
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Richard Leroy Parker - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a law enforcement officer's order to "just kinda stay here" results in a seizure under the Fourth Amendment, and whether complying with that order is valid consent?

(2) Whether the causation requirement from *United States v. Burrage*, 571 U.S. 204 (2014), is satisfied when a medical examiner cannot determine whether the distributed drug alone was sufficient to cause an individual's death?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Parker, 2:17-cr-01034 (N.D. Iowa) (criminal proceedings), judgment entered October 17, 2018.

United States v. Parker, 18-3277 (8th Cir.) (direct criminal appeal), judgment entered April 7, 2021.

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On Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Richard Parker, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 18-3277, entered April 5, 2021.

OPINION BELOW

On April 5, 2021, a panel of the Eighth Circuit Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is published and available at 993 F.3d 595. Mr. Parker filed a petition for rehearing *en banc* and/or petition for rehearing by the panel. The Eighth Circuit Court of Appeals denied the petition on June 10, 2021.

JURISDICTION

The Court of Appeals entered its judgment on April 5, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. 841(b)(1)(A) (2017)

If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment

STATEMENT OF THE CASE

On August 24, 2017, a grand jury indicted Mr. Parker with three counts related to alleged drug distribution. (DCD 2).¹ Count 1 alleged that Mr. Parker distributed a controlled substance near a protected location resulting in the death of E.M., in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(C), 851, and 860(a). (DCD 2). Count 1 alleged Mr. Parker distributed both a mixture or substance containing a detectable amount of heroin, and a mixture or substance containing a detectable amount of cocaine. (DCD 2). The government alleged that Mr. Parker distributed both heroin and cocaine to E.M., and that E.M. died as a result of both the heroin and the cocaine. Count 2 alleged that Mr. Parker possessed with intent to distribute a mixture or substance containing a detectable amount of heroin near a protected location, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(C), 851, and 860(a). (DCD 2). Count 2 was based upon heroin found at Ashley Ostrander and Donte Richard's residence, and the government alleged Mr. Parker possessed that heroin with intent to distribute. All counts alleged that Mr. Parker committed the offense after having been previously convicted of two or more felony drug offenses. (DCD 2).

¹ In this brief, the following abbreviations will be used:

"DCD" -- district court clerk's record, followed by docket entry and page number, where noted;

"PSR" -- presentence report, followed by the page number of the originating document and paragraph number, where noted;

"Supp. Ex" -- Government suppression exhibit, followed by video number and time stamp;

"Supp. Tr." -- Suppression hearing transcript, followed by page number;

"Ex." -- Government trial exhibit; and

"Trial Tr." -- Trial transcript, followed by volume and page number;

Mr. Parker filed a motion to suppress. (DCD 36). He asserted that law enforcement violated his Fourth Amendment and *Miranda* rights by seizing and questioning him at the residence and the police station. (*Id.*). A hearing was held on the motion.

Officers arrived at the residence at 12:28 a.m. in response to a 911 call. (Supp. Tr. 26). E.M. was receiving medical attention in a bedroom. (Supp. Tr. 26; Supp. Ex. 1, #1). At least four officers were at the scene, as well as paramedics. (Supp. Ex. 4, #1 & 2). Initially, Mr. Parker walked throughout the residence. (Supp. Ex. 4, #1 12:28 a.m.).

Officer Walker ordered Mr. Parker, Ostrander, and Richards to the living room. (Supp. Tr. 27). Walker told the three that the officers “had” to get their information. (Supp. Ex. 5, #1 12:28 a.m.). Mr. Parker provided Walker with his name and address, and then walked into the dining room. (*Id.* at 12:28 a.m.).

Ostrander told the officers that Mr. Parker and E.M. were in the bedroom together, and that when she went into the bedroom later E.M. was not waking up. (*Id.* at 12:28:30 a.m.). Meanwhile, Mr. Parker attempted to leave the dining room to enter the kitchen. (*Id.* at 12:29:15 a.m.). Walker stated “Hey Richard, do you have a middle name” and gestured to Mr. Parker. (*Id.* at 12:29:30 a.m.).

Walker asked Mr. Parker for more identifying information. (*Id.* at 12:29:30 a.m.). Mr. Parker again walked into the kitchen, and Walker followed him. (*Id.* at

12:29:30 a.m.). Walker asked Mr. Parker if he was in the bedroom with E.M., and he stated he was, but nothing happened. (*Id.* at 12:30 a.m.).

Mr. Parker again tried to walk away, and again, Walker followed. (*Id.* at 12:30:15 a.m.). Walker then told Mr. Parker, “I just got to talk to you, so just kinda stay here.” (*Id.* at 12:30:30 a.m.).

Walker asked Mr. Parker whether E.M. used drugs that day. (*Id.* at 12:31 a.m.). Mr. Parker stated E.M. had used cocaine. (*Id.* at 12:31 a.m.). Walker then told Mr. Parker “we’re just going to step outside and talk.” (*Id.* at 12:31:30 a.m.). While walking, Walker again tells Mr. Parker “let’s go outside and talk.” (*Id.* at 12:31:45 a.m.).

Outside, Mr. Parker and Walker stood within view of flashing patrol lights. (Supp. Ex. 5, #1 12:32 a.m.). Walker asked Mr. Parker if anything physical happened, which Mr. Parker denied. (*Id.* at 12:32 a.m.). Walker asked Mr. Parker whether he had used drugs that day; he denied using drugs. (*Id.* at 12:32 a.m.).

Walker continued to question Mr. Parker about E.M.’s drug use. (*Id.* at 12:33 a.m.). A paramedic opened the door. (*Id.* at 12:34:15 a.m.). Mr. Parker held open the door, and Walker stated “Richard just wait here.” (*Id.* at 12:34:45 a.m.). Walker immediately repeated the command “just wait here.” (*Id.* at 12:35 a.m.).

Walker further questioned Mr. Parker. (*Id.* at 12:36 a.m.). Again, Walker repeated the command “just wait out here.” (*Id.* at 12:36:15 a.m.). Mr. Parker told

Walker he was cold; Walker again told Mr. Parker to just “wait right out here” while Walker went inside to find a t-shirt. (*Id.* at 12:36:45 a.m.).

Walker continued to question Mr. Parker, just inside the door. (Supp. Ex. 5, #1 12:37:30 a.m.). Walker again asked Mr. Parker if he used drugs. (*Id.* at 12:37:45 a.m.). Mr. Parker stated, for the first time, that he had used drugs that day. (*Id.* at 12:37:45 a.m.). He later told Mr. Parker, “you got to understand, we’re going to be asking questions. . . Make sure there was no foul play or anything like that.” (*Id.* At 12:41:45 a.m.).

Another officer then told Mr. Parker to sit at the dining room table with Walker. (*Id.* at 12:46 a.m.). Walker asked Mr. Parker if he was on probation or parole. (Supp. Ex. 5, #2 at 1:44 a.m.). Mr. Parker stated he was on parole. (*Id.*). Walker asked Mr. Parker who his probation officer was. (*Id.*).

Mr. Parker remained in the dining room, with officers posted at every door and Walker standing right in front of him. (Supp. Ex. 6, #1 2:19 a.m.). The officers appear to be armed and in full uniform. (Supp. Ex. 2, #1, 1:16:00 a.m.). Walker told Ostrander and Richards that “in these types of situations” the officers have a job to do. (Supp. Ex. 1, #2 12:52 a.m.). He stated that the officers needed to make sure there was no “foul play” and so law enforcement could not let anyone “wander around the house.” (Supp. Ex. 1, #2 12:52 a.m.).

While sitting, Walker told Mr. Parker that investigators were coming and that these investigators would get a more detailed statement from him. (Supp. Ex. 6, #1

2:19:30 a.m.). Walker told Mr. Parker that they were waiting for the investigators to arrive. (*Id.* at 2:19:45 a.m.). Mr. Parker waited for two hours. (Supp. Tr. p. 34).

Officer Gudenkauf radioed in Mr. Parker's name to run a warrants check. (Supp. Ex. 2, #2, 1:58 a.m.). At 2:24 a.m., Ostrander attempted to use the restroom. (*Id.* at 2:24 a.m.). Gudenkauf stopped her, while standing in the doorway to the dining room where Mr. Parker was located, and prevented her from leaving the room. (*Id.* at 2:24 a.m.). Another officer stated, while in the kitchen with Parker, that the officers could not leave anyone alone. (*Id.* at 2:25 a.m.).

Investigator David Randall arrived at 2:48 a.m. (Supp. Ex. 6, #2 2:48 a.m.). He asked Mr. Parker if he "would be willing" to come to the police station for further questioning. (*Id.* at 2:48:30 a.m.). He told Mr. Parker he was not under arrest. (*Id.* at 2:49 a.m.). Eventually, Mr. Parker agreed. (*Id.* at 2:49 a.m.). He was transported to the police station in a patrol car. (Supp. Tr. p. 89).

At the beginning of the interrogation, Randall told Mr. Parker he was not under arrest and read him his *Miranda* rights. (Supp. Ex. 6, #2 at 3:22:30). Mr. Parker signed the *Miranda* wavier form. (*Id.* at 3:23 a.m.). Mr. Parker made several incriminating statements. (*Id.* at 7).

The magistrate judge filed a report and recommendation, recommending the denial of the motion to suppress as to Mr. Parker's statements. (DCD 47; Appendix A). As part of the factual findings, the magistrate judge determined that Mr. Parker

stated E.M. had used cocaine. (*Id.*, p. 4; App. p. 4). The magistrate then found that *after* these statements, Walker told Mr. Parker to “stay right here.” (*Id.*).

The court determined Mr. Parker was not in custody at the residence. (*Id.*, p. 10; App. p. 10). The magistrate judge found that the encounter was a valid *Terry* stop, and the seizure was not improperly prolonged. (*Id.*). The court found that the *Terry* stop was justified by Mr. Parker’s statement that E.M. had used cocaine. (*Id.*, p. 11; App. p. 11). The court determined that the encounter never evolved into a custodial arrest. (*Id.*, pp. 11-12; App. pp. 11-12).

The district court adopted the report and recommendation. (DCD 94; Appendix B). The court determined the seizure was lawful because Mr. Parker indicated that E.M. used cocaine. (*Id.*, pp. 6-7; App. pp. 28-29). However, the order did not specify when Mr. Parker was seized. (*Id.*, pp. 6-7; App. pp. 28-29). The court held that the stop never evolved into a custodial arrest. (*Id.*, p. 8; App. p. 30).

The case proceeded to a jury trial.² An autopsy was conducted on E.M., and the medical examiner testified at trial regarding the findings. E.M.’s alcohol level was .139. (Trial Tr. Vol. II, p. 385). The examiner could not find heroin in her system, but was told that E.M. used heroin. (*Id.*, p. 378). E.M.’s internal examination showed signs indicative of a heroin overdose; however, he could “never rule out a heroin overdose with an internal examination.” (*Id.*, p. 381). The examination also showed indications of recent heroin use before death. (*Id.*, p. 391, 383).

² As this petition only challenges the causing death finding, Mr. Parker will focus on the evidence relating to this finding.

According to the examiner, cocaine was in E.M.'s system at a potentially fatal level. (*Id.*, pp. 389-90). Heroin was also potentially present at a fatal level. (*Id.*, p. 390). However, the examiner testified that it was difficult to determine what was a "safe level" of cocaine or heroin. (*Id.*).

Ultimately, the medical examiner testified that the cause of E.M.'s death was a mixed drug toxicity of cocaine, ethanol, and heroin. (*Id.*, p. 387; Ex. 16). The examiner could not determine if the cocaine and alcohol would be enough to cause her death. (*Id.*, p. 393). He acknowledged that E.M.'s sleep apnea could potentially have played a role in her death. (*Id.*, p. 412). In the end, the examiner could not state that one drug caused her death. (*Id.*, p. 417).

The jury convicted Mr. Parker on both counts. (DCD 124). The jury acquitted Mr. Parker of delivery of cocaine under Count 1. (*Id.*). Under the special interrogatories, the jury found that Mr. Parker only delivered heroin to E.M., and that only the heroin resulted in her death. (*Id.*).

Pro se, Mr. Parker filed a motion for reconsideration of the suppression ruling. (DCD 163). He noted that the order found that Mr. Parker made statements regarding drug use before Walker ordered him to stop and "just stay here." (*Id.*). The court found he was seized at this moment. (*Id.*). This was incorrect; the body camera illustrates Mr. Parker was ordered to stay before statements regarding drug usage. (*Id.*).

The government resisted the motion, but conceded that the magistrate judge had transposed the facts regarding Mr. Parker's statement and Officer Walker's order to remain. (DCD 168).

The district court denied the motion. (DCD 170; Appendix C). The court acknowledged that the report and recommendation reversed the order of events. (*Id.*). However, the court found that Mr. Parker was not seized when Walker told him to "just stay here." (*Id.*). Alternatively, the court found that Walker had reasonable suspicion of drug usage at the residence, justifying any seizure. (*Id.*).

The case proceeded to sentencing. A presentence investigation report ("PSR") was created. The PSR determined Mr. Parker was subject to mandatory life imprisonment on both counts—under Count I because the jury made the resulting in death finding and Mr. Parker had at least one qualifying § 851 predicate, and under Count II because it was a 21 U.S.C. § 841(b)(1)(A) offense and Mr. Parker had at least two § 851 predicates. Mr. Parker objected to all of the alleged prior § 851 predicates, asserting none of them qualified. (PSR ¶¶ 33, 34, 40, 41).

At sentencing, the district court found that all four alleged predicates qualified as felony drug offenses. (Sent. Tr. p. 70). The court found Mr. Parker was subject to mandatory life sentences on both counts. (*Id.*, at pp. 60-62). The Court sentenced Mr. Parker to concurrent life sentences. (*Id.*, p. 66).

Mr. Parker appealed. As relevant to this petition, he challenged the denial of the motion to suppress and the sufficiency of the evidence to support the jury's "causing death" verdict.

The Eighth Circuit Court of Appeals affirmed Mr. Parker's conviction and sentence. *United States v. Parker*, 993 F.3d 595 (8th Cir. 2021). First, the court affirmed the motion to suppress. The court held that the Walker's statement of "just kinda stay here" was not a demand, and instead it was a consensual encounter. Additionally, the court determined that the officer's later statements of "just wait here" did not result in a seizure. The court found that the encounter never evolved into a seizure.

Next, the panel found sufficient evidence was presented to find that the heroin alone caused E.M.'s death. The court relied heavily on timing, and found that evidence established E.M. died "immediately" after she ingested the heroin. Further, the Court relied upon the expert testimony that heroin was present at a "potentially fatal" level. Therefore, the court determined that the heroin was an "independently sufficient cause" of E.M.'s death.

Finally, the circuit did not address any of the challenges to Mr. Parker's sentence. Because the panel upheld the sufficiency of the evidence on the "causing death" jury finding for Count I, it determined it need not address the arguments as to the life sentence on Count II under the concurrent sentencing doctrine.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S FINDING ON CONSENSUAL ENCOUNTER IS INCONSISTENT WITH SUPREME COURT PRECEDENT.

The Eighth Circuit Court of Appeal's holding that Mr. Parker was not seized or in custody, despite multiple orders to stay and the officers controlling Parker's movement, distorts the meaning of a consensual encounter and is inconsistent with the case law of other Circuits. The Court must grant the petition to reverse the denial of the motion to suppress Mr. Parker's statements and all evidence from the illegal seizure.

"A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (internal quotation marks omitted). One example from Supreme Court precedence is an officer's "use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 630. Yet in Mr. Parker's case, the Eighth Circuit determined multiple commands were simply requests, and the encounter was consensual. Looking at the circumstances, it is unclear why Mr. Parker would have felt free to leave or terminate the encounter with law enforcement.

First, at 12:30 a.m., Officer Walker told Mr. Parker, after repeatedly following him around the residence and gesturing towards him, "I just got to talk to you, so just

kinda stay here.” (Supp. Ex. 5, #1 12:30:15 a.m.). In fact, initially, the magistrate judge and district court found, by implication, that Mr. Parker was seized by these words. (DCD 47 pp. 10-11; App. pp. 10-11 and DCD 94 p. 7; App. p. 29). At this time, the residence was police dominated, and the officers are armed. As the evening continued, Mr. Parker was repeatedly told to wait, and then ordered to just “wait here” when he showed even the slightest sign of moving. (Supp. Ex. 5, #1, 12:34-35 a.m.). Officers then ordered him outside, and then ordered him back inside. (*Id.* at 12:31:45 a.m. – 12:46 a.m.). He was never advised that he was free to leave. (Supp. Tr. p. 30).

Other circuits have found less intrusive conduct and demands to constitute a seizure. In *United States v. Hernandez*, 847 F.3d 1257 (10th Cir. 2017), a defendant was walking on the street, talking with an officer while a patrol car followed. The officer asked the defendant to stop and talk with them. *Id.* The Tenth Circuit determined this was a seizure. *Id.* at 1264-65. Similarly, the Fourth Circuit has held that an officer stating “stay here” transforms a consensual encounter into a detention. *United States v. Laihben*, 482 F. App’x 827 (4th Cir. 2012). In fact, other circuits acknowledge that a gesture indicating an individual should remain is a seizure. *United States v. Gaines*, 918 F.3d 793, 797-98 (10th Cir. 2019).

The fact that Mr. Parker followed these commands does not transform the encounter to a consensual encounter under this Court’s precedent. “[A] mere

submission to a claim of lawful authority” does not indicate lawful consent. *Kaupp*, 538 U.S. at 631.

Alternatively, if Mr. Parker was initially not seized, the length and manner of the continued detention rendered it unlawful. From the time that Officer Walker ordered Mr. Parker to just “stay right here” until he was transferred to the police station was over two hours. (Supp. Ex. 5, #1 12:30:15 a.m.; Supp. Ex. 6, #2 2:48 a.m.). Mr. Parker was ordered to sit in the dining room with a uniformed officer standing over him, and two additional uniformed officers blocking each doorway. (Supp. Ex. 6, #1 2:19 a.m.). The individuals in the home, including Mr. Parker, could not use the restroom without a police escort.

II. THIS EIGHTH CIRCUIT’S ANALYSIS OF THE “INDEPENDENTLY SUFFICIENT CAUSE” REQUIREMENT HAS UNDONE THE CAUSATION REQUIREMENT IN *BURRAGE*.

The Eighth Circuit’s finding that heroin was an “independently sufficient cause” is inconsistent with *United States v. Burrage*, 571 U.S. 204 (2014). In *Burrage*, this Court held that “resulting in” requires that the prosecution prove that the substance—here, heroin—was an independently sufficient cause of the victim’s death. *Burrage* reversed the Eighth Circuit’s decision because the experts could not state whether the heroin alone would have caused the victim’s death.

Here, the evidence suffered the same weaknesses as in *Burrage*. The medical examiner admitted that he could not state that one drug alone caused E.M.’s death—including the heroin. (Trial Tr. Vol. II, p. 417). Because of this, the actual cause of

death was a mixed drug toxicity of cocaine, ethanol, and heroin. (*Id.*, p. 387). He testified:

Q: [T]he reason why you put the cause of death as mixed drug toxicity with heroin, ethanol, and cocaine is because you cannot say this one for sure caused her death, this one for sure caused her death, or this one for sure caused her death, correct?

A: Correct.

(*Id.*, p. 417); (*Id.* p. 418) (“Q: So what did cause [E.M.’s] death? A: Heroin, cocaine, ethanol.”).

Burrage makes clear that a drug may have contributed to an individual’s death is insufficient to establish that the drug “resulted in” the individual’s death. In fact, the testimony from the medical examiner is materially indistinguishable from the testimony in *Burrage*—that the victim died from “mixed drug toxicity.” 571 U.S. at 885-86. The only difference is the examiner avoided using the phrase “contributing factor.” Instead, he testified that the drugs, all together, caused E.M.’s death.

The Eighth Circuit found that *Burrage* was satisfied here because the medical examiner testified the heroin was present at a “potentially” fatal level. (*Id.*, p. 390). Yet, the examiner admitted that he did not believe there was really a “safe” level of heroin. (*Id.*). The examiner testified that “[i]n [his] opinion, most drugs don’t have a safe dose.” (*Id.*, p. 363).

Further, the examiner also testified that cocaine was present at a “potentially fatal” level, but admitted that he could not state that the cocaine usage was enough to cause her death. *Id.*, p. 387. He believed it was “impossible to answer that

question” and it was “beyond human capabilities.” *Id.* p. 393. Therefore, the “potentially fatal” testimony is meaningless and is insufficient to establish causation under *Burrage*.

Finally, the Eighth Circuit’s holding that timing is sufficient to establish beyond a reasonable doubt that the heroin was an independently sufficient cause of E.M.’s death is inconsistent with *Burrage*. The evidence supported that heroin was the last substance E.M. ingested, including evidence of 6-monoacetylmorphine, a byproduct of heroin which breaks down rapidly, in E.M.’s system. Because of this, the panel found that the jury could rely on an inference that the heroin was an independently sufficient cause. But timing cannot answer whether the heroin was independently sufficient or simply the “straw that broke the camel’s back.” In *Burrage* itself, heroin was also the last used drug before the victim’s death—yet this Court found this was insufficient to establish the heroin was an independently sufficient cause.

III. THE CONCURRENT SENTENCING DOCTRINE DOES NOT APPLY.

The Eighth Circuit applied the concurrent sentencing doctrine, finding it was unnecessary to address Mr. Parker’s challenges to his sentence. *Parker*, 993 F.3d at 606. The Eighth Circuit asserted that Count I necessitated a life sentence because of the causing death finding, so it was unnecessary to address Mr. Parker’s sentencing arguments. *Id.* However, Count I was still predicated on an § 851 enhancement. *See* 21 U.S.C. § 841(b)(1)(C). Further, as asserted, the causing death finding must be

reversed. Therefore, it is necessary to address Mr. Parker's challenges to his sentence.

CONCLUSION

For the foregoing reasons, Mr. Parker respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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