IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO. _____

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Jonas Ross III,

Petitioner,

-vs.-

United States of America,

Respondent.

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## QUESTION PRESENTED

**I. WHETHER THE EIGHTH CIRCUIT'S CONCLUSION THAT MR. ROSS DISTRIBUTED THE CONTROLLED SUBSTANCE THAT RESULTED IN THE DEATH OF K.P. IS IN CONFLICT WITH THIS COURT'S DECISION IN *BURRAGE*, THE REQUIREMENT FOR THE GOVERNMENT TO SHOW BUT-FOR CAUSATION, AND CASES FROM OTHER CIRCUITS, WHEN THERE IS NO EVIDENCE THAT MR. ROSS DISTRIBUTED THAT SUBSTANCE AS THE SUBSTANCE HE DID DISTRIBUTE CONTAINED FURANYL FENTANYL AND NO FURANYL FENTANYL WAS FOUND IN K.P.'S BLOOD OR URINE?**

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jonas Ross III, respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

## OPINION BELOW

On March 8, 2021, the Eighth Circuit Court of Appeals entered its Opinion and Judgment, Add. 1, affirming the November 12, 2019, Judgment of the United States District Court for the Northern District of Iowa imposing upon Mr. Ross a sentence of life imprisonment with respect to Count 1, and sentences of 360 months on each of Counts 2, 3, and 4, all to be served concurrently, and other consequences.

## JURISDICTION

The Eighth Circuit's jurisdiction was based on 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit filed its Opinion and Judgment on March 8, 2021. A timely Petition for Rehearing or Rehearing *En Banc* was filed, and denied on May 27, 2021.[1] This

1The Eighth Circuit extended the deadline for filing a Petition for Rehearing/Rehearing *En Banc* to May 5, 2021. The Petition for Rehearing *En Banc* was timely filed on May 5, 2021.

Petition for Writ of Certiorari is timely filed within one-hundred and fifty days[2] of the Eighth Circuit's filing of its Order denying Rehearing *En Banc*.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> In the case of a controlled substance in schedule I or II, . . . 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, . . .

21 U.S.C. § 841(b)(1)(C) (emphasis added).

## STATEMENT OF THE CASE

Jonas Ross, III, was indicted, on July 18, 2017, in a four-count Indictment. (DCD 4).[3] Count 1 charged Mr. Ross with Distribution of a Controlled Substance Resulting in Death, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Counts 2, 3, and 4, charged Mr. Ross with Distribution of a Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

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2Per this Court's Orders of March 19, 2020, and July 19, 2021, and Supreme Court Rule 30.

3"DCD" refers to the District Court's docket in *United States v. Ross*, S.D. Iowa 17-CR-0058.

On May 4, 2018, Mr. Ross entered a plea of guilty, without a plea agreement, to Counts 2, 3, and 4. (DCD 40). Mr. Ross proceeded to a bench trial on Count 1, which commenced on May 6, 2019. (DCD 95).[4]

The District Court found Mr. Ross guilty of Count 1. (DCD 130 – Transcript of June 26, 2019, announcement of verdict). The District Court sentenced Mr. Ross to a term of life imprisonment on Count 1, and to 360 months on Counts 2, 3, and 4, all to be served concurrently. (DCD 124).

On December 2, 2016, the body of K.P. Was found in room 230 of the Days in Hotel in Davenport, Iowa. (PSIR ¶ 30).[5] Officers at the scene found substances believed to be heroin and drug paraphernalia on the desk. *Id*. There was a trace amount of fentanyl scattered across the top of the desk. (PSIR ¶ 36). There was also a piece of a plastic bag, tied shut, containing a 1.57 gram rock of heroin, fentanyl, and furanyl fentanyl, fused into one piece. *Id*. Another baggie, opened, containing 0.008 grams of fentanyl was also found. (Tr. Tr. at 135-36, lines 18-2).

K.P.'s body was sent to the University of Iowa Hospitals and Clinics ("UIHC") for an autopsy and related lab work. (Gov't Ex. 30, autopsy report). The autopsy revealed that the cause of death was fentanyl intoxication. (Tr. Tr.

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4The transcripts of the bench trial are found at DCD 128 and 129.

5The Presentence Investigation Report (PSIR) is found at DCD 117. The paragraphs of the PSIR cited summarize the trial evidence, were not objected to, and are cited to for convenience.

202 at lines 19-20). UIHC pathologist Dr. Marcus Nashelsky, who performed the autopsy, ordered tests of both K.P.'s iliac blood and his urine. (Tr. Tr. at 206 lines 8-14).[6] Iliac blood is collected from a large vein in a person's groin. *Id.* at 204, lines 11-13. Blood collected from the iliac vein is especially useful in determining what drugs were in a person's body at the time of death. *Id*. at lines 18-25. In the case of K.P., the iliac blood testing showed a "high concentration" of fentanyl. *Id*. at page 205, lines 5-7. Most significantly, furanyl fentanyl, was not present in K.P. Iliac blood. *Id*. at 225, lines 1-3.

Dr. Nashelsky also ordered urine testing to see if it would support the blood testing results or provide new or additional information. (Tr. Tr. at 206, lines 1-4). K.P.'s urine contained fentanyl, norfentanyl, and morphine. *Id*. at lines 8-10. Norfentanyl is a metabolite of fentanyl; morphine is a metabolite of heroin. *Id*. Metabolites are chemicals which the body produces when it metabolizes (processes) a drug or other substance. For example, heroin in rarely present in the body when a person (living or deceased) is drug tested; a drug test of a heroin user would instead have a positive result for morphine, the metabolite of heroin. *Id*. at 208, lines 22-25. The metabolites found, and not found, are especially important in this case because they indicate that K.P. ingested only heroin and fentanyl, and

6Day 1 of the trial transcript (pages 1-189) is filed at DCD 128. Day 2 of the trial transcript (pages 290-302) is fled at DCD 129).

not furanyl fentanyl which, as discussed in more depth later, was contained in the mixture sold by Mr. Ross to K.P.

Law enforcement did not being investigating K.P.'s death as a criminal matter until eight days after his body was found. (PSIR ¶ 31). Investigators created a timeline of K.P.'s movements showing that he had spent the night of November 29, 2016, in Fremont, Ohio, and had arrived in Davenport, Iowa, on November 30th. (PSIR ¶ 30). K.P. called Mr. Ross on his way into Davenport, speaking with him for about fifteen minutes. (PSIR ¶ 32). They later exchanged text messages; first, about where to meet, and later, about whether K.P. wanted "one or two." *Id*. K.P. Responded that "If its good make it two." *Id*. Mr. Ross assured K.P. That it was "good," and K.P. replied "Ok two is good." *Id*.

Officers questions Mr. Ross on January 13, 2017, and also executed a search warrant on Mr. Ross' home. (PSIR ¶ 40). In that initial interview, Mr. Ross admitted to seeing K.P. on November 30, 2016, but denied giving him any drugs. *Id*.

Mr. Ross was interviewed again on April 13, 2017. (PSIR ¶ 44). At that interview, Mr. Ross admitted to selling heroin to K.P. On November 30, 2016, specifically that he sold K.P. two grams for $80 per gram, the rock of drug mixture in the sealed bag. *Id*.

Mr. Ross also testified at trial about his interaction with K.P. on November 30, 2016. Mr. Ross explained that he had worked for K.P. "off and on" for about two years, doing air duct cleaning. (Tr. Tr. at 239, lines 19-25). On December 1, 2016, the two men were to perform a job together. *Id*, at 279, lines 2-6. On the night before the job, November 30th, Mr. Ross went to the Days Inn to meet with K.P. and to sell him two grams of heroin. Mr. Ross actually sold K.P. less than two grams and intentionally shorted K.P. about a half-gram. *Id*. at 244, lines 2-7. K.P. was already using drugs when Mr. Ross arrived, calling the white substance he was snorting off the desk "China White." *Id*. at 245, lines 3-4. A rolled up dollar bill was found on the desktop in the hotel room. (Tr. Tr. 46 at lines 7-12). It had presumably been used by K.P. to snort the white substance. *Id*.

In discussing the case with prior counsel, Mr. Ross noticed that no testing had been done on the trace amount of drugs from the desk, which was clearly a different color (white) than the rock Mr. Ross had sold K.P. (which was gray). (Tr. Tr. at 250, lines 16-25). Subsequent testing of the trace amount of white powder revealed that it was pure fentanyl. (PSIR ¶ 36). The substance in the sealed baggie, which Mr. Ross admitted to selling to K.P. contained heroin, fentanyl, and furanyl fentanyl. *Id*.

## REASONS FOR GRANTING THE WRIT

Certiorari is properly granted as the Eighth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Certiorari is also properly granted as the Eighth Circuit "has decided an important question of federal law that has not been, but should be settled by this Court." Supreme Court Rule 10(c). Finally, certiorari is properly granted as the Eighth Circuit's opinion is in conflict with case law from other Circuits, particularly with *United States v. Ewing*, 749 F. App'x 317 (6th Cir. 2018). Supreme Court Rule 10(a).

### I. THE EIGHTH CIRCUIT'S CONCLUSION THAT MR. ROSS DISTRIBUTED THE CONTROLLED SUBSTANCE THAT RESULTED IN K.P.'S DEATH IS IN CONFLICT WITH *BURRAGE*, PRINCIPLES OF BUT-FOR CAUSATION, AND THE SIXTH CIRCUIT'S DECISION IN *EWING*

In *Burrage*, this Court 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, 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 injury." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). But-for causation "requires proof that the harm would not have occurred in the absence of —that is, but for—the defendant's conduct." *Id.* at 888.

*Burrage's* interpretation of but-for causation incorporates the exclusivity rule, *i.e*, where multiple factors are involved, a predicate act is a but-for cause only if the other factors are excluded as the but-for cause. This is implied by the example provided by the Court: "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Burrage*, 134 S.Ct. at 888.

Interpolating a mixed drug intoxication scenario into the Court's example provides the following: if a substance (A) provided by a defendant is administered to a victim who has taken other substances (B and C) not provided by a defendant, A is the but-for cause of the victim's injury or death even if B and C played a part in the injury or death, *so long as, without the incremental effect of A, he would have lived*. This Court's phrasing creates a counterfactual inquiry. The Government bears the burden of showing that B and C were not the but-for causes of a victim's injury or death. *See Restatement (Third) of Torts: Phys. & Emot. Harm* § 26 (2010) ("The requirement that the actor's tortious conduct be necessary for the harm to occur requires a counterfactual inquiry. One must ask what would have occurred if the actor had not engaged in the tortious conduct.").

Courts applying the but-for causation test to the "death results" enhancement have also implicitly endorsed the exclusivity rule, noting that the

Government must provide evidence that excludes the possibility that substances not provided by a criminal defendant were the but-for cause of a victim's serious bodily injury or death, *e.g.*, by assessing the lethality of their concentration in the blood. For example, in *Gaylord v. United States*, defendant distributed oxycodone to the victim. The postmortem and forensic pathology reports stated that the cause of death was "oxycodone and cocaine intoxication." *Gaylord v. United States*, 829 F.3d 500, 507 (7th Cir. 2016). The Seventh Circuit found that defendant's counsel had rendered ineffective assistance for failing to challenge the application of the "death results" enhancement on the basis that Gaylord's actions did not fit the statutory language of the enhancement. The Court noted that:

> In [defendant's] case, there was no evidence that the oxycodone he distributed was the but-for cause of death. Rather, the postmortem and forensic pathology reports stated that the cause of death was "oxycodone and cocaine intoxication." In other words, even without the oxycodone, the cocaine concentration may have been enough to result in [the victim's] death.

*Gaylord*, 829 F.3d at 507.

What is self-evident about the but-for test of *Burrage* is that the but-for test cannot be met if there is insufficient evidence that the drugs *distributed* by the defendant to the victim were actually *used* by the victim. If the victim does not use the drugs distributed by the defendant, the drugs <u>cannot be a but-for cause</u> of the victim's injury or death.

The problem in this case is that there was insufficient proof that the controlled substance distributed by Mr. Ross to K.P. was actually ingested by K.P., therefore constituting a "but-for" cause of K.P.'s death. Specifically, the substance distributed by Mr. Ross contained furanyl fentanyl as one of its components. There was no evidence of furanyl fentanyl in K.P.'s blood or urine. Thus, it was not shown that Mr. Ross distributed any controlled substance that was the but-for cause of K.P.'s death.

The District Court, in rendering its verdict, found that Mr. Ross "did, on or about November 30th of 2016, in the Southern District of Iowa, knowingly and intentionally distribute a mixture or substance containing a detectible amount of heroin, fentanyl, and furanyl fentanyl, Schedule I controlled substances, that resulted in the death and serious bodily injury of K.P." (Verdict transcript (DCD 130), at 2-3) (emphasis added). The Eighth Circuit's error was in finding that a "reasonable inference" could be made that Mr. Ross distributed the opened package of controlled substances that K.P. apparently used before his death. Add. 5. The controlled substances that Mr. Ross admitted selling were still in a double-knotted bag when K.P.'s body was found. Add. 6.

The Eighth Circuit pointed out that K.P. and Mr. Ross apparently agreed upon a two gram quantity of drugs, but the unopened, double-knotted bag of the heroin, fentanyl, and furanyl fentanyl mixture weighed only 1.57 grams. Add. 5.

The Eighth Circuit surmised that this could be proof that Mr. Ross distributed the second, opened package. *Id*. However, at trial Mr. Ross testified that he had "shorted" K.P., or sold him him less than the quantity agreed upon. (Tr. Tr. 244, lines 2-7). Mr. Ross presumably did so to increase his profit. The Government's drug transaction expert witness, Jon Johnson, testified that the practice of a drug dealer "shorting" a drug purchaser is "not uncommon." (Tr. Tr. 185, line 6).

The Eighth Circuit also agreed with the Government's contention that a drug user would not likely buy more drugs if he already had some on hand. Add. 5. The Eighth Circuit presumed that the fact that K.P. contacted Mr. Ross soon after his arrival in Davenport indicated an "urgent desire to ingest drugs," indicating that he probably did not have any with him. *Id*. The Eighth Circuit's argument is pure speculation. The Eighth Circuit ignores the fact that in *Burrage* and nearly every case applying *Burrage*, the respective drug users had other drugs available to them and used other drugs contemporaneous with their use of the drugs at issue. That is why the *Burrage* issue exists: when a drug user ingests controlled substances from multiple sources, it must be determined whether the controlled substances distributed by the defendant were the "but-for" cause of the user's death or injury. Further, if the Eighth Circuit was correct that K.P. had an "urgent desire to ingest drugs," K.P. more likely than not contacted several sources of supply to see who could provide him with drugs the fastest.

The Eighth Circuit also improperly placed the burden on Mr. Ross to show that he had not distributed the opened baggie of drugs to K.P., instead of placing the burden on the Government where it belonged to show that Mr. Ross had distributed the baggie containing the fatal substance. *See* Add. 7 (noting that defendant had not shown that K.P. had access to other illicit substances).

The Government has the burden of proof at trial to show, beyond a reasonable doubt, "(1) 'knowing or intentional distribution of [fatal drug mixture]'; and (2) 'death caused by ('resulting from') the use of that drug.' To satisfy the second element, the Government must prove that use of the drug distributed by the defendant was 'a but-for cause of the victim's death.'" *United States v. Ewing*, 749 F. App'x 317, 327 (6th Cir. 2018), citing to *Burrage v. United States*, 571 U.S. 204, 210 (2014), and *United States v. Volkman*, 797 F.3d 377, 392 (6th Cir. 2015) (internal citations omitted).

The Eighth Circuit's opinion is in conflict with the Sixth Circuit's opinion in *Ewing*. In *Ewing*, the defendant made three arguments as to the insufficiency of the evidence supporting his conviction: (1) there was insufficient evidence that he sold drugs to the decedent; (2) there was insufficient evidence to show that fentanyl (one of the components in the drugs he sold) was the but-for cause of decedent's overdose death; and (3) there was insufficient evidence that the defendant sold the decedent the drugs which caused his death. *See Ewing*, 749 F.

App'x at 327. The Sixth Circuit reversed Ewing's "death results" enhancement, but left his conviction for Distribution of a Controlled Substance intact, finding that the evidence supported the conclusion that a drug transaction had occurred. *Id.* at 330. The Sixth Circuit found that there was insufficient evidence to explain the absence of heroin or heroin metabolites in the decedent's blood. *Id*. In *Ewing*, the defendant was found to have sold a heroin/fentanyl mixture, and the missing drug or metabolite in decedent's toxicology results was heroin. *Id*. In the present case, Mr. Ross admitted to selling the heroin/fentanyl/furanyl fentanyl mixture, and the missing drug in K.P.'s toxicology results was furanyl fentanyl.

The Eighth Circuit's decision is in conflict with *Ewing*. *Ewing* specifically vacated the "death results" enhancement because there was insufficient evidence to link *both* drugs in the mixture sold by defendant to the decedent's overdose.

Here, there was no evidence that K.P. had ingested furanyl fentanyl, one of the substances contained in the mixture of controlled substances distributed by Mr. Ross. The Government's forensic pathologist, Dr. Marcus Nashville, testified that K.P.'s blood contained high concentrations of fentanyl and that K.P. died from fentanyl intoxication. (Tr. Tr. 224 at lines 19-22; Tr. Tr. 224 at lines 15-18). There are many fentanyl analogs and furanyl fentanyl is new analog, one with which he was not very familiar. *Id*. at 213, lines 5-18. When Dr. Nashelsky learned of the chemical composition of the drugs in the unopened package (which

Mr. Ross had admitted distributing), he requested that the toxicology laboratory test the body fluids for furanyl fentanyl. *Id*. However, the toxicology analysis did not find furanyl fentanyl or any metabolite of furanyl fentanyl in K.P.'s blood. *Id*. at 225, lines 1-3.

Dr. Nashelsky conceded that an explanation for the lack of furanyl fentanyl or its metabolites would be that K.P. never used any substance containing furanyl fentanyl. (Tr. Tr. 223 at lines 22-25). As previously discussed, the unopened package, supplied by Mr. Ross, did contain furanyl-fentanyl. *Id*. at 223 lines 2-12. The residue in the opened package was fentanyl and did not contain furanyl fentanyl. *Id*. Dr. Nashelsky further testified that although there was possible toxicologic evidence of recent heroin use based on the heroin metabolite morphine being found in K.P.'s urine, morphine was not found in K.P.'s blood. (Tr. Tr. 224 at lines 1-25). Dr. Nashelsky was unable to say when the heroin may have been used by K.P. *Id*. at lines 10-12. Nor did Dr. Nashelsky testify that any heroin had been used by K.P. at the same time that he used the fentanyl found in high concentrations in K.P.'s blood.

The Government had the burden of explaining the absence of furanyl fentanyl in K.P.'s blood and urine. The Government failed to do so. The Government had no evidence to show that K.P. had ever used furanyl fentanyl, the critical difference between the substance distributed by Mr. Ross found in the

unopened baggie and the pure fentanyl found in the opened baggie (not containing furanyl fentanyl).

Without proof of furanyl fentanyl in K.P.'s body, the Government had to prove that Mr. Ross distributed the pure fentanyl in the opened baggie to K.P. The Government produced no evidence that he had done so. The drugs were distinct as to color to the naked eye (gray vs white) and differed in chemical composition. In fact, the District Court did not find Mr. Ross guilty of distributing the pure fentanyl in the opened baggie. The District Court found that Mr. Ross had distributed "a mixture or substance containing a detectible amount of heroin, fentanyl, and furanyl fentanyl. . . that resulted in the death . . of K.P." (Verdict Transcript at 2-3). There was no evidence that the opened baggie, which K.P. had presumably used, contained furanyl fentanyl, or even heroin.

## CONCLUSION

Accordingly, this Court should grant *certiorari* to address whether the Eighth Circuit violated the principles of *Burrage* in finding that controlled substances distributed by Mr. Ross were the but-for cause of K.P.'s death.

Respectfully Submitted,

___/s/ Webb Wassmer_____
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ATTORNEY FOR DEFENDANT-APPELLANT
JONAS ROSS, III

## CERTIFICATE OF FILING

I hereby certify that on the 25th day of October, 2021, I did file this Petition for Writ of Certiorari by causing an original and ten (10) copies thereof to be delivered, via first class United States mail, postage paid, to Clerk, Supreme Court of the United States, 1 First Street N.E., Washington, D.C. 20543.

__/s/ Webb Wassmer_____
Webb L. Wassmer

## CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2021, I served this Petition for Writ of Certiorari by causing one copy thereof to be delivered via first class United States mail, postage paid to Clifford R. Cronk III, Assistant United States Attorney, United States Attorneys' Office, Southern District of Iowa, U.S. Courthouse, Suite 310, 131 East 4th St. Davenport, IA 52801, and by causing one copy thereof to be delivered via first class United States mail, postage paid to Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

class United States mail, postage paid, to Jonas Ross, III, Register No. 13443-026 USP Hazelton P.O. BOX 2000 Bruceton Mills, W.V. 26525

___/s/ Webb Wassmer_____
Webb L. Wassmer