

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC DEANGELO GRIGGS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for 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

- I. Whether a person can be convicted for distribution of heroin causing death using a jury instruction that makes the offense a strict liability crime by mis-stating its elements as articulated in *Burrage v. United States*, 571 U.S. 204 (2014).
- II. Whether the Government's violation of a defendant's due process rights through knowing use of perjured testimony at trial is automatically cured by defense counsel's cross examination and closing argument.

TABLE OF CONTENTS

MOTION FOR LEAVE TO PROCEED <i>IN FORMA PAUPERIS</i>	Preceding and attached pursuant to S. Ct. R. 39.2
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. The Decision Below is Incorrect	8
A. The Supreme Court should intervene and correct the Eighth Circuit's holding that jury instructions do not have to state the elements of the offense as articulated in <i>Burrage v. United States</i>	8
B. The Eighth Circuit's approach deprives individuals of due process under the Fifth Amendment by permitting conviction obtained by the Government's knowing use of perjured testimony.....	11
CONCLUSION	12

INDEX TO APPENDICES

Appendix A: Judgment of the Eighth Circuit

Appendix B: Opinion of the Eighth Circuit

Appendix C: Order of the Eighth Circuit denying petition for panel rehearing

Appendix D: Constitutional and Statutory Provisions required by
S. Ct. R. 14.1(f)

TABLE OF AUTHORITIES

Cases:

<i>Alcorta v. Texas</i> , 355 U.S. 28 (1957)	11, 12
<i>Bollenbach v. United States</i> , 326 U.S. 607 (1946).....	8
<i>Burrage v. United States</i> , 571 U.S. 204 (2014).....	8, 9, 10
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935).....	11
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959)	11
<i>Pyle v. Kansas</i> , 317 U.S. 213 (1942)	11
<i>Skilling v. United States</i> , 561 U.S. 358 (2010).....	10
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	9
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995))	9
<i>United States v. Griggs</i> , 54 F.4th 531 (8th Cir. 2022)	1, 8
<i>United States v. Lewis</i> , 895 F.3d 1004 (8th Cir. 2018)	10
<i>United States v. Parker</i> , 993 F.3d 995 (8th Cir. 2021).....	10

Constitutional and Statutory Provisions:

U.S. Const. amend. V	9, 11
21 U.S.C. § 841(b)(1)(C).....	9, 10

Other Authorities:

8th Cir. Model Crm. Instr. § 6.21.841C.....	4, 5
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Petitioner, Eric Deangelo Griggs, prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The November 21, 2022 judgment and opinion of the court of appeals, which appear at Appendix A and B to this petition, are reported at *United States v. Griggs*, 54 F.4th 531 (8th Cir. 2022). The December 29, 2022 order of the court of appeals denying Petitioner's timely petition for rehearing, which appears at Appendix C to this petition, is reported at 2022 U.S. App. LEXIS 35916 (8th Cir. Dec. 29, 2022).

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2022. The court of appeals denied petitioner's timely petition for panel rehearing on December 29, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth Amendment to the U.S. Constitution and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) are reproduced verbatim at Appendix C to this petition.

STATEMENT OF THE CASE

On September 25, 2019, a federal grand jury returned an indictment charging Petitioner Eric Griggs (hereafter "Griggs") with distribution of a controlled substance resulting in death (Count 1), possession with intent to distribute a controlled substance and aiding and abetting the same (Count 2), and use of a communication facility to commit a felony drug crime (Counts 3 and 4). (R. Doc. 2).¹

Count 1 arose out of the heroin overdose death of Abigail Wilder, a young woman struggling with a severe opioid addiction. (R. Doc. 174, at 24). It was undisputed throughout the trial that Wilder died from a heroin overdose. (R. Doc. 176, at 420-21). There was no evidence of mixed-drug toxicity. (R. Doc. 175, at 270-73). As a result, the fighting issue at trial was the source of the fatal heroin.

¹ In this Petition, "R. Doc." refers to the district court docket in Northern District of Iowa case number 19-cr-2062, followed by docket entry number and page number, where appropriate.

In the weeks and days leading up to her death, Wilder sought heroin through Facebook messenger and text message from multiple sources, including one of the Government's witnesses, Preston McCully. McCully perjured himself on both direct and cross examination about that fact. He testified falsely on direct that his friendship with Wilder did not really involve controlled substances. (R. Doc. 174, at 86). He testified falsely on both direct and cross that he had never distributed any controlled substances to Wilder. (R. Doc. 174, at 88, 89).

The falsity of McCully's testimony was known to the Government. Facebook Messages in Defendant Exhibit I explicitly showed a heroin transaction between Wilder and McCully, in which McCully determined the price, arranged the time and location of a meeting, and met with Wilder to distribute heroin to her. (R. Doc. 162-47). Defendant Exhibit H was a photograph, taken on Wilder's phone shortly after the meeting detailed in Exhibit I, that the Government's drug expert, Agent Meggers, testified appeared to be a corner-baggie of heroin. (R. Doc. 162-46; R. Doc. 176, at 359). In Facebook messages the following day, Wilder requested "that other point" from McCully, who responded that he "snorted it." (R. Doc. 162-47). The Government's case agent, Investigator Berry, testified he believed that Facebook Messenger exchange was a controlled substance transaction. (R. Doc. 175, at 200). Agent Meggers testified that request for a "point" meant Wilder was "asking if she can get another point of heroin, a tenth of a gram, when she gets off at 4." (R. Doc. 176, at 359). Wilder's boyfriend, Jeffrey Schmitt, testified that he knew McCully, and that he knew McCully to distribute controlled substances to Wilder. (R. Doc.

175, at 147). Government Exhibit 8E, which was admitted into evidence, (R. Doc. 166, at 2), and played to the jury, (R. Doc. 174, at 101) also made clear the Government knew McCully was lying. In that audio recording, dated August 28, 2018, (R. Doc. 174, at 59), just days before Wilder's death, Wilder first told Schmidt that she was "trying to get heroin." (R. Doc. 162). She first lied to Schmidt, saying she was with "nobody." *Id.* She then admitted that in fact, she was "with Preston," calling McCully by his first name. *Id.* McCully is then heard speaking directly to Schmidt on the call. *Id.*

Instead of correcting the record, the Government made use of McCully's false testimony, arguing explicitly during rebuttal close that McCully could not have been the source of heroin that killed Wilder because the foregoing exchange was too remote in time from her death. (R. Doc. 176, 421).

The parties disagreed about whether the district court's Count 1 elements instruction correctly stated the law after this Court's decision in *Burrage v. United States*, 571 U.S. 204 (2014). Griggs objected to the Court's elements instruction as to Count 1, requesting that the Court instead instruct the jury using the Eighth Circuit Model Instruction. (R. Doc. 134, 153). That instruction would have articulated the elements of Count 1 as follows:

The crime of distributing (describe substance, e.g., heroin) resulting in [death][serious bodily injury], as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant intentionally transferred1 (describe substance, e.g., heroin) to (name of transferee);

Two, at the time of the transfer, the defendant knew that it was [a controlled substance] [(describe substance, e.g., heroin)]; and

Three, (name of person injured/deceased) would not have [died][become injured] but for the use of that same (describe substance, e.g. heroin) transferred by the defendant.

8th Cir. Model Crm. Inst. § 6.21.841C. The district court refused to so instruct the jury. Instead, the court's instruction advised the jury using a different elements instruction (instruction number 14) combined with a special interrogatory (instruction 15) concerning causation.

Instruction 14, which purported to articulate the elements of Count 1, provided:

The crime of distribution of heroin, as charged in Count 1 of the Indictment, has two elements, which are:

One, on or about August 31, 2018, in the Northern District of Iowa, the defendant intentionally transferred heroin;

Two, at the time of the transfer, the defendant knew that it was a controlled substance, heroin.

It is not necessary that the government prove the defendant knew the substance was heroin, as long as the government proves that the defendant knew that the substance was some type of controlled substance.

For you to find defendant guilty of this crime, the government must prove all of these elements beyond a reasonable doubt as to the defendant; otherwise you must find the defendant not guilty of the crime charged under this count.

R. Doc. 155-1, at 16.

Instruction 15 discussed causation, providing as follows:

If you find the defendant guilty of distributing heroin as alleged in Count 1, you must determine, beyond a reasonable doubt, whether use

of the controlled substance you have found the defendant distributed resulted in the death of Abby Wilder. In deciding whether use of the controlled substance defendant distributed resulted in death, you are instructed that the government must prove, beyond a reasonable doubt, that the use of the particular substance was either a "but for" cause or "independently sufficient" cause of death. The government need not prove both alternatives; either is sufficient.

"But-For" Cause

To find a particular drug was a "but for" cause of death, you must unanimously and beyond a reasonable doubt find that, but for Abby Wilder's use of that particular drug distributed by defendant, Abby Wilder would not have died.

The following are examples of what it means to say that "but for" some act, a particular result would not have occurred. For example, where A shoots B, who is hit and dies, we can say that A caused B's death, since but for A's conduct B would not have died. The same thing is true if a person's act combines with other factors to produce the result, so long as the other factors alone would not have produced the result—if, so to speak, the person's act was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, the poison is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.

"Independently Sufficient" Cause

To find a particular drug distributed by the defendant was an "independently sufficient" cause of death, you must unanimously and beyond a reasonable doubt find that Abby Wilder's use of that particular controlled substance was sufficient to cause Abby Wilder's death, regardless of Abby Wilder's use of any other controlled substances. For example, if you find that Abby Wilder would have died from using heroin alone, regardless of whether Abby Wilder had used any other controlled substance, Abby Wilder's heroin use would be an independently sufficient cause of death.

The law does not require the government to prove that the defendant intended to cause death. Similarly, the law does not require the government to prove that defendant knew or should have known that he was exposing Abby Wilder. (sic) to a risk of death when defendant transferred the heroin.

Further, the government need not prove that the defendant intentionally transferred the drug directly to Abby Wilder, so long as the government proves beyond a reasonable doubt that the drug intentionally transferred by the defendant is the same drug that later resulted in the death of Abby Wilder.

(R. Doc. 155-1, at 17-18). The jury received the case around 12:00 noon, deliberated, and then returned with questions. One of the questions dealt with Count 1 and its elements. The jury asked:

On Instruction No. 14 it says Count 1 "Two, at the time of the transfer, the defendant knew that it was a controlled substance, heroin." Next paragraph says, It is not necessary that the government prove the defendant knew the substance was heroin. So question is on Count 1, does it have to be that it's got to be heroin or any controlled substance?

(R. Doc. 167, 1). The district court provided a written response as to the elements question, which provided as follows:

As to your question about Instruction No. 14, for the first element the government must prove that it was actually heroin that was transferred. For the second element it is not necessary that the government prove the defendant knew the substance was heroin, as long as the government proves that the defendant knew that the substance was some type of controlled substance.

(R. Doc. 167, at 5). The jury resumed deliberation until about 5:00pm, and returned the following day, continuing their deliberations, submitting another round of questions, and indicating they had deadlocked on one count. (R. Doc. 179, 449). The district court instructed them to keep deliberating, and they reached their verdicts after lunch. The jury acquitted Griggs of Count 2, which charged distribution of heroin and aiding and abetting. But it convicted Griggs of Counts 1, 3, and 4. The district court sentenced Griggs to 480 months' imprisonment.

Griggs appealed his conviction and sentence. As to the jury instruction issue, the Eighth Circuit simply found the combination of elements instruction and causation “interrogatory” to be “accurate under *Burrage*” without further explanation. *See Griggs*, 54 F.4th at 537. As to the perjury, the Eighth Circuit found explicitly that McCully had lied on the stand. *See Griggs*, 54 F.4th at 536 (“McCully falsely testified that his relationship with Wilder did not involve drugs.”). Despite this finding, and “assuming the perjury was used knowingly, recklessly, or negligently,” the Circuit determined that “no reasonable likelihood exists that the jury’s judgment was affected,” because defense counsel exposed McCully’s lies on cross examination and argued he was a possible source of the fatal drugs during closing argument. *Id.* at 536. The Eighth Circuit affirmed Griggs’s conviction and sentence, and denied a timely petition for panel rehearing.

REASONS FOR GRANTING THE PETITION

I. The Decision Below is Incorrect.

A. The Supreme Court should intervene and correct the Eighth Circuit’s holding that jury instructions do not have to state the elements of distribution of heroin causing death as articulated in *Burrage v. United States*.

District courts enjoy broad discretion to fashion jury instructions, and they are not required to instruct the jury in any particular language requested by either party. But they cannot mis-state the law. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). The Eighth Circuit’s approach renders distribution causing death a strict liability crime again, as it was before this Court’s opinion in *Burrage v. United States*, 571 U.S. 204 (2014). It does this through structural error, relieving the

Government of its burden to prove causation as a distinct element of the offense.

This error requires reversal. *See Sullivan v. Louisiana*, 508 U.S. 275, 282-83 (1993).

In *Burrage*, this Court held that causation in Section 841 is an element of the offense. It is not a sentencing factor. As this Court explained:

Because the “death results” enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 115-116 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Thus, the crime charged in count 2 of Burrage’s superseding indictment has two principal elements: (i) knowing or intentional distribution of heroin, § 841(a)(1),³ and (ii) death caused by (“resulting from”) the use of that drug, § 841(b)(1)(C).

Burrage, 571 U.S. at 210 (internal citation omitted).

Griggs was entitled to have each element of Count 1 clearly identified and explained as such to the jury. U.S. Const. amend. V; *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993)). Instead, the district court articulated an entirely different set of elements for Count 1, instructing the jury that Griggs was guilty of Count 1 if he was guilty of knowing distribution of heroin generally. The separate interrogatory did discuss causation. But it was not articulated as an element of the offense. This structural error was prejudicial because of the evidence and facts in this case.

This was not a case of mixed-drug toxicity. Rather, it was undisputed that heroin killed Wilder. Yet, the “causation” interrogatory asked the jury to search for and attach significance to mixed-drug toxicity evidence that was necessarily absent

from the record. The structure of the jury charge turned a finding of guilt on mere heroin distribution into a proxy for guilt on distribution causing death.

A juror reading the interrogatory at Instruction No. 15 would have already determined that Griggs “transferred heroin.” But not necessarily to Wilder. Instruction 14 did not require a finding of distribution to any particular person, as the crime of simple distribution requires no such thing. But since everyone agreed that Wilder died of heroin, there was nothing more for the juror to find because the “but-for” interrogatory premised causation on Wilder dying from “that particular drug distributed by defendant.” Thus, the Government was relieved of proving the element of causation because of the lack of mixed-drug toxicity. This will occur every time a drug death is clearly the result of a particular drug. If there is no dispute as to drug toxicity, the Government will always receive this reduced burden. Notably, the only cases the Government cited in support of the given instruction were cases involving mixed-drug toxicity. *See United States v. Lewis*, 895 F.3d 1004, 1010 (8th Cir. 2018); *United States v. Parker*, 993 F.3d 995 (8th Cir. 2021).

In *Burrage*, this Court applied the rule of lenity to Section 841(b)(1)(C)’s phrase “results from” a “meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.” *Burrage*, 571 U.S. at 216; *see also Skilling v. United States*, 561 U.S. 358, 410 (2010). Yet the Eighth Circuit has done just that, through the structured use of a jury charge that mis-states the elements of distribution causing death, and disfavors defendants by relieving the

Government of its burden on causation. The Supreme Court should intervene, and require the Eighth Circuit to articulate the elements under *Burrage*.

B. The Eighth Circuit's approach deprives individuals of due process under the Fifth Amendment by permitting convictions obtained by the Government's knowing use of perjured testimony.

This Court has long recognized that the “presentation of testimony known to be perjured” is “inconsistent with the rudimentary demands of justice.” *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *see also Pyle v. Kansas*, 317 U.S. 213, 216 (1942). Even where not solicited by the prosecutor, there is an affirmative duty to correct such false testimony once proffered by a government witness. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citing *Alcorta v. Texas*, 355 U.S. 28 (1957)) (citations omitted). Such testimony must be corrected even where it “goes only to the credibility of the witness.” *Napue*, 360 U.S. at 269. (“The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.”); *see U.S. Const. amend. V.*

The fighting issue at trial was the source of the heroin that killed Wilder. The Government argued that nobody but Griggs could have been that source. Meanwhile, Griggs argued that McCully and others from whom Wilder solicited heroin were just as plausible. McCully perjured himself concerning this critical fact. Instead of correcting the record, the Government argued in its rebuttal close that McCully could not have been the source, specifically arguing “[s]o looking at somebody three weeks before when there's no digital footprint of communication,

that's just a red herring." (R. Doc. 176, 421). Griggs's conviction should not stand upon the use of such perjured testimony on the determinative issue at trial.

The Government's knowing use of perjured testimony about a crucial and contested fact in this case is analogous to *Alcorta*, where the Government knowingly elicited false testimony from a witness, who falsely denied having sex with the defendant's wife on multiple occasions. At trial, Defendant had claimed he found that same witness embracing his wife, which accounted for his fit of rage when killing her, constituting a lesser type of homicide. In reversing the conviction, this Court noted this defense would have been corroborated had the witness not lied about such a critical fact. *Id.* at 32.

Under the Eighth Circuit's approach, cross examination and argument of counsel, as a matter of law, insulated the U.S. Attorney's Office from its knowing use of perjured testimony to convict Griggs in violation of the Fifth Amendment. The Supreme Court should intervene to clarify this critical legal standard and ensure adherence to its precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: March 27, 2023

Respectfully submitted,



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