent effect on the adequacy and effectiveness of prior litigation to determine the legality of the conviction. The government’s exploitation of inconsistent legal positions, in the context of a deep circuit split, warrants this Court’s attention. While brushing off its procedural advantage, the

government focuses its brief on merits questions never reached by the courts below. This case is about the threshold for consideration of a habeas corpus petitioner's claims, not the merits. The Court should grant the writ of certiorari to resolve the plain statutory meaning of "inadequate or ineffective" in the context of addressing the government's unfair procedural advantage from taking inconsistent legal positions.

A. The Government Took Inconsistent Legal Positions Resulting In An Unfair Procedural Advantage.

After its lengthy argument on the merits, the government only briefly addressed its inconsistent legal positions, claiming, first, the government did not participate in the summary rulings in the Second and Eleventh Circuits, and, second, "no inconsistency exists between the Second Circuit's determination and the position the government has taken as to retroactivity." Brief in Opposition at 19. The first claim is irrelevant and the second is factually wrong.

First, as reflected in the petition and opposition, the Second and Eleventh Circuits dealt summarily with the petitioner's pleadings, denying relief because procedural rules are not retroactive. The fact that the government played a passive role in the petitioner's earlier litigation is beside the point because the government is now invoking rulings that it admits were wrong to block his present habeas corpus petition. Thus, the petitioner is relying on the inconsistency between the government's admission in other cases and circuits that *Burrage v. United States*, 571 U.S. 204 (2014), is retroactive, and its reliance on the Second and Eleventh Circuit's ruling that *Burrage* is not retroactive. Prior litigation

cannot be adequate or effective if it relied on a position the government admits is wrong—whether or not the government procured the prior ruling.

Second, the government claim that “no inconsistency exists” is contradicted by the government’s adoption of the basis for dismissal of Mr. Lewis’s prior litigation. The government consistently asserted that the prior litigation provided an unobstructed procedural shot and was, therefore, adequate and effective to determine the legality of the petitioner’s conviction. In doing so, the government validated treatment of *Burrage* as a procedural rule.

The Second Circuit, in a ruling adopted by the Eleventh Circuit, summarily dismissed Mr. Lewis’s case because “*Burrage* did not announce a new rule of constitutional law made retroactive by the Supreme Court on collateral review.” In support, the court relied on the non-retroactive *procedural* decision of constitutional law of *Alleyne v. United States*, 570 U.S. 99 (2013). The prohibition on retroactivity regarding “a new rule of constitutional law” applies only to *procedural* rules under 28 U.S.C. § 2244(d)(1)(C). In contrast, Mr. Lewis argued that *Burrage* is a substantive ruling, with retroactive effect, relying on this Court’s precedent in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

In arguing that the government has not taken inconsistent positions, the government overlooks the critical distinction between procedural and substantive rules recently noted in *Edwards v. Vannoy*:

By contrast [to procedural rules], a new *substantive* rule—for example, a rule that particular conduct cannot constitutionally be criminalized—usually applies retroactively on federal collateral review. The parties here agree, as

do we, that the rule announced in *Ramos* [*v. Louisiana*, 140 S. Ct. 1390, 1404 (2020)] is procedural. The *Ramos* rule affects “only the manner of determining the defendant’s culpability,” not the “range of conduct or the class of persons that the law punishes.”

141 S. Ct. 1547, 1555 n.3 (2021) (emphasis in original) (citing *Welch v. United States*, 578 U. S. 120, 128-29 (2014)), and quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

In the present case, the government argued in the district court that the earlier litigation provided adequate and effective opportunities for relief; the district court then denied relief based on prior litigation that “specifically stated that *Burrage* does not apply retroactively,” finding that the earlier litigation provided an unobstructed procedural shot for the claim.

Appendix 13.

On appeal, the government continued to argue that prior Second and Eleventh Circuit rulings, which depended on *Burrage* being a procedural decision, foreclosed further review because Mr. Lewis had the opportunity to litigate his claim. *Lewis v. Salazar*, Answering Brief, No. 19-35018, docket number 30, at 10-11 (9th Cir. Mar. 23, 2020). While acknowledging that it had on some occasions conceded *Burrage*’s retroactivity, the government cited an unpublished case finding *Burrage* was a procedural decision (*Dixon v. Warden of FCI Schuylkill*, 647 F. App’x 62 (3rd Cir. 2016)), and relied on the procedural case of *Alleyne*, just as did the Second and Eleventh Circuit. *Id.* at 12-13. The government defended the dismissal because the petitioner had an adequate and effective opportunity to prevail based on the Second and Eleventh Circuit’s treatment of his claim as procedural rather than substantive.

In contrast, the government's repeated concessions in courts such as the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits that *Burrage* applies retroactively can only be based on its being a substantive decision. Petition at 13-14. As the Court noted in *Edwards*, no rule of constitutional criminal *procedure* operates retroactively except the right to counsel announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963). 141 S. Ct. at 1557. The concessions based on *Burrage*'s substantive effect are in irreconcilable conflict with the government's arguments in the present case that rulings in the Second and Eleventh Circuits, based on *Burrage* being a procedural rule, provided adequate and effect review of Mr. Lewis's claims. The government's attempt to slip out of the conflict – claiming the decision is only substantive as to drug crimes – asks the Court to resolve the merits of Mr. Lewis's claims instead of recognizing the stark reality: the government even in this Court continues to seek a procedural advantage based on its inconsistent positions.

B. The Government Devotes Most Of Its Brief To Merits Arguments That Should Be Resolved By The District Court In The First Instance.

The bulk of the government's brief argues that Mr. Lewis should not win on the merits of his claims. Brief in Opposition at 14-18. But this Court is a court of review, not first view. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (when an issue remained unaddressed by the court below, "mindful that we are a court of review, not of first view, we do not consider them here"). By successfully arguing that the Second and Eleventh Circuit proceedings prevented consideration of Mr. Lewis's petition, the government

succeeded in avoiding the merits arguments that it now makes in this Court as reasons to deny the writ.

The merits of Mr. Lewis’s claims, presented pro se in the district court, should be considered in the first instance in the district court with the assistance of counsel. Based on the government’s invocation of the “inadequate or ineffective” requirement, both the district court and the court of appeals barred consideration of the petition for failure to meet that mandatory prerequisite for consideration of claims, finding lack of jurisdiction. Appendix at 4, 10. Therefore, the courts below never addressed the merits of the claim that *Burrage*, through its reasoning, required but-for causation beyond the scope of the Controlled Substances Act. This Court has repeatedly and emphatically rejected the government’s contention that only this Court’s narrow holdings are binding: “It is usually a judicial decision’s reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.” *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020); *see also Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part) (“In the American system of stare decisis, the result and the reasoning each independently have precedential force.”). Lower courts are “bound not only by the holdings of higher courts’ decisions but also by their ‘mode of analysis.’” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989)).

Application of *Burrage*’s reasoning and mode of analysis to Mr. Lewis’s claim will provide bases for relief when the district court finally addresses the merits. This Court’s reasoning in *Burrage* involved detailed descriptions of causation from the common law

and the principles of statutory construction that generally apply to criminal statutes. 571 U.S. at 210-19. The Court even illustrated its reasoning for adopting but-for causation using examples from homicide scenarios. *Id.* at 211. The contemporaneous interpretation of the relevant statutes at the time of trial applied the much broader “contributes-to” approach instead of the “but-for” standard later adopted by this Court. Because the conviction was based on an untenably broad view of causation, and no reasonable juror would have convicted Mr. Lewis based on the correct, narrower standard, Mr. Lewis raised a valid claim of actual innocence of the offense of conviction.

The government’s factual arguments should be rejected because, having succeeded in preventing any lower court from reaching the merits, the government must assume that the facts asserted in the petition and reasonable inferences drawn from them are true in determining “if they plausibly suggest an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *see Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (reversing dismissal of civil rights action for failure to construe all inferences in plaintiff’s favor on summary judgment motion).

The question raised before this Court does not involve the facts of Mr. Lewis’s underlying offense nor whether his actual innocence claim should prevail. Rather, the only question is whether the government wrongly received a procedural advantage by taking inconsistent positions on whether *Burrage* is a substantive ruling with full retroactive effect or instead a procedural rule subject to the bar on retroactivity for non-substantive decisions

required by *Ramos*. The resolution of the ultimate factual and legal issues presented in the case should be made by the district court in the first instance.

C. This Case Presents An Ideal Vehicle To Resolve A Circuit Split Regarding The Scope Of The Escape Hatch While Assuring That The Government Disgorges The Procedural Advantage Resulting From Its Inconsistent Litigation Positions.

The government, even after previously seeking this Court's review of the circuit split regarding the meaning of "inadequate and ineffective" in 28 U.S.C. § 2255(e), asks the Court to deny the writ because the Court has done so before. Brief in Opposition at 11-12. The reasons to grant the writ are just as compelling as when the Solicitor General first petitioned for review, and this case presents an excellent vehicle for resolving the further matured conflict among the circuits.

First, this case illustrates the need for national uniformity. The petition in the Eleventh Circuit was subject to summary dismissal, while under Ninth Circuit law, Mr. Lewis would have his day in court. The present case starkly demonstrates the need for this Court to intervene to assure that litigants do not have their rights determined by the vagaries of where the Bureau of Prisons chooses to house the petitioner. The same legal standards should apply to § 2255(e) motions regardless of the circuit within which the prisoner is held in custody.

Second, because no court has ever addressed the merits of Mr. Lewis's claims, the legal questions related to what constitutes an "inadequate or ineffective" remedy can be resolved separately from the merits, which should be resolved by the district court in the

first instance. The Court can recognize that substantive changes in law are cognizable and squarely hold that, where the government adopts inconsistent positions regarding prior litigation, the petitioner has not been provided an adequate or effective procedural shot at relief. The discrete threshold question of cognizability can be resolved without engaging with the complexities of the underlying merits.

Third, the conflict in the circuits warrants this Court's attention not only for the reasons first recognized by the Solicitor General, but because the effects of the split have been magnified as more petitioners have different access to the courts depending on their geographical location. The circuit split implicates the central purpose of this Court's discretionary review: "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" SUP. CT. RULE 10(A). The grant of the writ achieves a primary purpose for this Court's review.

Conclusion

For the foregoing reasons and those stated in the petition for a writ of certiorari, we respectfully request that the Court grant the writ, vacate the judgment below, and remand to the district court to consider the petitioner's statutory claims because the government was foreclosed from asserting that prior litigation was not "inadequate or ineffective" – or was adequate and effective – to test the legality of his detention under 28 U.S.C. 2255(e)

when that litigation was decided based on a legal position the government concedes is wrong.

Dated this 6th day of August, 2021.

A handwritten signature in black ink, appearing to read "Stephen R. Sady", written over a horizontal line.

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