

Supreme Court, U.S.
FILED

JUL 09 2021

OFFICE OF THE CLERK

No. 19-1017

21-5595

IN THE
SUPREME COURT OF THE UNITED STATES

Jovan Harris — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jovan Harris #16359-059
(Your Name)

U.S. Penitentiary/P.O. Box 1000
(Address)

Kansas City, KS 66048
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1.) WHETHER, FOR PURPOSES OF TITLE 21 U.S.C. §841(A)(1) AND (B)(1)(C)'S ENHANCED PENALTY "IF DEATH RESULTS" FROM THE USE OF A SUBSTANCE, REQUIRES PROOF THAT THE PETITIONER WAS THE PROXIMATE CAUSE OF THAT DEATH?

2.) WHETHER THE COURT BELOW MISAPPLIED THIS COURT'S HOLDING IN BURRAGE V. UNITED STATES, 571 U.S. 204 (2014), WHEN IT AFFIRMED PETITIONER'S CONVICTION, WHICH WAS BASED ON THE STANDARD OF MORE-LIKELY-THAN-NOT THE VICTIM OVERDOSED ON PETITIONER'S DRUGS?

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A : Decision of the US Court of Appeals

APPENDIX B : Decision of the Federal Trial Court

APPENDIX C : Decision of the US Court of Appeals Denying Rehearing

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Alleyne V. United States, 570 U.S. 99, 115 (2013)	
Apprendi V. New Jersey, 530 U.S. 466, 490 (2000)	
Burrage V. United States, 571 U.S. 204 (2004)	
Ferguson V. Moore-McCormac Lines, Inc., 352 U.S. 521, 527 (1957)	
Robinson V. Shell Oil Co., 519 U.S. 337, 340 (1997)	
Smith V. United States, 508 U.S. 223, 246 (1993)	

STATUTES AND RULES

21 U.S.C. §841(a)(1)	
21 U.S.C. §841(b)(1)(c)	

OTHER

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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 20, 2020.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. §841 PROHIBITED ACTS

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. §841(b)

(b) Penalties. Except as otherwise provided in section 409, 418, or 420 [21 USCS §849, 859, 860, Or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

21 U.S.C. §841(b)(1)(c)

In the case of a controlled substance, containing 5 grams or

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (CONT.)

more of heroin, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life.

STATEMENT OF THE CASE

Jovan Harris ("Harris"), was arrested on November 16, 2016, on a seven count indictment alleging: Count One- conspiracy to possess with the intent to distribute, and distribution of a controlled substance resulting in death, in violation of 21 U.S.C. §841(a)(1) and (b)(1)(c); Count Two- distribution of a controlled substance resulting in death, in violation of 21 U.S.C. §841(a)(1) and (b)(1)(c); Counts Three thru Five- distribution of a controlled substance resulting in serious bodily injury, in violation of 21 U.S.C. §841(a)(1) and (B)(1)(c); and Counts Six and Seven distribution of a controlled substance, in violation of 21 U.S.C. §841(a)(1).

On November 29, 2016, Harris pleaded not guilty, and proceeded to trial.

On May 14, 2018, the jury convicted Harris on Counts One, Two, Three, Five, Six, and Seven. He was acquitted of Count Four.

On December 18, 2018 the Court sentenced Harris to 300 months on Counts 1, 2, 3, and 5, and 240 months for each of Counts 6 and 7. The sentences were ran concurrently for a total of 300 months.

At trial the evidence showed that Jordan Larry ("JWL") overdosed on heroin and died, on September 1, 2015. What the evidence didn't show was from whom this heroin came from.

Detective Christopher Martin worked for the Moorhead, Minnesota Police Dept. crimes and drug task force. (Tr. 297-98) He was part of the investigation into Jovan Harris' ("Harris") case. (Tr. 298)

(SEE CONTINUATION PAGES)

STATEMENT OF THE CASE (CONT.)

He was the lead officer on the overdose of JWL. (Tr. 350).

On September 1, 2015, Martin was on his way to work and responded to a call at 706 22nd Ave., S., in Moorhead, involving a heroin overdose. When Martin arrived at the scene, the victim, JWL, had died from a substance, which later proved to be heroin and fentanyl. (Tr. 301, 349, 630-31)

J.W.L's cell phone was seized. (Tr. 312). The investigation later obtained call and text message history related to this phone from Verizon. (Tr. 314).

Detective Martin testified that J.W.L Phone had numerous other calls and texts from many individuals Martin admitted he did not investigate. (Tr. 369-370).

Detective Martin admitted he only investigated 18 hours before J.W.L's death, between the hours of 4 and 7 o'clock. (Tr. 353-54)

Detective Martin testified that he only assumed J.W.L obtained the heroin 18 hours before his death. And that J.W.L could have purchased the heroin any time after getting out of jail a week prior, to the day of his death. (Tr. 353-54)

The phone history connected J.W.L to Alexis Centers, with whom Martin spoke to on September 2, 2015. (Tr. 319)

Centers told Martin that she knew J.W.L. She let Martin look at her phone. Martin observed and photographed text messages between Centers and J.W.L. on August 31, 2015. (Tr. 320). These text messages never referenced Harris. (Tr. 362). Martin testified that Centers was with J.W.L. at the South Moorhead Dairy Queen at 6:60 pm, August 31, 13-18 hours before J.W.L.'s death. (Tr. 321-22)

STATEMENT OF THE CASE (CONT.)

Martin also spoke with Zach Speiker, who was also with J.W.L. at the same time and place. (Tr. 322). J.W.L., Centers, and Speiker were all at the Dairy Queen together at around 6:33 to 6:40 pm on August 31. (Tr. 422-24). Harris was not at the Dairy Queen. (Tr. 426).

Detective Martin testified, that he could not verify that he, in fact, was speaking with Zach Speiker. Detective Martin never sat down with the person on the phone to interview or ID them. (Tr. 395) Martin testified that based on that conversation, he believed Stamart Liquor mart was the location where J.W.L picked up heroin August 31st, 2015. (Tr. 323)

Martin obtained video surveillance footage from Stamart. (Tr. 327-28). The footage shows a Chrysler 300 past by a red Chevy S10 Pick-up at 4:46. A blue Ford Taurus does pull into the lot and starts traveling southbound. (Tr. 331) Martin believed J.W.L was meeting somebody inside this vehicle. (Tr. 333) Martin testified that he could not see or make out J.W.L in the Blue Ford Taurus. Martin also testified he could not identify that J.W.L was in the Taurus, based on the license plate or any other information. (Tr. 362) Martin could not see anyone in the vehicle. (Tr. 364)

Though Martin assumed J.W.L was meeting someone in the Chysler, he testified that the Red Chevy S10 pulled from in front of the Liquor Mart doors, to within six to ten feet of the Blue Taurus, into one of the parking spots a few spots away from the Ford. (Tr. 364-65) Martin testified that the cars are out of view of the camera and can't tell if anyone approached the Taurus.

STATEMENT OF THE CASE (CONT.)

It's his supposition drugs were exchanged. (Tr. 365)

Speiker told Martin that J.W.L. was in the Taurus at Stamart. (Tr. 399). However, by the time of trial, Speiker had died, so he did not testify. (Tr. 341).

Martin's investigation into J.W.L.'s death turned to Harris only when law enforcement agents began to receive a series of anonymous calls from a female, which were made between September 7 and September 15, 2015. (Tr. 335).

Harris had been arrested in July 2015 and booked into the Cass County Jail. (Tr. 336) His booking sheet was obtained, which showed that he listed his phone number as 414-334-9671. (Tr. 340, 405).

Detective Martin testified he didn't have evidence on who the phone was registered to and could not show that the defendant Jovan Harris is associated or registered to the phone. (Tr. 337)

Detective Martin could not determine where the physical location of the phone, who had control over the phone, or who was using this phone. (Tr. 338)

In addition, Harris at that time was driving a silver Chrysler 300 with Wisconsin plates. (Tr. 403) Martin testified that the Chrysler 300 Plate in the video is unreadable. (Tr. 366)

Martin testified he didn't know the true time frame as to how long J.W.L. Maintained the heroin before he used it and overdosed. And didn't have evidence of J.W.L. and Jovan Harris exchanging money for drugs. (Tr. 370) But the Detectives did have proof that J.W.L. was buying heroin from Cory Heinze and Jacob Wetch, August 5th and August 27th, 2015. Just a few days before J.W.L.'s death September 1st, 2015. (Tr. 1236-37) Detective Heidbreder testified

STATEMENT OF THE CASE (CONT.)

that during investigation Jovan Harris was never identified as being a source or connected in any fashion. (Tr. 1236) J.W.L., Jacob Wetch, and Cory Heinze were being investigated and charged for a Conspiracy to deliver heroin that defendant Harris was not involved or connected to. (Tr. 1236) Jacob Wetch was J.W.L.'s source to heroin on both occasions before his death. (Tr. 1236) The C.I. was buying heroin from J.W.L. who had to wait on his source, Wetch. (Tr. 1236) On one of the occasions, Wetch took J.W.L. and the C.I. to Heinze, and on another occasion, Wetch sold to J.W.L. and the C.I. (Tr.1236-39) One of these heroin deals happened at the Stamart. (Tr. 1238) In the same area Detective Martin believes J.W.L. picked up heroin the day before he died. (Tr. 323) Detective Heidbreder testified that the Stamart parking lot, which the Blue Taurus was observed in, he believed contained J.W.L. is in close Proximity to Jacob Wetch's house. (Tr. 1252)

Jacob Wetch's house was right next to the Stamart Liquor Mart where Detective Martin believe J.W.L. last purchased heroin. (Tr. 1252) And Jacob Wetch was the last person who was seen, by Detectives, selling J.W.L. heroin. (Tr. 1252) Zach Speiker died before trial and could not testify to anything. (Tr. 341) Including if he was in fact the person in the phone interview.

Martin at that point had the phone numbers for J.W.L., Speiker, Centers, and one who he believed to belong to Harris. (Tr. 342)

With this phone information, Martin began to review the information that he had obtained from Verizon regarding J.W.L.'s phone information. (Tr. 342). On August 31, J.W.L. did most of the calling and texting out. (Tr. 345,347). He primary called

STATEMENT OF THE CASE (CONT.)

and texted who he believed to be Harris. (Tr. 345,347) Most of the texts were between 4:30 pm and 9:46 pm. (Tr. 374) This information matched up with the video from Stamart. (Tr. 348).

Martin admitted Governments Exhibits 8A and 9A were not official documents from the Phone Company. But documents he made to show contact between J.W.L., Zach Speiker, and the number Martin alleged was Harris'. (Tr. 343-44) Though Martin testified there was many other calls and text messages, he didn't investigate in this same time frame. (Tr. 369-370) Martin testified that he didn't know what any of these calls or messages were about. An could not show that any of the calls were even answered. (Tr. 359) Though Martin testified that he believed J.W.L. passed away from heroin, he obtained on August 31st, 2015 (Tr. 344) He also testified that there was no way of tying the heroin that was in J.W.L.'s system to the heroin that was found in his wallet at the scene because there was no lab analysis done on his blood work to compare with the heroin found at the scene. Martin testified that he had no proof what heroin killed J.W.L. and it could have been a totally different batch. (Tr. 353) Martin testified two foil packets were located at the scene. One was open next to the syringe, on the counter J.W.L. used in his overdose, and the other was in his wallet. Martin admits in his testimony that he did not have any solid information as to where that heroin in those foil packets came from. (Tr. 357) Martin testified, that J.W.L. was a known heroin distributor and user, and did not know how long J.W.L. actually possessed the heroin he overdosed from. (Tr. 370)

STATEMENT OF THE CASE (CONT.)

Indeed, Martin was focused on determining J.W.L.'s movements from 3:59 pm to 7 pm, on August 31, which was 13-18 hours before J.W.L.'s death at 8:30 the next morning. (Tr. 353). J.W.L. furthermore, had prior experience buying and selling heroin. (Tr. 356). In fact, J.W.L. was a known heroin user and distributor. (Tr. 370).

During the March to July time frame, Alexis Centers was using heroin and getting it from J.W.L. (Tr. 437). To make these deals, Centers would usually pick J.W.L. up, they would go wherever they had to to obtain heroin. J.W.L. would take Center's money, meet with whomever he would meet with, and return to Center's car. (Tr. 440). J.W.L. would meet with someone who drove a silver Chrysler 300. (Tr. 442) This process happened pretty much every other day, but Centers never got a good look at J.W.L.'s dealer. (Tr. 443-44). J.W.L. never told Centers the name of his dealer. (Tr. 444) She did say, however, that J.W.L.'s dealer was a short black male with dreads. (Tr. 444-45). In 2005 and at Harris' trial, Centers could not recognize Harris, and didn't know who J.W.L.'s dealer was.

The last time Centers went through this process with J.W.L. was on August 31, 2015. Centers had texted J.W.L., (Tr. 447), at the Dairy Queen at 6 or 7 pm. J.W.L. was there with another person, a white male with dreads. (Tr. 448)

J.W.L. had the heroin on him, he told her that his dealer was with him and they would wait on her. (Tr. 449) Once Centers got the heroin, she parted company and used the heroin over the next several hours. (Tr. 452). She learned about J.W.L.'s death the next day. Law enforcement contacted her, and she showed

STATEMENT OF THE CASE (CONT.)

them her cell phone, which revealed a text message indicating that J.W.L. was with his dealer just before he and Centers met at Dairy Queen. (Tr. 452-56).

Alexis Centers said Brandon Jacobs supplied J.W.L. (Tr. 438) Alexis was going with J.W.L. to meet with whoever. Sometimes inside Motel 6 or a silver Chrysler 300. (Tr. 442) Alexis didn't specifically see who J.W.L. was meeting at Motel 6. (Tr. 443) Alexis met with J.W.L.'s source. She gave a description of a short black male with dreads. (Tr. 445) Alexis testified in her 2015 statement, she identified J.W.L.'s source as being a really tiny short black guy. Alexis estimated the source's height to be five foot four because he was shorter than her. Alexis said she is five-five. Alexis testified the reason she knows his height is because she saw him when he approached her car. (Tr. 474) Alexis testified she seen the source between the months of June and August on more than one occasion. (Tr. 475) Alexis says she was able to see the source every time J.W.L. picked up heroin. When she was asked how she saw the source? She said, "Just through the vehicle's windows." When she was asked, "Would you be able to see him through the window?" Alexis said, "yes". (Tr. 479-480) Alexis said she seen the source through the window four or five times. (Tr. 480) Alexis was shown a line up containing Jovan Harris. Alexis testified that she was not able to pick out J.W.L.'s source. (Tr. 482-83) Alexis admits in her testimony J.W.L. could have had many other suppliers as well. (Tr. 483) Alexis says she was buying heroin from Jacob Wetch from 2013-2014. (Tr. 459) Alexis said she

STATEMENT OF THE CASE (CONT.)

knew Wetch sold heroin in 2013, but didn't know what he was doing in 2015, and was not aware Jacob Wetch sold J.W.L. heroin within days of his death. (Tr. 473) Alexis admits that she didn't know what J.W.L was doing and it's possible he was using heroin from many different sources. (Tr. 472)

Derek Petterson had multiple felony convictions. (Tr. 511-513) Petterson testified he has a pretty good relationship going with Detective Heidbreder. Petterson testified, in a interview with Detectives, he was asked about a drug dealer he knew that was in the drug trade. Petterson identified a number of different people including Jacob Wetch, but never brought up Pooh or Jovan Harris in any fashion. He also testified, a photograph was shown to him, and the detective wanted information related to the person. The detective, in fact, identified the person as Jovan Harris, and told Petterson that Harris was a dealer. Petterson also testified that he didn't know who Jovan Harris was or the person in the picture was. Petterson again testified, that the Detective told him this was Jovan Harris in the picture and that Harris is a drug dealer, but only used Harris' government name. (Tr. 541-42) Petterson testified that he started asking people about Harris and they told him nick name and where Harris lived. (Tr. 543) Petterson said he asked friends for information on the person he was being subpoenaed for because he could potentially be a witness. (Tr. 543) He admitted he didn't have a lot of information, having to do with Harris or Pooh, before talking to the two friends. (Tr. 543-44) In the 2016 interview, Petterson identified Harris' picture as little G., but admitted in testimony little G. was a different dealer.

STATEMENT OF THE CASE (CONT.)

Petterson identified the same picture as Ty or T-y's. But testified that Ty was another dealer in the area. Petterson remembers telling officers that he met Pooh through BJ and not Wetch. (Tr. 545-46) Petterson says he remembers faces but didn't recognize Harris. He also admitted law enforcement gave him the info. about Harris being a drug dealer and that Harris was the person on the picture. (Tr. 547) Petterson testified, that the reason he called Jacob Wetch is because Wetch was a heroin dealer, that Wetch always buys from a guy who lives only a half a block away from Petterson. Petterson says this was Pooh's house. (Tr. 518) Petterson says he's done 20 to 30 transactions with Harris or Pooh through Jacob Wetch. Never hand to hand. (Tr. 548) Jacob Wetch was asked about drug deals during the time he was getting heroin from Pete or James Smith, was he giving it to Petterson? Wetch said that he tried but Petterson robbed Wetch. (Tr. 701) Wetch said he called Pete, A.K.A. James Smith, and met with Petterson and Petterson took the heroin. (Tr. 702) Petterson believes Pooh lives in the four-plex behind Hornbacher's because that's where Wetch would walk in and get the heroin. (Tr. 550) James Smith, not Harris, was the person that lived in the four-plex behind Hornbacher's. (Tr. 574) James testified, he was giving the heroin to Wetch and Wetch sold it for him. (Tr. 606) Wetch testified that Petterson lied about his whole testimony. And that he never was his middle man. But Petterson did rob him. (Tr. 728-29)

James Dion Smith has a criminal record for drug-related matters. Law enforcement agents spoke with him in August 2016

STATEMENT OF THE CASE (CONT.)

about his drug activity. (Tr. 571) James admits he was involved in drugs. (Tr. 569) In 2016, Smith lived on 8th street North, by Hornbacher's, in a four-plex house. (Tr. 574) Smith admitted he met Jacob Wetch through a friend, when Jacob Wetch sold him weed. At this point Smith wasn't selling drugs. He didn't know anything about heroin. Smith says Wetch showed him heroin and asked him to sell it, a few different times. Smith testified that at this time he never even knew a guy by the name of Jovan Harris, (Tr. 576-77) Smith initially testified he met Harris through Brazil when Smith was selling them weed. (Tr. 579) Later Smith admitted he actually only sold weed to Brazil and only assumed Harris was in the car. (Tr. 599-600) Smith testified Wetch got him into the heroin trade. (Tr. 593) Smith testified that he remembered the interview with Dan Heidbreder. Detective Heidbreder identified he was targeting Jovan Harris. (Tr. 589) Smith remembered saying: "I don't know him at all." (Tr. 590) Smith testified, that Heidbreder put down a picture of Jovan Harris and said he wanted to target that individual. (Tr. 590) Smith said Heidbreder told Smith: "We're going to tell you what we have, and informed him Jovan Harris is a major drug dealer in the area." Smith told him that he had no involvement with Harris. (Tr. 591) Smith testified, he never did heroin deals directly with Harris. (Tr. 596) Smith said, "he only met [sic] a phone call," then after that, "a woman." He never did any direct activities with Pooh as far as heroin, it was always females. (Tr. 597) Smith testified, in his initial interview he said he didn't know Jovan Harris and didn't know a person

STATEMENT OF THE CASE (CONT.)

known as Pooh. (Tr. 598) Smith said there was no face-to-face meetings with Harris only over the phone, and he can't say that it was actually him who was talking over the phone.

(Tr. 600-01) Smith never seen Harris with any of the females.

(Tr. 603) Smith only gave the heroin to Wetch and Wetch would sell it to Tyler. (Tr. 586) Smith broke the heroin down and Wetch sold it, and brought the money back. (Tr. 604) Girls from Minneapolis would bring heroin to Smith and he would package it and give it to Wetch in foils. (Tr. 604-606) Smith says he knew Wetch was selling to Tyler and Morgan. (Tr. 607)

Smith pointed the defendant out as being Jovan Harris. But admitted the only time he met Harris was when he sold Harris weed at Hornbachers. (Tr. 608). Though he admits he actually sold Brazil the weed. (Tr. 600) The only time he seen Harris was when law enforcement showed him his picture. Smith said that he can't point at him and say that's the person that was bringing the girls to deliver the heroin. He said, "I can't say if that was actually him." (Tr. 608)

Jacob Wetch has convictions for conspiracy to deliver heroin and paraphernalia. (Tr. 647) In the summer of 2015, he was selling heroin to keep his addiction going. (Tr. 661-62) Jacob Wetch testified that Cory Heinze was his Co-Conspirator in one of his Conspiracy cases and he was conspiring to sell heroin with Cory Heinze. (Tr. 712) Wetch testified he had other connections and talked with law enforcement a few times after his heroin conspiracy was filed. (Tr. 704) Wetch testified he was selling so much heroin his middle man sent Wetch to the

STATEMENT OF THE CASE (CONT.)

source. When Wetch was asked what was the guy's name. Wetch said, "I don't really know a specific name because I was getting it from a lot of different people. (Tr. 664) Jacob Wetch was charged in 2016 for his and Heinze's Conspiracy. (Tr. 648) But their conduct happened in August of 2015. (Tr. 648) This coincides with Detective Heidbreder's testimony. When he stated Heinze sold Jordan Larry or "J.W.L." heroin August 5th, 2015 and Wetch sold J.W.L. heroin August 27th, 2015. Just days before J.W.L.'s death. Heidbreder also stated that Harris wasn't ever identified as being a source or connected in any fashion.

(Tr. 1236-38) Wetch testified, that Heinze and his Conspiracy to distribute heroin ran from August of 2015 to January of 2016.

(Tr. 714-15) Wetch testified that his Attorney told him his Proffer Agreement stated that if Wetch Cooperated against Pooh, Wetch could not be charged federally. He would be allowed to plead to his two counts in state court. (Tr. 716) Wetch admits that he was told to target Jovan Harris in his Proffer Agreement. And that it depended on how Cooperative he was and how much information he provided against Jovan Harris, whether he was going to be federally indicted or left in state court.

(Tr. 717-18) Wetch said he Cooperated with them for leniency on his case. (Tr. 719) Proffer signed April 14, of 2016. (Tr. 724-25) But Wetch admits he couldn't show any calls, texts, or numbers for Harris at the time. (Tr. 725) Wetch said he was getting heroin from Harris 10 times a day when he got tips from washing cars, it was not every day. (Tr. 734) Pooh lived out of town. (Tr. 677)

Wetch said he was selling heroin to 50 people but he was

STATEMENT OF THE CASE (CONT.)

talking about his conspiracy with Heinze. (Tr. 712-714) Wetch said he did buy 3.5 grams but never said from who or if it was from his conspiracy or all of the different people he claimed he was buying from. (Tr. 664) The prosecutor asked Wetch about amounts and that he didn't mean from Pooh but from his general practice. (Tr. 664)

Paul Ramirez was convicted of terrorizing in August 2015, and was later caught making a meth deal. (Tr. 759,762). Law enforcement agents offered to let him cooperate against someone else. (Tr. 762). During this time, Ramirez was using all types of drugs, including heroin. (Tr. 763) He told agents that he was friends with T.P.M., that T.P.M. had introduced him to Pooh, and that he knew where to get heroin. (Tr. 766,768). When Ramirez was introduced to Pooh, which was a couple of days before Ramirez' arrest for meth sales, (Tr. 769), Ramirez got a sample of heroin from Pooh. (Tr. 770). Ramirez got the heroin off of the bathroom counter in T.P.M.'s apartment. (Tr. 770-771).

Ramirez agreed with agents to do a controlled buy in March 2016. (Tr. 775). Ramirez was fit with a recording device, (Tr. 777), and was to go to T.P.M.'s apartment to buy heroin. (Tr. 778).

On March 21, 2016, Ramirez made the first of two controlled buys. Ramirez knocked on T.P.M.'s apartment door. T.P.M. answered and let Ramirez in. (Tr. 783). M.S.M. was there, as were Pooh and Pooh's friend. (Tr. 784). It appeared that Pooh was staying at the apartment. (Tr. 788) Ramirez testified that he didn't see Pooh with any heroin during the first alleged controlled buy. (Tr. 851) Ramirez didn't remember where the buy

STATEMENT OF THE CASE (CONT.)

money went and didn't know who he handed it to. (Tr. 838) Ramirez said he had personal belongings in the house where he did the alleged buys. He had a bedroom in this house, also toiletries and clothes. (Tr. 870-71) Ramirez admits he lived there.

(Tr. 870) Ramirez admits Tyler McIntosh sold him heroin twice a week. (Tr. 878-79) Ramirez never told law enforcement he lived in the house they were sending him into. (Tr. 890) Ramirez said he asked Tyler McIntosh to "hook him up" and not Pooh.

(Tr. 898) Ramirez said he went to McIntosh instead of Pooh to negotiate quantity and price for the buy. All his contact was with McIntosh. (Tr. 903) Ramirez says he assumed McIntosh got drugs from Pooh though he could not hear any communication between them in the living room. He could not see in the living room because he stayed in the kitchen. And couldn't see who was in the living room. (Tr. 906-907)

Ramirez says he didn't know if Pooh was going in the bathroom to prepare drugs, he just assumed that. (Tr. 909) No one told Ramirez to go get the drugs in the bathroom, he just decided to. (Tr. 911) Ramirez admits that at no point did he communicate to Pooh about drugs or money, or anything of that nature.

(Tr. 913) Ramirez admits that he told law enforcement that he negotiated with Pooh for the first buy. But didn't know why he lied to them. (Tr. 917) Ramirez says he did not ever approach Pooh to talk to him about the desire to purchase heroin on the second buy. (Tr. 923-24) Ramirez admits he could have and had every opportunity to hide heroin in the house without anyone knowing. (Tr. 937). He didn't see who got the second buy money. (Tr. 938). Ramirez admits he already had the baggie in his

STATEMENT OF THE CASE (CONT.)

pocket that he told police Pooh gave him. (Tr. 928-929)

Morgan Masters ("M.S.M."), has a criminal drug record. (Tr. 951). She started using heroin in January 2015 with Paul Ramirez. (Tr. 953-54). In early spring 2015, M.S.M. met Brazil, who offered to give her a ride home from downtown Fargo. (Tr. 957-58). In the car were M.S.M., Brazil, M.S.M.'s friend Willie, and Pooh. M.S.M. knew Pooh as "Jovan". This was the first time M.S.M. met Jovan. (Tr. 958). Tyler McIntosh is Masters' boyfriend. (Tr. 954) Masters overdosed August 27th (Tr. 963) Masters said she did meth and probably lots of other things. (Tr. 965) Masters was positive for T.H.C., opiates, and amphetamines. (Tr. 969) Masters testified that if she was to be honest she didn't know if she was buying heroin from "P", A.K.A. James Smith, before or after she overdosed. But if that was the case,. The heroin her and Tyler McIntosh overdosed from could have been from "P". (Tr. 999) Masters said she did not necessarily know where she went to go get the heroin she overdosed on. (Tr. 1000) When she was asked: "Do you remember who gave it to you?" Masters said: "Oh, my goodness, well, I'm pretty sure it was probably from Pooh." She was asked: "Pretty sure, but it could have been "P" is that right?" Masters said: "Yeah, but I don't think so." (Tr. 1000) She really didn't know when she was buying from "P" because everything is really a blur. (Tr. 974) Could have been before or after her O.D. Masters still don't know what drugs she overdosed from. (Tr. 1001) Masters can't remember how she arranged to get the drugs she overdosed on. (Tr. 1002) But she says she always called Pooh because he was the only

STATEMENT OF THE CASE (CONT.)

person they ever got from. (Tr. 1002) But this is not true because Jacob Wetch admits in his testimony he was selling Tyler and Morgan heroin in the summer of 2015. (Tr. 666) James SMith said his heroin was being sold to Masters and McIntosh. (Tr. 608) Masters even says the "C.I." Ramirez would sale her heroin. (Tr. 986-92) Masters even had to ask McIntosh where the heroin came from she overdosed from. (Tr. 994). Masters says McIntosh overdosed after they went to the same place to pick it up, but Masters admitted she was really just assuming on where and how they got the heroin and really didn't know. (Tr. 1005)

Tyler P. McIntosh ("T.P.M.") has been convicted of drug felonies. (Tr. 1029). He started using heroin in 2013, and between 2013 and 2017, was a regular heroin user. (Tr. 1035, 1038-39). T.P.M. started injecting heroin in 2015, at which point "Jovan" was supplying heroin to T.P.M. At that time, T.P.M. knew Jovan as "Pooh". (Tr. 1041). T.P.M. first met Pooh in spring of 2015. (Tr. 1042-43). McIntosh testified that he did not recall where the heroin came from that he injected the morning he overdosed. (Tr. 1053-54) McIntosh was asked if he knew where Masters' heroin she overdosed on came from? McIntosh said: "Pooh". But when he was asked if the heroin came directly from Pooh or someone he directed them to? McIntosh admitted that he didn't really know. (Tr. 1055) McIntosh has a conviction of a class A delivery of heroin charge in 2017. (Tr. 1030) McIntosh was asked if he at some point seen Harris hand off heroin to Miss Masters? McIntosh said: "I don't recall that." (Tr. 1046)

STATEMENT OF THE CASE (CONT.)

After T.P.M.'s overdose, Pooh left the area for an unusually long time. Pooh directed T.P.M. to contact "P" for heroin. (Tr. 1055-56). T.P.M. got heroin from "P" a "hundred times. A lot." (Tr. 1057). "P" was James Smith. (Tr. 1078).

On May 14, 2018, the jury found Harris not guilty on count 4, distribution of a controlled substance resulting in serious bodily injury. The jury found Harris guilty of all the remaining counts. (DCD 97).

On December 18, 2018, Harris' sentencing hearing was held. (DCD 140). The government recommended a sentence of 360 months, *id.* at 2, Harris recommended a sentence of 240 months, which was the statutory mandatory minimum. (DCD 119, p.10) The District Court determined that Harris' total offense level under the Federal sentencing Guidelines was 42, and his Criminal History Category was III. This yielded a Guidelines range of 360 months to life.

The Court imposed a sentence of 300 months for each of Counts 1, 2, 3, and 5, and 240 months for each of Counts 6, and 7. The Court imposed the sentences to run concurrently, for a total sentence of 300 months imprisonment.

Harris filed a timely notice of appeal.

On or about July 20, 2020, the U.S. Court of Appeals, for the Eighth Circuit Affirmed Harris' conviction and sentence.

REASONS FOR GRANTING THE PETITION

1. Jovan Harris, the Petitioner ("Harris"), was convicted and sentenced under Title 21 U.S.C. §841's enhanced penalty for distribution of a controlled substance resulting in either death or serious bodily injury.

However, in the instant case there was no proof that the heroin which the three people who overdosed came from Harris. In two of the overdoses, the victims had several other drugs in their system.

At best the evidence showed that Harris was involved in drug dealing in the area of, and around the time of the overdoses.

The evidence also showed numerous other persons were also dealing heroin to the victims during the same time frames. Further, the victims themselves were all involved in selling heroin to each other at the time of the overdoses.

Two of the people who overdosed, Morgan Masters and Tyler McIntosh, admitted they had used other drugs at the time of their overdoses. Moreover, neither of them could say that the heroin they used came from Harris.

Nobody testified that the heroin that Jordan Larry dies from came from Harris. Instead, the trial court allowed, and the Appellate Court affirmed Harris' conviction based on the circumstantial evidence that he was involved in drug dealing in the area, and during the time frames involved. There was no proof that Larry got the heroin from Harris.

In other words, Harris' conviction was upheld because it was "likely" or "possible" that the heroin the three people overdosed on, came from Harris.

(See continuation pages)

REASONS FOR GRANTING THE PETITION (CONT.)

WHETHER 21 U.S.C. §841 REQUIRES PROOF OF PROXIMATE CAUSE

Title 21 U.S.C. §841 provides a penalty enhancement for distribution of a controlled substance "if death or serious bodily injury results from the use of such substance. See 21 U.S.C. §841(a)(1) and (b)(1)(c). The enhancement is significant. When the enhancement applies, the sentence shall be "not less than twenty years [nor] more than life." 21 U.S.C. §841(b)(1)(c). The issue in this case is whether the "death... results from the use of such substance" language requires proof of proximate cause.

This Court reviews issues of statutory construction 'de novo', as they are pure questions of law. In construing statutes, the Court begins with the plain language, and, if it is "unambiguous", then the "inquiry must cease." Robinson V. Shell Oil Co., 519 U.S. 337, 340 (1997). If the statute is ambiguous, the Court will turn to other tools of statutory construction. As demonstrated below, section 841's "death results" language is ambiguous, and those other tools favor requiring proof of proximate cause.

The language of 18 U.S.C. §841(b)(1)(c) is ambiguous. Burrage V. United States, 571 U.S. 204, 210-11 (2014), this Court addressed the statute and language at issue in this case, concluding it requires proof of actual cause but declining to answer whether it requires proof of proximate cause. This Court began its analysis by noting that the "law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause.... (Often called the proximate cause). "ID. at 210-11(quoted The New Shorter Oxford English Dictionary 2570 (1993)). After rejecting the government's various

REASONS FOR GRANTING THE PETITION (CONT.)

arguments, this Court concluded that "[e]specially 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 (citation omitted). Justices Ginsburg and Sotomayor did not agree that the statute was unambiguous (in terms of actual cause) but did "agree that 'in the interpretation of a criminal statute subject to the rule of lenity,' where there is room for debate, and should not choose the construction 'that disfavors the defendant.'" Id. at 219 (Ginsburg, J, concurring)(quoting Burrage's majority opinion).

This Court's grant of certiorari in Burrage, suggests the language of §841(b)(1)(c) is ambiguous. Although Burrage does not answer the question, it does provide helpful guidance. In Addition to the majority and concurrence's reliance on the rule of lenity with this specific statute's language in Burrage, the Court also granted certiorari on the question of whether that language requires proof of proximate cause. Id. at 208, 210 ("Whether the defendant may be convicted under the 'death results' provision... without separately instructing the jury that it must decide whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense). In granting certiorari, this Court, at the very least, suggested that the statute is not as straightforward as it seems.

The "rule of four" is this Court's "practice on granting certiorari on the vote of four justices". Ferguson V. Moore-McCormack Lines, Inc., 352 U.S. 521, 527 (1957)(Frankfurter, J.,

REASONS FOR GRANTING THE PETITION (CONT.)

dissenting)(internal quotations omitted). Justice Frankfurter explained that "[t]he rule of four is not a command of Congress. It is a working rule devised by the Court as a practical mode of determining that a case is deserving of review, the theory being that if four Justices find that a legal question of general importance is raised that is ample proof that the question has such importance." Id. at 529 (internal quotations omitted.) While there is no Circuit Court split on this issue, maybe the four Justices believed this issue is "a United States Court of Appeals... ha[d] so far departed from the accepted and usual course of judicial proceedings, ...as to call for an exercise of this Court's supervisory power." S.Ct. R. 10(a) Maybe, four Justices believed this issue is "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." Id. No matter the answer, the grant of certiorari certainly suggests that four justices had some questions about whether proof of proximate cause is required under §841(b)(1)(c)'s "death results" enhancement.

Section 841(b)(1)(c)'a enhanced penalty applies, not when the prohibited conduct, i.e., the distribution of the controlled substance, results in death or serious injury, but when "death or injury results from the use of such substance." §841(b)(1)(c) (emphasis added).

In the case 'sub judice', there was no evidence adduced that the heroin Larry overdosed, and died from came from Harris. Instead the government relied on the fact the witnesses claimed that Harris, as well as themselves, sold heroin in the same geographical area, and during the same time frames, as when Larry overdosed.

REASONS FOR GRANTING THE PETITION (CONT.)

Further, Larry himself was involved in a drug conspiracy to distribute heroin in the same area, and time frame leading up to his overdose. (Tr.) The government admitted that Harris was not involved in that conspiracy whatsoever. Therefore, there was no proof that Larry's death was the result from "the use of" heroin obtained from Harris. The District Court did not require it, and the Court of Appeals upheld the District Court's holding that as long as the circumstantial evidence showed it was "possible", or "likely" that Harris provided the heroin, it was sufficient to convict him.

The District Court should have had to prove that Harris was the proximate cause of Larry's death, that is that the heroin that Larry overdosed on had a direct link to Harris. At best the evidence showed that the heroin he O.D.'d on could have came from any of several sources.

Finally, the rule of lenity controls here. The rule of lenity holds that "Where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." Smith V. United States, 508 U.S. 223, 246 (1993). Here the statute is ambiguous (at minimum), and therefore the Court should choose the construction that is more favorable to Harris, requiring proof of proximate cause to apply the "death results" enhancement. That conclusion is only bolstered by both the majority and dissent's reference to the rule of lenity in Burrage. 571 U.S. at 216 ("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 219 (internal citation omitted)

REASONS FOR GRANTING THE PETITION (CONT.)

(Gingburg, J., concurring)("I do agree that 'in the interpretation of a criminal statute subject to the rule of lenity,' where there is room for debate, one should not choose the construction 'that disfavors the defendant.'"(quoting the majority). In sum, the rule of lenity should apply in this case and requires an interpretation that favors Harris.

Therefore, this Court should grant certiorari on this issue, in Light of Burrage, and resolve the issue of whether the trial Court must prove the defendant is the proximate cause of a person's death, to qualify for §841(b)(1)(c)'s "death results" enhancement.

2. Both the trial Court, and the Appellate Court ignored this Court's holding in Burrage that the evidence must show that "but-for" Harris' actions, the victim Larry would not have died, and the two other victims would not have overdosed. Instead, they allowed Harris' conviction to stand though there was no direct proof that any of the victims who overdosed, did so on heroin obtained from Harris. As set forth more fully in the Statement of Case, the evidence showed at best, that Harris sold heroin in the same geographical area, and during the same time frames, as other people were selling heroin, to the same users of heroin, three of whom overdosed. The two victims who overdosed and lived, Morgan Masters("Masters"), and Tyler McIntosh ("McIntosh"), testified that they could not say for sure the heroin they overdosed on came from Harris. Moreover, both had several other drugs in their blood at the time of the overdose.

REASONS FOR GRANTING THE PETITION (CONT.)

Because the "death results" enhancement increased the minimum and maximum sentences to which Harris was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt. See Alleyne V. United States, 570 U.S. 99, 115-116 (2013); Apprendi V. United States, 530 U.S. 466, 490 (2000). Thus the crime charged in Counts One, Two, Three, and Five of Harris' indictment has two principal elements: (i) Knowing or intentional distribution of heroin, §841(a)(1), and (ii) death resulting from the use of the drug, §841(b)(1)(c).

This Court in Burrage held that "The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause." Id. at 210.(quoting H. Hart and A. Honor, Causation in the Law 104 (1959)). When a crime requires "not merely conduct but also a specified result of conduct," a defendant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result."

1 W. LaFave, Substantive Criminal Law, §6.4(a), pp. 464-466 (2nd ed. 2003). Those two questions on which this Court granted certiorari in Burrage. In Burrage this Court only found it necessary to decide the first; "Whether the use of heroin was the actual cause of [the victim's] death in the sense that §841(b) (1)(c) requires." Id. at 210.

In Burrage the Court used the analogy "Where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." Id. at 211. (quoting LaFave).

REASONS FOR GRANTING THE PETITION (CONT.)

In this case, using the analogy above, ~~it was like A, B, C,~~
D and E, were all shooting guns into the air. One of the bullets
came down, struck F, and he died. The bullet was not recovered,
so no one knows whose bullet actually struck F and killed him,
but because A fired into the air, there is circumstantial
evidence he is guilty.

In Burrage, the Court held that a trial Court must prove that
"but-for" a defendant's action the victim would not have died.

In this case that proof was not offered, nor adduced at trial.

In complete abrogation of this Court's holding in Burrage,
the trial allowed Harris to be convicted based on the
circumstantial evidence that he was selling heroin in the area,
and during the time frames of the overdoses. The Appellate
Court upheld his convictions, based on the same circumstantial
evidence.

As pointed out in the Statement of Case, the evidence equally
pointed to Larry obtaining heroin from another source.

As for Master' and McIntosh's overdoses, neither could
definitively say the heroin they used came from Harris. Masters
admitted using several other drugs at the time of the overdose.

In Burrage, the government argued "[w]hen the conduct of two
or more actors is so related to an event that their combined
conduct, viewed as a whole, is a but-for cause of the event,
and application of the but-for rule to them individually would
absolve all of them, the conduct of each is a cause in fact
of the event." This Court rejected that argument, as too
permissive an interpretation of §841(b)(1).

The Burrage Court held "[w]here use of the drug distributed

REASONS FOR GRANTING THE PETITION (CONT.)

by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. §841 (b)(1)(c) unless such use is a but-for cause of the death or [serious bodily] injury." Id. at 218.

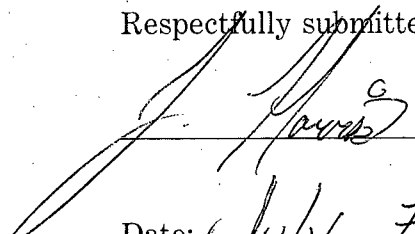
In this case there was evidence that pointed equally to Larry, Masters, and McIntosh, obtaining the heroin from other sources, as there was that they obtained it from Harris. The government knew this, but once again wanting to punish someone simply chose Harris as their scape-goat.

The opinion of the Eighth Circuit is therefore, in direct contravention of this Court's holding in Burrage, and Harris requests this Court to Grant- Vacate- and Remand this case in Light of it's holding in Burrage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: July 7th 2021