21-6924

IN THE
SUPREME COURT of the UNITED STATES
JANUARY TERM 2022

No. _____

JOHN VEYSEY,
Petitioner-Appellant,

v.

LOUIS WILLIAMS II, WARDEN,
Federal Correctional Institution,
Oxford, Wisconsin,
Respondent-Appellee.

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

John Veysey, Pro *Se*
Reg. No.: 10507-424
Oxford–FCI
P. O. Box 1000
Oxford, WI 53952

IN THE
SUPREME COURT of the UNITED STATES
JANUARY TERM 2022

No. _____

JOHN VEYSEY,
Petitioner-Appellant,

v.

LOUIS WILLIAMS II, WARDEN,
Federal Correctional Institution,
Oxford, Wisconsin,
Respondent-Appellee.

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

John Veysey, Pro *Se*
Reg. No.: 10507-424
Oxford–FCI
P. O. Box 1000
Oxford, WI 53952

TABLE OF CONTENTS

QUESTION PRESENTED

1. WHETHER § 2255 (E) "SAVINGS CLAUSE" IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEAL AS THE CORRECT INSTRUMENT BY WHICH PETITIONER-APPELLANT COULD BRING FORTH A *BURRAGE*-TYPE ARGUMENT.
   a. WHETHER THE PETITIONER-APPELLANT COULD HAVE BROUGHT AN EARLIER ARGUMENT FOR *BURRAGE* IN A DIRECT APPEAL OR § 2255 PRE-*BURRAGE V. UNITED STATES*, 571 U.S. AT 204, 134 S. CT. 881 (2014).

2. WHETHER *BURRAGE* IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEAL, WHEN IT RULED,
   a. *BURRAGE* APPLIES ONLY TO THE CONTROLLED SUBSTANCE ACT OF 21 U.S.C. § 841 STATUTE CONTAINING A "DEATH OR SERIOUS BODILY INJURY RESULT" ENHANCEMENT;
   b. THAT *BURRAGE* HAS NOT SET A NEW STANDARD, BY WHICH ONE MUST INTERPRET THE USE OF "BUT-FOR" IN A WIDE RANGE OF CASES;
   c. WHETHER *BURRAGE* APPLIES TO GUIDELINES SENTENCE OR ANY CASE IN WHICH AFFECTS THE STATUTORY SENTENCING RANGE BY A "DEATH OR SERIOUS BODILY INJURY RESULT" FINDING.

3. LASTLY, IS *BURRAGE* IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEAL WHERE A DEFENDANT WAS SENTENCED PRE-*BOOKER*, AND WHERE THE GUIDELINES WERE STILL MANDATORY.

a. THUS, SHOULD PRE-*BOOKER* GUIDELINES EFFECTIVELY SET MANDATORY SENTENCING RANGES, THUS IT MAY BE THAT THE CAUSATION STANDARD SET FORTH IN *BURRAGE* SHOULD BE EXTENDED TO "DEATH OR SERIOUS BODILY INJURY RESULT" PROVISION CONTAINED IN THE MANDATORY GUIDELINES.

PARTIES

The Petitioner-Appellant, are John Veysey *pro se*, in the courts below for himself and all those persons who are now or may in the future be confined as prisoners by the Federal Bureau of Prisons – Oxford Federal Correctional Institution, Oxford, Wisconsin.

The Respondent-Appellees are Louis Williams, II Warden (at the time) Oxford – FCI; Alice H. Green, United States Attorney's Office *Lead Attorney*; Leslie K. Herje, United States Attorney's Office Western District of Wisconsin.

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (continued)

Cases **Page**

Statutes and Authorities

TABLE OF AUTHORITIES (continued)

Statutes and Authorities (Continued) **Page**

Other

DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at No. 3:16-cv-00299 (7th Cir. 2021) and a copy is attached hereto as Appendix A. (A1-A3). The order of the United States District Court for the Western District of Wisconsin attached hereto as Appendix B. (A4–A12).

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Seventh Circuit entered on November 1, 2021. A copy of that order attached hereto as Appendix A. (A1-A3). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Amendment VI to the Constitution of the United Stated ensuring, that, "in criminal cases the right to a speedy and public trial by jury";

In addition,

Amendment XIV to the Constitution of the United States ensuring the "due process clause" required, "that any fact that increased the penalty for a state crime beyond the prescribed statutory maximum other than the fact of a prior conviction had to be submitted to a jury and proved beyond a reasonable doubt."

Furthermore,

Burrage v. United States, 571 U.S. at 204, 134 S. Ct. 881 (2014) deals solely with the statutory sentencing range vis-à-vis the enhancement under §841(b) (1) (B). *Burrage*, 134 S. Ct. at 892. However, the same Statutory Sentencing can and should be adopted under §844(i) as it has been adopted in numerous districts and appellate court cases since *Burrage*'s beginning as well as any case that applies 'death results' or serious bodily injury pre-*Booker*.

STATEMENT OF THE CASE

We recite only so much of the twenty-year history of this litigation as is necessary for a determination of the issue presently before the Court. Beginning in 1999, Petitioner-Appellant, JOHN VEYSEY, charged in a multi-count indictment with mail fraud, wire fraud, and arson. The District Court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231.

Petitioner-Appellant, found guilty of all counts after a jury trial on March 6, 2001, and sentenced to 110 years in the Bureau of Prisons on November 30, 2001. *United States v. John Veysey*, 2001 U.S. Dist. LEXIS 20992 (7th Cir. N.D. Ill., December 18, 2001). Notice of Appeal and Jurisdictional statement filed December 6, 2002. The Court of Appeals rejected all of Veysey's arguments and affirmed the conviction. *United States v. John Veysey*, 334 F.3d at 600, 2003 U.S. App. LEXIS 178060 (7th Cir. Ill, 2003). Furthermore, the Supreme Court denied certiorari review on January 12, 2004. *Veysey v. United States*, 540 U.S. 1129, 124 S. Ct. 1102 LEXIS 443 (2004)

On January 21, 2005, Petitioner-Appellant filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Arguing that the trial court erred by enhancing his sentence based on his having committed homicide, that since that offence is not pled in the indictment as required by *Apprendi*. Noting the same argument as made on direct appeal; the court denied relief. The decision not appealed. *United States v. Veysey*, 2005 U.S. Dist. LEXIS 24026 (7th Cir. N.D. Ill., Oct. 13, 2005)

Petitioner-Appellant, filed a motion on January 7, 2010 to dismiss indictment by a person in federal custody. It was asserted that a violation of the Speedy Trial Act under 18 U.S.C. § 3161 (b) related to his federal conviction. The district court denied his motion. It was appealed, June 9, 2010. *Veysey v. United States*, No.: 10-1392 (7th Cir June 9, 2010). May of 2013,

Petitioner-Appellant petitioned for a writ of habeas corpus under U.S.C. § 2241, again arguing the previous argument rose January of 2010. *Veysey v. Werlinger*, 13-cv-33-wmc (W.D. Wis. Dec. 13, 2013). Dismissed for lack of jurisdiction. The Appeals Court also dismissed for failure to pay filling fee.

Veysey filed a Writ of Habeas Corpus under 28 U.S.C. § 2241 savings clause on May 5, 2016 alleging that *Burrage v. United States*, 571 U.S. at 204, 134 S. Ct. 881 (2014) is applicable in his case. The petition was denied On October 30, 2018. *Veysey v. Williams*, 16-cv-299 wmc (W.D. Wis. Oct. 30, 2018).

At which point Veysey filed an Appeal *pro se* with the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois on November 26, 2018 (Dkt. 25). Several weeks later, the Petitioner-Appellant was told that his case was suspended until a later time. It was not until the Order dated September 22, 2021, *See* (Appendix C. A–13), at which time he was given thirty days from the date to file a memorandum explaining why the Court (7^{th} Circuit Court of Appeals should not summarily affirm the district court's decision.

The Petitioner-Appellant filed the Memorandum as requested by the Court in a timely manner submitted November 1, 2021, a decision was forth coming from the Appellate Court November 19, 2021, affirming the district court's judgment and dismissing appointment of counsel.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

This case is important for the issues it raises as to the proper allocation of functions between the federal district courts and federal courts of appeals. This Court has consistently recognized that "[t]he proper observance of the division of functions between federal trial courts and the federal appellate courts is important in every case," especially in cases where the district court has been asked to issue an effective remedy to cure unconstitutional conditions. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977), *Milliken v. Bradley*, 433 U.S. 267 (1977) (Milliken II) (public schools); *Hutto v. Finney*, 437 U.S. 678 (1978) (state prisons). Thus, I present the following in support of my petition for Writ of Certiorari, praying the Court will recognize the *pro se* nature of my unskilled presentation.

I. THE TYPE OF ARGUMENT BROUGHT FORTH UNDER *BURRAGE* COULD NOT HAVE BEEN SOUGHT EARLIER IN A DIRECT APPEAL OR § 2255 MOTION

The Appellate Court erred in dismissing the Petitioner-Appellant's § 2241. After the time for direct appeal, a § 2255 motion is usually the only way for a federal prisoner to challenge his conviction or sentence. Nevertheless, the so-called "savings clause" in § 2255 (e) provides that the traditional habeas corpus remedy (codified at § 2241) is available to federal prisoners where § 2255 is "inadequate or ineffective to test the legality of his detention". Whether a federal prisoner may obtain relief under § 2241 via the savings clause depends on whether § 2255 provides "'a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Webster v. Daniels,* 748 F.3d 1123, 1136 U.S. App. (7th Cir. 2015) (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)).

The savings clause does not permit courts to casually throw AEDPA's restrictions (deadlines, limitations, on successive petitions) out the window – "something more than lack of success with a section § 2255 motion must exist before the savings clause is satisfied." *Id.*

Nevertheless, this Court has repeatedly held that the savings clause permits a defendant to overcome AEDPA barriers where there is a "fundamental defect" that "cannot be corrected under § 2255." *Copper v. United States*, 199 F.3d 898, 901 (7th Cir. 1999).[1] The question is not whether the defendant is raising a legal claim that is *categorically* not cognizable under § 2255.[2] *See Webster*, 784 F.3d at 1136.

The Seventh Circuit Court's savings-clause cases apply a multi-part test, holding that the savings clause is available where:

1) The claim relies on a retroactive statutory-interpretation case and thus cannot be raised in a successive § 2255 motion;

2) the claim could not have been raised in the petitioner's first § 2255 motion; and

3) the error is "grave enough . . . to be deemed a miscarriage of justice".

See, e.g., Montana v. Cross, 829 F.3d 775, 783 (7th Cir. 2016).

However, it maybe worded differently in the various cases.[3] Occasionally, this Court has said that the first-prong must involve a retroactive *Supreme Court* opinion. In other cases, the Court has said that other new developments suffice. *Webster,* 748 F.3d 1136 U.S. App. (7th Cir. 2015); *Morales v. Bezy*, 499 F.3d 668, 670-73 (7th Cir. 2007); *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001). The present case is easy in this regard: Veysey relies on *Burrage*, a well-defined statutory-interpretation, retroactive Supreme Court case.

---

[1] See *also, e.g., Webster*, 784 F.3d at 1136-37; *Brown v. Rios*, 696 F.3d 638, 640-41 (7th Cir. 2012); *United States v. Prevatte*, 300 F.3d 792, 798-802 (7th Cir. 2002); *Davenport v. United States*, 147 F.3d 605, 710, U.S. App. (7th Cir. 1998)

[2] As discussed above, a claim that is categorically not cognizable under § 2255 (say, a claim complaining about a minor condition of supervised release), also would be categorically not cognizable under § 2241.

[3] The requirements are sometimes numbered or ordered differently. For consistency, this brief refers to the standard's three prongs as articulated and numbered above.

The Court, in various ways, has articulated the second-prong. *See Garza*, "As Garza frames the argument, it was literally impossible for him to have raised it at any time earlier than April 4, 2001, the date of the Commission's decision, because the United States had no judicially-cognizable treaty obligation not to execute Garza until that time. The argument therefore *could not have been* raised in his direct appeals or in his first § 2255 motion." *Garza*, 253 F.3d at 924.

The third-prong is straightforward: To get relief under § 2241 via the savings clause, there must be an injustice – something affecting the "fundamental legality" of the conviction or sentence. *Webster*, 784 F.3d at 1136. Moreover, it is well established that a defective sentence, say eighty years greater that the otherwise applicable maximum sentence, presents such an injustice. *Brown v. Rios*, 696 F.3d 640 (7th Cir. 2012), as to meet the test.

A) WHY THE APPELLATE COURT ERRED IN DISMISSING THE PETITIONER-APPELLANT'S § 2241 UNDER THE 3-PRONGS OF THE "SAVINGS CLAUSE"

Meeting the first-prong of the savings-clause test: his claim relies on *Burrage*, a statutory-interpretation case. At both the district and appellate level, the government conceded that *Burrage* is a statutory-interpretation case retroactively applicable. Judge Conley stated, "Here, Veysey has satisfied the first condition because *Burrage v. United States*, 571 U.S. 204, 134 S. Ct. 881 (2014), constitutes a new case of statutory interpretation." *See* (Appendix B. A-10). In *Krieger v. United States*, 842 F.3d 490 (7th Cir. 2016), "We rejected the contention that *Burrage* is merely an extension of non-retroactive cases such as *Apprendi*."

B) SECOND PRONG OF THE SAVINGS CLAUSE

The second-prong of the savings-clause test: the District Court concluded that a *Burrage*-type argument could have been brought earlier in a direct appeal or § 2255 motion. Again stated by Judge Conley, "Veysey has not shown, or even suggested that such an argument was foreclosed by binding circuit precedent. [Footnote —2 added] Nor has this court found any binding precedent that would have foreclosed a *Burrage*–type argument at the time Veysey was sentenced." *See* (Appendix B. A-11).

An underlying *Burrage*-type argument would have been academic at best to say the claim could have been raised on direct appeal or initial § 2255. This brings us to the most recent of decisions by the Supreme Court, that of *Burrage* and why until this ruling no claim of relief could be established. "The United States Supreme Court's insistence on "but-for" causality has not been restricted to statutes using the term "because of". The Court has, for instance, observed that in common talk, the phrase "based on" indicates a "but-for" causal relationship, and that the phrase, "by reason of," requires at least a showing of "but for" causation." *See Burrage* 187 L.Ed 719.

Petitioner-Appellant tried with the then means available numerous times to redress the issue of murder or attempted murder to no avail: *Apprendi*, *Booker* respectively – stated earlier these non-retroactive and well-defined instruments of law at the time would not serve to fulfill the justice he sought.

The Seventh Circuit Court of Appeals ruled that Veysey sentence was not outside the *then* Sentencing Guidelines as decided at the time under the standard set by *Apprendi.* In addition, without exception, *Booker*, being non-retroactive afforded no relief. However, had he been sentence after the *Booker* decision, or in light of Burrage, the outcome would certainly have afforded a different outcome – certainly the means by which the government brought forth its

complaint, prosecution, jury findings, and ultimate sentencing would have been done-so with a different set of judicial rules.

Prior to *Burrage* no such relief was offered Veysey on direct appeal or § 2255, even though Veysey's attorney brought up on direct appeal a "but-for" *type*–argument, "Veysey did not have any means, nor was it proved that he had any role in the death of his wife". (Dkt. 1 at 26). In fact, it would have been irresponsible and frivolous. Simply put, the law would not have allowed at the time any relief of sentence for which now a *Burrage*-type argument applies: ". . . is not about who decides a given question (judge or jury) or what the burden of proof is (preponderance versus proof beyond a reasonable doubt). It is rather about *what* must be proved." *See Burrage* 187 L.Ed 889.

The "*what* must be proved" was that Veysey role in the murdered of his wife; that was not proved. More importantly, the government would have had an easier time in proving the *attempted- murder charge*, though in doing so it would have restrained the term of incarceration imposed.

We look at *Lewis v. United States*, 523 U.S. 155, 140 L Ed 2d 271, 118 S. Ct. 1135 (1997) (*Vacated Fifth Circuit Judgment Sentence and Remand for Resentencing)*, "The Government concedes petitioner's point. The Solicitor General writes: "If the jury had found petitioner guilty of second degree murder under federal law, the district court would have been required to utilize the [then] Sentencing Guidelines provisions applicable to that offence." *Lewis*, 523 at 173.

Moreover, the *then* Sentencing Guidelines for second degree murder pre-*Booker* provided for a range of 168 to 210 months' imprisonment for a first-time offender who murders a "vulnerable victim,' United States Sentencing Commission, Guidelines Manual § § 2A1.1,

3A1.1, ch. 5, pt. A (Nov. 1994). Although, pre-*Booker*; subsequently, a judge could impose a higher sentence by departing from the Guidelines range, thus transforming in light of *Burrage*.

Let us again review the opinion of Judge Conley as to the second-prong of the "savings clause" and why an error was made in dismissing the § 2241. "*Veysey has not shown, or even suggested that such an argument was foreclosed by binding circuit precedent.*" The argument of whether a *Burrage*-type claim at the time of the direct appeal or § 2255 could have been made, by way of the Judge Conley's footnote addressed that question: "*Nor has this court found any binding precedent that would have foreclosed a Burrage*–type *argument at the time Veysey was sentenced.*" That in fact Veysey at the time of his direct appeal or 2255 could not have brought up such an argument as shown by Judge Conley goes to the argument at hand. ". . . the second prong is satisfied if 'it would have been futile' to raise a claim in the petitioner's original 'section § 2255 motion, as the law was squarely against him.'" *See* (Appendix B. A-11).

More to the argument at hand, under Rule § 11, every pleading, written motion or paper must be signed by at least the attorney of record, or by the party if unrepresented by counsel. Furthermore, all pleadings, motions, or papers certify to the best of the person's knowledge, information, and belief, formed to be reasonable under the given circumstances.

Subsequently, the pleadings, motions, or papers not meant for nefarious purpose, such as to harass, cause delay, or needlessly increase the cost of litigation. In addition, pleadings, motions, or papers for means of legal dispute are defensible by existing law or by nonfrivolous[4] arguments for extending, modifying, or reversing existing law; or for establishing new law.[5]

---

[4] **Frivolous**, "Black's Law Dictionary" Tenth Addition, *adj.*; Lacking a legal basis or legal merit; not serious; not reasonably purposeful <a frivolous claim>

[5] RULE § 11 (b) (1) (2) and (3) – SIGNING PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS

Furthermore, by filing frivolous arguments and incurring disfavor with the court at hand, one could incur sanctions, both monetary and punitive, even limiting ones filing.

In *Davila v. Lorie Davis, Director, Texas Department of Criminal Justice*, 582 U.S. ___, 137 S. Ct. ___, 198 L Ed 2d 603 (2017) (*Decision Upheld*) If trial counsel failed to preserve the error at trial, then petitioner's proposed rule ordinarily would not give the prisoner access to federal review of the error. Moreover, that an effective appellate counsel should not raise every *nonfrivolous* argument on appeal, but only those arguments most likely to succeed.

We look further at *Jones v. Barnes*, 463 U.S. 745, L Ed 2d 987, 103 S. Ct. 3308 (*Decision Reversed*) were it was stated that the defense counsel assigned to appeal from the criminal conviction held to have no constitutional duty to raise every nonfrivolous issue requested by defendant. In the United States Court of Appeals for the Second Circuit it held that when the appellant requests his counsel to raise additional colorable points, counsel must do so to the extent of his professional duty as the defense attorney and by not doing so failed his client on two nonfrivolous claims.

On certiorari. the United State Supreme Court reversed the Second Circuit Court's decision stating: "The defense counsel assigned to appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant."

In a more recent decision by the Seventh Circuit Court of Appeals we look at *Pinkney v. United States*, No.: 17-2339, U.S. App. (7th Cir. 2018) petitioner filed under 28 U.S.C. § 2255 in which the district court denied to vacate his sentence and affirmed his previous Illinois robbery conviction were violent felonies under the ACCA.

The Seventh Circuit Court of Appeals affirmed. However, it should be noted that the court further explained in its decision: "That before the Samuel Johnson Decision, the petitioner

had no basis to assert that his sentence was illegal and thus he could not claim a right to be released. The Curtis Johnson decision did not change that fact: all it did was to eliminate the elements clause of the ACCA as a basis for some state robbery convictions to qualify as violent felonies. The petitioner's claim under the Curtis Johnson decision stayed until the Samuel Johnson decision. Only then could he file a nonfrivolous motion for relief."

It would have been *foreclosed by judicial precedent*[6] and a waste of the courts time to argue a *Burrage*-type argument based on then-precedent, as precedent did not exist to support such an argument — until the recent decision in *Burrage* — only then could the filing of a nonfrivolous motion for relief be accomplished, and thus meet the second-prong of the "savings clause".

C) THIRD PRONG OF THE SAVINGS CLAUSE

To redress the third-prong of the "savings clause": "that the error is grave enough to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding . . ." *Montana v Cross*, 829 F.3d at 776.

In *Davenport,* one defendant presented a situation similar to that of *Montana*. That conviction occurred prior to the Supreme Court's decision in *Bailey v. United States*, 516 U.S.C.S. 137, 116 S. Ct. 501, 133 L Ed 2d 472 (1995). It held, "That 'use' in section 924(c) does not include mere possession, as had been the law of this circuit when Nichols was convicted." *Davenport*, 147 F.3d at 607. Given the state of the law at the time of his conviction: "[The defendant] had no reasonable opportunity, either when he was convicted, appealed or later when he filed a motion for postconviction relief under section 2255, to challenge the legality of his conviction for using a firearm in connection with a drug offense on the ground that "use" does

---

[6] *Riley v Dorethy*, ___ Fed. Appx. ___ (2018) LEXIS 21722 (*Affirmed*); *United Stated v. Emerson*, 223 Fed. Appx. 496 (2007) (*Affirmed*); *Gaustad v. Deppisch and Pulver*, 246 Fed. Appx. 392 (2007) (*Affirmed*)

not include merely possessing." *Montana*, 829 F.3d. at 782. At the time, the law was against him in the circuit that it was not necessary to raise the issue to preserve the basis for collateral attack later on.

In addition, "It would just clog the judicial pipes to require defendants, on pain of forfeiting all right to benefit from future changes in the law, to include challenges to settled law in their briefs on appeal and in postconviction filings." *Montana*, 829 F.3d at 783.

Quoting *Davenport*, 147 F. 3d. at 607.

"The question raised is whether in these circumstances, which as was said differ decidedly from those of the *Davenport*'s case, the remedy created by section 2255 can be brought adequate to enable the prisoner to test the legality of his detention. *Montana*, 829 F.3d 783.

The Third Circuit in *In re Dorsainvil*, 119 F.3d 245, 251 (3rd Cir. 1997) answered with a *no*. The defendant could not have used his first motion under the section to obtain relief on a basis of yet established law. Furthermore, he could not use a second or other successive motion to obtain that relief because the basis which he sought relief is neither newly discovered evidence nor a new rule of constitutional law.

If we conclude as in *Montana*, 829 F.3d at 784, "That the savings clause will permit a federal prisoner 'to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion.'" Then it is safe to espouse that the Petitioner-Appellant, in light of *Burrage*, would afford him a greater standard (*i.e.* jury instruction clarification, sentence and guideline enhancement clarification, *etc.*) thus a potentially different outcome. Consequently, the difference between the then pre/post-*Burrage* sentence and the now sentence, equates to a

decidedly different outcome of some eighty-years. In the above mentioned, it can be said that the error is "grave enough" to deem an injustice and meet the third-prong of the "savings clause".

II. THE SEVENTH CIRCUIT APPELLATE COURT ERRED IN CONCLUDING *BURRAGE* IS ONLY APPLICABLE TO CONTROLLED SUBSTANCE ACT 21 U.S.C. § 841 STATUTE CONTAINING A "DEATH RESULT" ENHANCEMENT AS "BUT-FOR" STANDARD WHEN IT IS MORE FAR-REACHING

If we undertake that *Burrage* is indeed retroactive as adopted by this court and reasoned previously, the next logical conclusion is to ask does *Burrage* apply only to the Controlled Substance Act 21 U.S.C. § 841. Thus, can we conclude since *Burrage* came to be, that any statute containing a "death or serious bodily injury result" enhancement and that of the "but-for" standard would then apply accordingly.

The numerous Appellate courts and even this body of the Supreme Court have adopted by way of a loosely interpreted "but-for" standard of interpreting *Burrage* to govern more than the limited view of the Controlled Substance Act 21 U.S.C. § 841.

In U*nited States v. Miller*, 2014 U.S. App. LEXIS 22317 (6th Cir. Nov. 20, 2014) (*Convictions reversed. Case remanded.*) Because of element of prosecution under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (a) (2) (A), required the government to establish "but-for" causation, and thus, the district court erred in failing to give a "but-for" instruction on causation. Because motive played a starring role at trial, and defendants presented evidence other, non-religious motives for the assaults, the error was not harmless. The conviction reversed and remanded.

In the opinion by the Honorable Sutton:

> "Regrettably for all concerned, a case decided *after* this criminal trial. *Burrage v. United States*, 571 U.S. at 204, 134 S. Ct. 881 (2014). Because this error was not harmless, and indeed went to the central factual debate at trial, we must reverse these convictions."

> "Consistent with these definitions, the Supreme Court has "insiste[d]" that "statutes using the term "because of" require a showing of "but-for" causality". *Burrage*, 134 S. Ct. at 889. It has applied this requirement in criminal and civil cases alike."

In addition,

> "The conclusion makes good sense in the context of a criminal case implicating the motives of the defendants. The alternative proposed definition of the phrase ("significant motivating factor") does not sufficiently define the prohibited conduct. How should a jury measure whether a specific motive was significant in inspiring a defendant to act? Is a motive significant if it is one of the three reasons he acted? One of ten? "Uncertainty of [this] kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." [*Burrage*] (rejecting the "substantial" or "contributing" factor test). Even if there were some doubt over which of these definitions Congress had in mind, which we do not think there is, the rule of lenity would require us to adopt the more lenient of the two in a criminal case. *See.* at 891; *See* also *Id.* at 892 (Ginsburg), agree that it requires "but-for" causation in the setting of a criminal statute in view of the rule of lenity, *see Burrage*, 134 S. Ct. at 892 (Ginsburg, J. concurring in the judgment)."

United States v. Miller, 2014 U.S. App. LEXIS 22317 (6th Cir. Nov. 20, 2014) (*Convictions reversed. Case remanded.*)

In *United States v. Matusiewicz*, U.S. Dist. Court of Delaware LEXIS 169821 (December 21, 2015) (*Affirmed*). The two defendants found guilty on charges of cyber stalking that resulted in a death. The prosecution did not charge any of the defendants with murder of the victim or conspiracy to commit murder. Rather, they were charged with offenses related to their alleged surveillance and harassment under the federal interstate stalking statute, 18 U.S.C. § § 2261A (1), 2261 (b) & 2, and the federal cyberstalking statutes, 18 U.S.C. § § 2261A (2), 2261 (b) & 2. The maximum sentence for a violation of these statutes, is a sentence of five years, but an enhanced penalty of up to life imprisonment exists "if death of the victim results." 18 U.S.C. § 2261 (b) (1).

This case presented an issue of first impression for a federal trial court under the cyberstalking statue – how to define for a jury the proof required establishing that Defendants' conduct caused the victim's death. In holding with *Burrage,* "it is not about who decides a given question (judge or jury) or what the burden of proof is (preponderance versus proof beyond a reasonable doubt). It is rather about *what* must be proved." What must-be-proved in this instance is that the defendants caused the death of the victim, which must be proved beyond a reasonable doubt.

> "Because § 2261 (b) (1) enhanced the maximum sentence to which the Defendants are exposed in this case, it is an element which must be submitted to the jury and proven beyond a reasonable doubt (emphasis added). See *Burrage v. United States*, 571 U.S. at 204, 134 S. Ct. 881 (2014) (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2162-63, 186 L. Ed. 2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000))."[7]

United States v. Matusiewicz, No.: 13-83 U.S. Dist. Court of Delaware LEXIS 169821 (December 21, 2015) (*Affirmed*).

In *Matusiewicz*, the Government submitted the following language in the jury instructions to the Court: "Was Christine Belford's death a reasonably foreseeable result of the offense? Stated differently, you should decide whether a reasonable person, knowing all to the evidence presented during the trial, would have foreseen that Ms. Bedford's death would result from the offense." Jury Instruction at 71-72 *Matusiewicz.*

The Petitioner-Appellant was enhanced to the maximum sentence in his case the same as was done in *Matusiewicz*; moreover, the '*what*' must be proved in Veysey's case was that he committed murder; to be more precise, no such jury instruction was given in Veysey's case as was done in *Matusiewicz* .

---

[7] Once again, this 2015 case which is post-*Apprendi, Booker* and *Alleyne* are all cited facts and in use as a progressive standard leading to *Burrage* and ultimately the issue at hand.

By leaving this key instruction out of Veysey's jury instruction, and the judge making the ultimate decision in *light–of*, it afforded the Government no need to increase the burden of proof between the defendant and the alleged victim. This intern did not allow Veysey to defend against the charge of murder, when only an outcome of simple fraud and arson was alleged and needed proved. However, in doing so, took the proximate cause that is an essential element away from the jury to find for an "enhanced penalty", which requires the government to prove a real and meaningful cause of action in the death or bodily injury outcome, which in the end ensures the defendants' rights.

The record in the case at hand showed that no such proof existed. At trial:

> "Dr. Larry Blum performed the autopsy upon Patricia Veysey and testified the cause of death as cardiac arrhythmia due to a bridging intramuscular coronary artery. (Tr. 2651 – 2565). Dr. Robert J. Myerburg, a cardiologist, (did not perform an autopsy, but read from a file) testified that the bridging was not the cause of death. (Tr. 1562). In fact, *he ruled out sudden cardiac death but was unable to determine a cause of death.* (Tr. 1566 – 1571) emphasis added). Dr. Robert Kirschner based his testimony on a number of factors including the position of the body, the reaction of the defendant upon finding his wife, defendant's unusual actions on the day of her death and his review of the medical records only [again all via a file/report], autopsy report and witness statements as well as Dr. Myerburg's report, also, he *was unable to determine a cause of death.* (Tr. 2602 – 2690) (Emphasis added). A defense witness, Dr. Jeffery Jentzen a forensic pathologist, testified that Patricia Veysey most probably died as a result of cardiac arrhythmia or sudden stoppage of her heart related to a mitral valve prolapse. (Tr. 4343)."

See (Dkt. 12 at 3)

Burrage is not about whether a judge or jury makes the "death results" finding, but instead clarifies that an underlying crime must be a "but-for" cause of death, and not merely a contributing factor to the death, in order for a sentence to be enhanced.

In light of *Burrage*, the logical conclusion to ask, does *Burrage* apply to the Controlled Substance Act 21 U.S.C. § 841 *only*.[8] [9] It has become apparent that *Burrage* is applicable in cases other than 841 drug offenses as stated previously. More apparent, is the recognition of this fact at many levels, from District, Appellate, and even in several Supreme Court case examples presented.

A. *BURRAGE* APPLICABILITY TO GUIDELINES SENTENCE OR ANY CASE IN WHICH THE STATUTORY SENTENCING RANGE WAS AFFECTED BY THE "DEATH RESULT" FINDING

In further support of Petitioner-Appellant argument why the District Court erred, we look to the following in *Prevatte v. Krueger*, No.: 15-2378 LEXIS 14029 (7th Cir. August 1, 2017):

> "We agree with the district court that *Prevatte's* petition should be dismissed, but our reasoning is different than that of; the district court. First, our court has already found that *Burrage* is not about whether a judge or jury makes the "death result" finding, but instead clarifies that the underlying crime, in this case the detonation of a bomb, must be a "but-for" cause of death and not merely a contributing factor to the death. Second, *Prevatte* could have argued that the government did not prove that the bomb was a "but-for" cause of death at his trial, as part of his direct appeal or a part of his initial § 2255 motion. No circuit precedent prevented him from making such an argument. Third, and perhaps, most importantly, the rebutted evidence at trial established that the bomb was the "but-for" cause of Ms. Antkowicz's death. Therefore, *Prevatte's* enhanced sentence is neither illegal nor a miscarriage of justice. For these reasons, the

---

[8] *Pereira v. Jeff Sessions*, AG, 585 U.S. ___, 138 S. Ct. ___, 201 L Ed 433, (2018) (*Reversed and Remanded*); *Ohio Secretary of State v. A. Philip Randolph Institute*, 584 U.S. ___, 138 S. Ct. ___, 201 L Ed 141, (2018) (*Judgment Reversed*); *Maslenjak v. United States*, 582 U.S. ___, 137 S. Ct. ___, 198 L. Ed. 2d 460, (2017) (*Vacated and Case Remanded*); *Bramski v. United States*, 573 U.S. ___, 134 S. Ct. ___, 189 L Ed 2d 262, (2014) (*Fourth Circuit Judgment Affirmed*); *Scialabba Acting Director U.S. Immigration v. Osorio*, 573 U.S. ___, 134 S. Ct. ___, 189 L Ed 2d 98, (2014) (*Judgment in Favor of Beneficiaries Reversed, Case Remanded*).

[9] *Burrage* case statutes apply to other than that of Controlled Substance Act § 841: *Pereira v. Jeff Sessions* (AG) — 8 U.S.C.S. § 1229; *Ohio Secretary of State v. A. Philip Randolph Institute* — 52 U.S.C.S. § 20507 (b) (2); *Maslenjak v. United States* — 18 U.S.C.S. § 1425 (a); *Bramski v. United States* — 18 U.S.C.S. § 924 (a) (1) (A); *Scialabba Acting Director U.S. Immigration v. Osorio* — 8 U.S.C.S. § 1153 (h) (3).

district court was correct in holding that *Prevatte's* petition for habeas corpus should be dismissed."

Prevatte v. Krueger, No.: 15-2378 LEXIS 14029 (7th Cir. August 1, 2017) (*Affirmed and Remanded.*)

Not to be obtuse in one's argument, but it must be made clear that to the first part of the Seventh Circuit court of Appeals decision in *Prevatte*, the detonation of the bomb must be the "but-for" cause of death and not merely a contributing factor to the death. It was clear in the record that the bomb in question was the contributing factor of Ms. Antkowicz's death. Not so in the Petitioner-Appellant case as stated previously, "*in which no clear evidence could be proved that Mr. Veysey had anything to do with the death of his wife, except for the assumption as to how she died or if there was even foul play.*" *See* (Dkt. 12 at 3) (Tr. 1566-1571; 2651-2565; 2602-2690; -4343)

Secondly, it was stated in *Prevatte* he could have argued that the government did not prove that the bomb was a "but-for" cause of death at his trial, as part of his direct appeal or as a part of his initial § 2255 motion. It was further stated, that no circuit precedent prevented him from making such an argument. In the Petitioner-Appellant case he has argued that point in nauseam over the past twenty-years at both the district and appellate court[10] that he was not the cause of his wife's or anyone else death, nor cause of any bodily harm.

Most importantly, what differs from Petitioner-Appellant argument over that of *Prevatte* is the un-refuted evidence at trial which established that the bomb was the "but-for" cause of Ms. Antkowicz's death. In Petitioner-Appellant case, he argued at the time of his sentencing and again on direct appeal that he was not the cause of his wife's death.

"Dr. Robert J. Myerburg and Dr. Robert Kirschner witnesses for the government "[were] *unable to determine a cause of death.*" (Tr. 2602 – 2690)

[10] *See United States v. Veysey*, 334 F.3d 600 (7th Cir. 2003) Appellate Brief at 32-34, 36

(emphasis added), and Dr. Larry Blum the original pathologist and Dr. Jeffery Jentzen a forensic pathologist both for the defense testified that "Patricia Veysey most probably died as a result of cardiac arrhythmia or sudden stoppage of her heart related to a mitral valve prolapse." (Tr. 4343)."

He again argued, though incorrectly in his § 2255 the same issue which was brought up on appeal. Being dismissed after it was construed as a second attempt to apply *Apprendi.*

Let us look further in *Prevatte* for the applicability that *Burrage* applies outside the provision of the Controlled Substance Act.

> "*Burrage* interpreted the "death results" provision of the Controlled Substance Act that is similar, but not identical to the "death results" provision of § 844 (i). Respondent does not affirmatively dispute the applicability of *Burrage*'s holding to § 844 (i). Accordingly, we assume, without deciding, that *Burrage's* requirement of "but-for" causation applies to the "death results" provision of § 844 (i)." *See* (Fn. – 2)

Prevatte v. Krueger, No.: 15-2378 LEXIS 14029 (7th Cir. August 1, 2017)
(*Affirmed and Remanded.*)

I do not wish to presume to know the minds of those Honorable Judges on the Seventh Circuit Court of Appeals in this instance, but I believe that the same *Burrage* requirement of "but-for" causation that applies to the "death results" provision of § 844 (i) in *Prevatte* would aptly apply in Petitioner-Appellant case. As I believe the Appellate Court alluded to when it stated, "[r]egardless of any underlining merit in his claims". *See* (Appendix A. A-2).

Petitioner-Appellant wishes to show that in light of the Supreme Court's decision in *Burrage* the MODERN FEDERAL JURY INSTRUCTIONS have been revised which involved similar enhancement. *See* (Appendix D. – A 14–16).

Most notable that *Veysey* was charged with Arson § 844 (i) Instruction 30-6 Fourth Element—Death or Personal Injury; in addition he was charged with multiple counts of Mail and

Wire Fraud which have also been affected by *Burrage*; along with 59 other Substantive Instructions throughout many Districts and Appellate Courts.

In a recent decision by the Supreme Court a citizen was improperly convicted of knowingly procuring naturalization contrary to law, based on false statements under 18 U.S.C.S. § 1425 (a) Procurement of Citizenship or Naturalization Unlawfully, in applying for admission as refugee, since there was no finding that false statement to government was not shown to be casual connected to procuring naturalization.

> "While § 1425 (a) clearly imports some kind of causal or means-end relation, see supra, at ___ – ___, 198 L. Ed. 2d at 466-468, Congress left that relation's precise character unspecified. Cf. *Burrage v. United States*, 571 U.S. ___ – ___, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014) (noting that courts have not always construed criminal statutes to "require [ ] strict "but-for" causality", and have greater reason to reject such a reading when the laws do not use language like "results from" or "because of"). The open-endedness of the statutory language allows, indeed supports, our adoption of a demanding but still practicable causal standard."

Maslenjak v. United States, 582 U.S. ___, 137 S. Ct. ___, 198 L. Ed. 2d 460, 2017 (*Vacated and Case Remanded*).

Maslenjak further supports Petitioner-Appellant argument in support of why the District Court erred in concluding that *Burrage* was inappropriate in this instance. In addition, if we look further to *Bostock v. Clayton County Georgia*; 140 S.Ct. 1731; 207 L.Ed. 2d 218; (2020 U.S. LEXIS 3252) (*reversed* and *Remanded* and *Affirmed)*. We find the Supreme Court once again used *Burrage* in a non-drug related, multi-circuit Appeals Court decision involving Title VII of the Civil rights Act of 1964; to encompass the Eleventh, Sixth, and Second Circuit Court of Appeal(s).

- The question was not what "sex" meant, but what Title VII says about it. What is most notable, the statute prohibits an employer from taking certain actions "because of" sex. The court

previously explained, "The ordinary meaning of "because of ', 'by reason of' or 'on account of.'" In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350, 133 S.Ct. 2517, 186 L. Ed. 2d 503 (2013) in which the citing of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L. Ed. 2d 119 (2009); we find the following, in the language of law, the meaning under Title VII's "because of" test incorporated the "simple" and "traditional" standard of but-for causation. In *Nassar*, 570 U.S., at 346, 360, 133 S.Ct. 2517, 186 L. Ed. 2d 503. This form of causation is established whenever a particular outcome would not have happened "but-for" the purported cause. See *Gross*, 557 U.S., at 176, 129 S.Ct. 2343, 174 L. Ed. 2d 119. In other words, a "but-for" test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a "but-for" cause.

If we used the standard offered in *Gross*, 557 U.S., at 176, 129 S. Ct. 2343, 174 L. Ed. 2d 119, the Government cannot meet the standard of but-for causation by which Petitioner-Appellant was sentenced. Often events have multiple but-for causes, thus, it should only apply when not only the Petitioner-Appellant expert witness' but also the expert witness' for the Government cannot offer any more than a speculative "but-for" cause of why *Veysey's* wife died, the Petitioner-Appellant should not be held to the standard of the "but-for" cause of the death. Furthermore, it should be noted that the Supreme Court has recognized language in *Burrage* that reaches well beyond the interpretation of only the Controlled Substance Act, 21 U.S.C. § 841, as shown;

In Veysey's case, the fraud did not cause the death of his wife, nor, was the death the outcome of the fraud. 'Which came first the chicken or the egg?' Not wishing to be cavalier, it is not the intention of the Petitioner-Appellant to make light of such a tragic situation. The Government said that fraud was committed in collecting life insurance on his wife. Fraud could

only be committed if his actions caused the death of his wife. If the death was not the direct result of his actions, then no fraud was committed.

It is my intention to be clear that in a complicated case such as this, one in which the Government rushed on many fronts and left gaping holes. At the time, those holes never needed to be filled, but since *Burrage* now afford a different outcome through the clarity of the Supreme Court's ruling, which makes clear what action this Court should have now taken.

It was once again not a foregone conclusion in this case holding with *Burrage*, that Mr. Veysey was the cause of his wife's death.

III. THE COURT ERRED DENYING THE PETITIONER-APPELLANT § 2241 MOTION BY NOT CONSIDERING IN LIGHT OF *BURRAGE* THAT ON COLLATERAL REVIEW THE MANDATORY PRE-*BOOKER* GUIDELINES WERE RELEVANT UPON RESENTENCE

A. *BOOKER'S* NON-RETROACTIVITY ON COLLATERAL REVIEW

The Petitioner-Appellant issue at hand is whether *Booker v. United States*, 543 U.S. 220, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005) can be applied pre-*Booker* in an argument in light of *Burrage*, even though *Booker* has not been applied retroactively in cases like Veysey's was decided before *Booker's* January 12, 2005 issuance.

The Seventh Circuit concluded that Booker in not retroactive on collateral review.

> "Although the Supreme Court did not address the retroactivity question in *Booker*, its decision in *Schriro v. Summerlin*, 542 U.S. 348, 159 L. Ed. 2d 442, 124 S. Ct. 2519 (2004), is but conclusive on the point. *Summerlin* held that *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) – Which, like *Booker*, applied *Apprendi's* principles to a particular subject – is not retroactive on collateral review."

McReynolds v. Bennett, 397, 480 F.3d (7th Cir. 2005) (*Decision District Court Affirmed.*)

Petitioner-Appellant was sentenced in his criminal case in 2001 and disposition of his direct appeal was decided 2003 well before the decision in *Booker*. As a general matter, new

constitutional rules of criminal procedure will not be applicable to those cases, which have become final before the new rules announced. Two categories of decisions fall outside this general bar on retroactivity for procedural rules. First, new substantive rules generally apply retroactively. Second, new "watershed rules" of criminal procedure, which are procedural rules implication the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect.

Let us look at a landmark case in which a petitioner found guilty, sought relief and ultimately denied until his habeas petition then heard before the Supreme Court in what became a landmark case of a "watershed" ruling. *Teague v. Lane* 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (*Reversed and remanded*).

Under *Teague*, a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determination that place particular conduct or persons covered by the statute beyond the state's power to punish. Procedural rules, by contrast, regulate only the manner of determining the defendant's culpability. Such rules alter the range of permissible methods of determining whether a defendant's conduct is punishable. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raises the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.

Under *Teague,* a rule is substantive by striking down the residual clause as void for vagueness. A substantive rule affected the Armed Career Criminal Act of 1984 by altering the range of conduct or the class of persons that the Act punishes. Before, an offender in that situation faced 15 years to life in prison. After the change in ruling, the same person engaging in

the same conduct is no longer subject to the same outcome from the Act, and faces at most 10 years under U.S.S.G.

Under *Burrage,* a *New Substantive* ruling has been conceded to apply retroactively by the United States Department of Justice and then Attorney General.[11]

Petitioner-Appellant filed a motion under § 2255 to vacate, set aside, or correct his sentence. In that motion, argued a similar issue as raised in his direct appeal. The District Court held:

> " . . . Veysey is not entitled to raise this same issue by way of a post-conviction petition in the absence of changed circumstance . . . and does not suggest any changed circumstance here. The Supreme Court's more recent decision in *Booker* [site omitted] *arguably gives Veysey's argument more traction*: *Booker* held that "defendants have a right to a jury trial on *any* disputed *factual* subject that increases the maximum punishment and that the Federal Sentencing Guidelines come *within* this rule to the extent that their operation is mandatory." See *McReynolds v. United States*, 397 F.3d 479, 480 (7th Cir. 2005) (summarizing *Booker*). The Seventh Circuit concluded in *McReynolds*, however, that *Booker's* "new rule about the federal system" does not apply retroactively to cases which, like Veysey's, were finally decided before *Booker's* January 12, 2005 issuance. *Id.* at 481.
>
> "[The District Court] concludes that, *until* and *unless* the Supreme Court holds *Booker* applicable on collateral review, Veysey has no avenue for relief."

United States v. Veysey, No.: 05-cv-386; 2005 U.S. Dist. LEXIS 24026 (N.D. Ill., October 13, 2005)

However, in light of *Burrage*, and how it is applicable in Veysey's case as shown in its retroactivity and application in this instance case of "death results", it does afford that on resentence both *Booker* and *Apprendi* application do apply.

---

[11] See *also, e.g., United States v. Jenson*, 2015 U.S. Dist. LEXIS 50171 (S.D. Ill., April 17, 2015); *Weldon v. United States*, 2015 U.S. Dist. LEXIS 50959 (S.D. Ill., April 17, 2015); *Ragland v. United States*, No.: 14-3748 (8th Cir. April 29, 2015).

B. THE 'WATERSHED' DECISION IN LIGHT OF *BURRAGE* MAKES PRE-*BOOKER* RULINGS RETROACTIVE ON COLLATERAL REVIEW IN AS MUCH AS IT RELIES UPON RESENTENCE IN THE PETITIONER-APPELLANT § 2241

The Petitioner-Appellant, *pro se*, makes his argument before this Honorable body using plain-language concerning why the District and Appellate Court has erred in dismissing § 2241. As both the Government and District and Appellate Court are correctly noted, there are no cases holding to *Booker*'s retroactivity. However, at this time there are no cases holding this rule not to be retroactive as applied in light of *Burrage* "death result" and "but-for" provisions to a pre-*Booker* argument.

At issue, is the effect on the Petitioner-Appellant's case based on the retroactivity of *Burrage*? First, *Burrage* is deemed by the Supreme Court and Seventh Circuit Court of Appeals and most other Court of Appeals as retroactive stated previously and should be treated so. Second, the Petitioner-Appellant argues that *Burrage* is not only a case that is uniquely based on a drug charge, chiefly 21 U.S.C. § 841. However, it is argued that it extends well beyond § 841– again as stated previously – and should be treated as such. In this instance as it applies in *Prevatte* "death results" provision of § 844 (i) the same "but-for" causation applies to Petitioner-Appellant's case, as well as many others represented herein.

Furthermore, it is just as important to state that it is not the Petitioner-Appellant's wish that this argument in anyway, be an additional attempt to argue *Apprendi* or in any way let it be concluded that it is the Petitioner-Appellant's argument to imply that *Apprendi* or *Booker* are retroactive on the face:

> ". . . Veysey's *Apprendi* arguments have been rejected numerous times, however, and he cannot use *Burrage* to revive them."

Veysey v. Williams, 16-cv-299 wmc (W.D. Wis. Oct. 30, 2018) (Appendix A-9).

Please note, that the Petitioner-Appellant would examine the historical progression of facts in a non-retroactive nature in both *Apprendi* and *Booker*, culminating with *Burrage* and not from a perspective of non-retroactivity as it applies to *Apprendi* and *Booker*, not as has been argued in past filings by Veysey.

It is important to note that in Petitioner-Appellant's direct appeal his then counsel of record made the following argument:

> "Veysey was sentenced on the fraud counts of 1 – 13, 15 -17, the Court applied application note 14 of Guideline 2F1.1 to sentence defendant under the Murder guidelines of 2A1.1. While the maximum sentence for fraud is 5 years, the Court used the application to enhance defendant's sentence beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) which held that any fact, other than prior conviction, that increases the statutory maximum penalty must be submitted to the jury and found beyond a reasonable doubt.
>
> "The issue of whether Mr. Veysey committed murder was never given to the jury by way of a verdict or a special interrogatory. Without this issue being decided by the jury beyond a reasonable doubt, the Court had no authority to make that determination.
>
> "The Court agreed with the government's argument that the only logical conclusion that can be drawn from the guilty verdicts regarding the fraud counts relating to the death of Patricia Veysey was that the jury found that the murder occurred. The government argues that Count 1 charged that, in committing a fraud against the insurance company, the defendant caused the death of Patricia Veysey. Therefore the jury, in finding defendant guilty of Count 1, must have found beyond a reasonable doubt that he caused the death."

United States v. John Veysey, 334 F.3d at 600, 2003 U.S. App. LEXIS 178060 (7th Cir. Ill, 2003)

The Government argued in Count 1 that, in committing a fraud against the insurance company, the Petitioner-Appellant caused the death of Patricia Veysey. Therefore, the jury found

the Petitioner-Appellant guilty of Count 1, thus the Government concluded as did the Seventh Circuit Court of Appeals solely based on the rule of law at the time *Apprendi*, one of guilty.

Let us look first at *Apprendi*, which the United States Supreme Court held the Federal Constitution requires that, any fact, other than a prior conviction, that increases the statutory maximum penalty must be submitted to the jury and found beyond a reasonable doubt.

On Certiorari, the United States Supreme Court reversed and remanded. The issue was that the Fourteenth Amendments' "due process clause" required, "that any fact that increased the penalty for a state crime beyond the prescribed statutory maximum other than the fact of a prior conviction had to be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 146 L. Ed. 2d 436.

Additionally, in *Blakely v. Washington*, 542 U.S. 296, 159 L Ed 2d 403, 124 S. Ct. 2531 (2004) (*Washington Court of Appeals reversed and Remanded for further proceedings*), which involved state criminal statutes, it was held, pursuant to the Constitution's Sixth Amendment right to a jury trial, that any fact other than a prior conviction which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Nonetheless, these were state crimes, and neither involved the Federal Sentencing Guidelines.

A State judge imposed a sentence based on his determination that the accused, whom had plead guilty to kidnapping his then estranged wife, had in fact acted with deliberate indifference and cruelty and sentenced the defendant beyond the prescribed statutory maximum of what must be submitted to a jury and proved beyond a reasonable doubt.

The Judge in the case imposed a prison sentence of 90-months, a sentence 53 months the maximum penalty apportioned. The judge in this case after hearing the description given by the

wife of her kidnapping, imposed a sentence, on the bases of other state statutes allowing in some cases an "exceptional sentence" exceeding the general statutory limit, on the ground that the accused had acted with "deliberate cruelty," which was a statutorily enumerated ground for an enhanced sentence in a domestic-violence case.

The Supreme Court in a finding that the accused's right to a jury trial violated the Federal Constitution's Sixth Amendment, later reversed the decision. It was the facts in supporting deliberate cruelty that *neither had been admitted to, nor found by a jury*. The judge could not have imposed the 90-month sentence solely based on the facts admitted in a plea agreement.

The Supreme Court in their decision in *Blakely* stated, "Any fact that increased the penalty for a crime beyond the prescribed statutory maximum had to be submitted to a jury, and proved beyond a reasonable doubt and carried out this design be insuring that a judge's authority to sentence [is] derived wholly from a jury's verdict." *Blakely*, 159 L. Ed. 2d 403. The framers gave a guarantee in the Constitution, the right to a jury-trial, because they were unwilling to trust the government to blot out the role of jury. Emphasis added.

Moving on to *Booker,* the two defendants at sentencing were found by a preponderance of the evidence that defendant one had distributed 566 grams of cocaine above the 92.5 grams found by the jury; defendant two had obstructed justice.

On appeal, they challenged their sentence because the U.S. Sentencing Guidelines Manual violated the Sixth Amendment, by allowing the judge and not the jury to find facts that determined the sentence range.

In this case the Seventh Circuit Court of Appeals held the application of the Guidelines in their case violated the Sixth Amendment by limiting the defendant's right to have a jury

determine, using a standard of reasonable doubt, how much cocaine-base was possessed and whether he obstructed justice.

In a case where no enhancements outside the factual findings by a judge that increased the sentence beyond the findings of the jury, there was no constitutional violation in applying the Guidelines unless the Guidelines were invalid entirely. "If the Guidelines were severable a judge could use a sentencing jury, if not the judge could choose any sentence between 10 years and life — in the latter the judge was free to draw on the Guidelines for recommendation." *Booker*, 375 F.3d 508.

On certiorari, the Supreme Court concluded:

> "Sixth Amendment jury-trial right held to apply to Federal Sentencing Guidelines; Guidelines made effectively advisory by severance of statutory provisos concerning mandatory applicability; these holdings help to apply to all cases currently pending on direct review."

Blakely v. Washington, 542 U.S. 296, 159 L Ed 2d 403, 124 S. Ct. 2531 (2004)
(The *Washington State Court of Appeals reversed and Remanded for further proceedings*)

The Supreme Court in *Booker* also held as it did in *Blakely*. "The Federal Constitution requires that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt". *Booker*, 375 F.3d at 621.

As to the Constitution's Sixth Amendment right to jury trial, that other than the facts of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, it must be submitted to a jury, and proved beyond a reasonable doubt.

The Supreme Court stated in *Booker* the concern to possible reduction in sentencing efficiency, "The interest in fairness and reliability protected by the right to a jury trial had always

outweighed the interest in concluding trials swiftly". *Booker*, 375 F.3d at 624. In addition, the Court held in the case at hand that the Guidelines had to apply to all cases, including the cases at hand, and currently pending on direct review.

In *Burrage v. United States*, 571 U.S. at 204, 134 S. Ct. 881 (2014), we find a defendant convicted following a jury trial of unlawfully distributing heroin which caused the death of another person in violation of 21 U.S.C.S. § 841 (b) (1) (c), subsequently sentenced to 20 years imprisonment. The Eighth Circuit Court of Appeals affirmed the conviction; conversely, the Supreme Court granted certiorari that brings us to Petitioner-Appellant argument for which he now seeks relief.

In *Burrage* the Supreme Court held that where the use of a drug distributed by the defendant was not an independently sufficient means to cause the victim's death or serious bodily injury, the defendant could not be liable for penalty of enhancement under 21 U.S.C.S. § 841 (b) (1) (c), unless such use was a "but-for" cause of the death or injury.

In reversing the defendant's conviction and sentence under 21 U.S.C.S. § 841 (b) (1) (c) because no evidence that a person who purchased the heroin died after using the heroin or other drugs. The district court used the wrong standard when it instructed the jury.

The district court instructed the jury that it could find the defendant guilty of violating 21 U.S.C.S. § 841 (b) (1) (c) if it found that the heroin he distributed was a contributing cause of the victims death. The Supreme Court found that where use of a drug distributed by a defendant was not an independently sufficient cause of the victims death or serious bodily injury, the defendant could not be liable for penalty enhancement under 21 U.S.C.S. § 841 (b) (1) (c) unless such use was a "but-for" cause of death or injury.

In addition, because the Controlled Substance Act did not define the phrase "result from," the court gave the phrase its ordinary meaning, ". . .that a thing "results" when it arises as an effect, issue, or outcome from some action, process, or design. In the usual course, that required proof that the harm would not have occurred in the absence of – that is, "but-for" – a defendant's conduct." *Burrage*, 134 S. Ct. 881.

The 'watershed' decision of *Burrage* makes a strong argument for a pre-*booker* ruling retroactive on collateral review in as much as it relies upon resentence in the Petitioner-Appellant § 2241. It must be stated that in making this strong statement it is known to the Petitioner-Appellant the Seventh Circuit Court of Appeals could and has taken the meaning to imply once again he is bringing forth an *Apprendi/Booker*-type argument, which on first look is not retroactive, they did not make such a claim in their opinion. *See* (Appendix A. A1–3). The Petitioner-Appellant's concern was so strong; he studied *Collateral Review*[12] to have a better understanding of the meaning.

Consideration, inspection, or reexamination of a subject or thing that is asked of this Court. Consideration in light of *Burrage; i*nspection of the similar facts of the case in light of the many changes in interpretations since the ruling on *Burrage* in 2014 outside a narrow scope of a drug charge; and reexamination of Petitioner-Appellant case for any miscarriage of justice whether based on Sixth or Fourteenth Amendment violation, the "but-for" issue, or 'death results' enhancements that have come about since *Burrage*.

It is foreclosed, "*Burrage* is a 'watershed' ruling." Nevertheless, how in this case does that apply? The fact is, *Burrage* is retroactive, and if we can conclude that *Burrage* applies

---

[12] **Review,** *"Black's Law Dictionary"* Tenth Addition, **1.** Consideration, inspection, or reexamination of a subject or thing. **2.** Plenary power to direct and instruct an agent or subordinate, including the right to remand, modify, or vacate any action by the agent or subordinate, or to act directly in place of the agent or subordinate

beyond the limited latitude of 21 U.S.C.S. § 841 which has been shown herein in numerous examples respective of District, Appellate, and Supreme Court Cases.

Then the next logical conclusion is *Burrage* applies outside the provision of Controlled Substance Act § 841 were a "death results" provision which is similar to § 844 (i) (as it is in the Petitioner-Appellant case) and was not disputed by this court in *Prevatte.*

Judge Conley stated, "*Burrage* could be applicable in cases where the defendant was sentenced pre-*Booker*, as is true herein, because the guidelines were still mandatory . . . effectively [setting] mandatory sentencing ranges, it may be that [the] causation standard set forth in *Burrage* should–be extended to § 844(i) "death results" provisions contained in mandatory guidelines." *See* Dkt. 22 at 7.

Burrage deals solely with the statutory sentencing range vis-à-vis the enhancement under §841(b) (1) (B). *Burrage*, 134 S. Ct. at 892. However, the same Statutory Sentencing can and should be adopted under §844(i) as it has been adopted in numerous cases since *Burrage* [13] [14] as well as any case that applies 'death results' or serious bodily injury pre-*Booker.*

We look no further than the recent decision in *Young v. Antonelli*, 982 F.3d 914, 916 (4th Cir. 2020) (concluding that the Supreme Court's decision in *Burrage v. United States*, 571 U.S. 204(2014), "does, in fact apply to the 'death results' provision of the Sentencing Guidelines, at

---

[13] *Pereira v. Jeff Sessions*, AG, 585 U.S. ___, 138 S. Ct. ___, 201 L Ed 433, (2018) (*Reversed and Remanded*); *Ohio Secretary of State v. A. Philip Randolph Institute*, 584 U.S. ___, 138 S. Ct. ___, 201 L Ed 141, (2018) (*Judgment Reversed*); *Maslenjak v. United States*, 582 U.S. ___, 137 S. Ct. ___, 198 L. Ed. 2d 460, (2017) (*Vacated and Case Remanded*); *Bramski v. United States*, 573 U.S. ___, 134 S. Ct. ___, 189 L Ed 2d 262, (2014) (*Fourth Circuit Judgment Affirmed*); *Scialabba Acting Director U.S. Immigration v. Osorio*, 573 U.S. ___, 134 S. Ct. ___, 189 L Ed 2d 98, (2014) (*Judgment in Favor of Beneficiaries Reversed, Case Remanded*).

[14] *Burrage* case statutes apply to other than that of Controlled Substance Act § 841: *Pereira v. Jeff Sessions* (AG) — 8 U.S.C.S. § 1229; *Ohio Secretary of State v. A. Philip Randolph Institute* — 52 U.S.C.S. § 20507 (b) (2); *Maslenjak v. United States* — 18 U.S.C.S. § 1425 (a); *Bramski v. United States* — 18 U.S.C.S. § 924 (a) (1) (A); *Scialabba Acting Director U.S. Immigration v. Osorio* — 8 U.S.C.S. §-1153 (h) (3).

least there in effect prior to the decision in *United States v. Booker*, 543 U.S. at 220"). (*Vacated and Remanded*).

In *Young*, the Appeals Court noted that *Burrage* changed the law as to statutory provision; it did not do so as to the corollary Sentencing Guidelines. Nor, has the Supreme Court or the Fourth Circuit authority on whether *Burrage* applies to the "death results" Sentencing Guidelines, the district court correctly concluded the invocation of *Burrage* to the Sentencing Guidelines.

However, the Fourth Circuit Court of Appeals had a very different opinion of the matter. They concluded that in fact *Burrage* does indeed apply to the Guidelines. We first must look at the language of U.S.S.G. §2D1.1 which significantly parallels the language of §841(b) (1) that indeed *Burrage* interpreted and contains the statutory penalty of *Young* charged offense.

If we further look at *U.S. v. Patterson*, 38 F.3d 139, 144 n.5 (4th Cir. 1994) ("Section 2D1.1 also contains sentence enhancement provisions that parallels 21 U.S.C. § 841(b) (1) (c) and applies when a defendant is convicted under §841(b) (1) (c) "death results" from the use of controlled substance.

In addition, the offense of conviction establishes that "death or serious bodily injury" resulted from the use of the substance and that the defendant committed the offense after one or more prior conviction for a similar offense.

Other district and appellate courts have recognized the parallel language of the Guidelines and Statute mirror each other in the following key respects:

Firstly, both guidelines provisions and the statute contemplate sentencing a defendant to a term of Life Imprisonment if he has committed an offense that resulted in *death* or *serious bodily injury*. *See United States v. Johnson*, 706 F.3d 728 (6th Cir. 2013) ("noting that U.S.S.G. §2d1.1

(a) (1) merely reinforces the enhanced penalty mandated by statute.") Thus treating the Guidelines no differently from Statute, as is the case in this instance as mandatory guidelines where applied to Veysey.

Another look takes us to *In re Hubbard*, 825 F.3d 225, 235 (4th Cir. 2016). A successive §2255 petition based on *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed. 2d 569 (2015) concluded that *Johnson* applies retroactively; though sentences are technically controlled by statute. The Sentencing Guidelines represents more than a mere suggestion to the Court about the proper sentence a defendant should receive.

It should further be noted in *In re Hubbard*, in light of the Supreme Court's decision in *Booker*, this in fact made the Sentencing Guidelines advisory. Thus, if we apply the Supreme Court's reasoning about a statute to the Sentencing Guidelines—like *In re Hubbard*, and in *Young*'s sentence which took place before *Booker*, we find that like Veysey's case, the Guidelines were mandatory.

CONCLUSION

Certiorari should be granted in light of the Court of Appeals' approach contrary to the decisions of this Court and does not respect the role this Court plays with regard to the diverse acceptance *Burrage* plays outside the Seventh Circuit Court of Appeals — This case provides the proper vehicle for determining appropriate guidelines in very-limited-cases across district and appellate courts where serious constitutional violations have occurred and there is little to no redress pre-*Apprendi/Booker* respectively, it would furthermore clarify the diverse interpretation across districts and appellate courts throughout the country.