ORIGINAL

22-7282

IN THE SUPREME COURT OF THE UNITED STATES

David W Linder,

Petitioner,

-vs.-

B. Lammer, Warden

Respondent.

On Petition for Writ of Certiorari

to the Seventh Circuit Court of Appeals

Petition for Writ of Certiorari

David W Linder, Pro Se
FCI-TH POB 33
Terre Haute, IN 47808

Questions Presented

Can the drug death statute, 21 § 841(b)(1)(C) be enlarged to include analogue drugs?

Can a McFadden review of a defendant's mens rea be performed by only checking jury instructions?

Supreme Court Rule 14.1 (b)(iii)
Related State & Federal Cases

03/30/99	Nevada v Linder	99 0330-1385	Controlled substances
04/18/99	Nevada v Linder	99 F05959X	New Unrelated charges
05/06/99	LVMPD v 28,119.63	99 A402854	
12/15/99	LVMPD v $1,270.00	99 A412387	

US v Forbes, 806 F Supp 232, 234 (D Colo 1992) went federal because Colorado had no "analogue statute". Nevada's analogue statute tracked federal law. Appendix at

11/19/99	Arizona Event		
08/17/00	State v Linder	S-8015-CR-20000813	Controlled substances

Docket: https://apps.supremecourt.az.gov/publicaccess

Attorney Billy K. Sipe, Jr reported Mohave County District Attorney was pressured to file charges. DEA was "laboring oar" invoking issue preclusion and res judicata. The same indoles named in Virginia were court ordered returned from DEA Headquarters in Lake Havasu City, AZ about January of 2002.

* Phillip R Conklin dies in New York on April 14, 2002 *

06/17/02 Linder notifies Biosynth International of withdraw from North Amercian market. In October of 2002 DEA prints screen that the relevant page is shut down.

12/10/03 Norfolk DEA takes Linder's auto and another four computers in Arizona. No arrest is made in fourth major seizure.

07/21/04 Norfolkers revisit Linder in Arizona with a Complaint. 76 days later it becomes2:04cr191 (ED ov Va)

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BRIEF FOR THE PETITIONER

Petitioner David William Linder respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. a1-a5) is not yet published in Nexus-Lexis. The district court's three opinions (Pet. App. a9-a35) are available at:

2017 US Dist Lexis 42032 Mar 23, 2017

2017 US Dist Lexis 182060 Nov 02, 2017

2018 US Dist Lexis 242506 Aug 14, 2018

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2022. A timely petition for rehearing was denied on August 24, 2022. A motion to recall the mandate was denied on Dec 5, 2022, and a renewed motion was denied on Jan 19, 2023. This Court extended the period to file Certiorari on Nov 8, 2022 and correction granted Jan 27, to March 28, 2023.

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

Table of Authorities

Statutes and Regulations

CSA Controlled Substance Act, 21 U.S.C., 801 et seq.

21 U.S.C. 802 (32)(A)

21 U.S.C. 802 (32)(A)(i) [structure PK pharmacokinetics]

21 U.S.C. 802 (32)(A)(ii) [effects PD pharmacodynamics]

21 U.S.C. 802 (32)(C)

21 U.S.C. 802 (32)(C)(i) Analogue is not a controlled substance

21 U.S.C. 811 (h) [temporary scheduling]

21 U.S.C. 841 (a)

21 U.S.C. 841 (b)(1)(C) [death results] [Sch I & II only]

21 U.S.C. 841 (b)(7)(A) [Analogues included, violence, rape]

21 U.S.C. 802(32)(A) states in part:

[T]he term "controlled substance analogue" means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(32) (A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

(C) Such term does not include—

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

(32) (A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

(C) Such term does not include—

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. **Farias** and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

(E) (i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

§ 811. Authority and criteria for classification of substances

(a) Rules and regulations of Attorney General; hearing. The Attorney General shall apply the provisions of this title to the controlled substances listed in the schedules established by section 202 of this title [21 USCS § 812] and to any other drug or other substance added to such schedules under this title. Except as provided in subsections (d) and (e), the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 202 [21 USCS § 812(b)] for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5 of the United States Code [5 USCS §§ 551 et seq.]. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(b) Evaluation of drugs and other substances. The Attorney General shall, before initiating proceedings under subsection (a) to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the

factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a).

(c) Factors determinative of control or removal from schedules. In making any finding under subsection (a) of this section or under subsection (b) of section 202 [21 USCS § 812(b)], the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

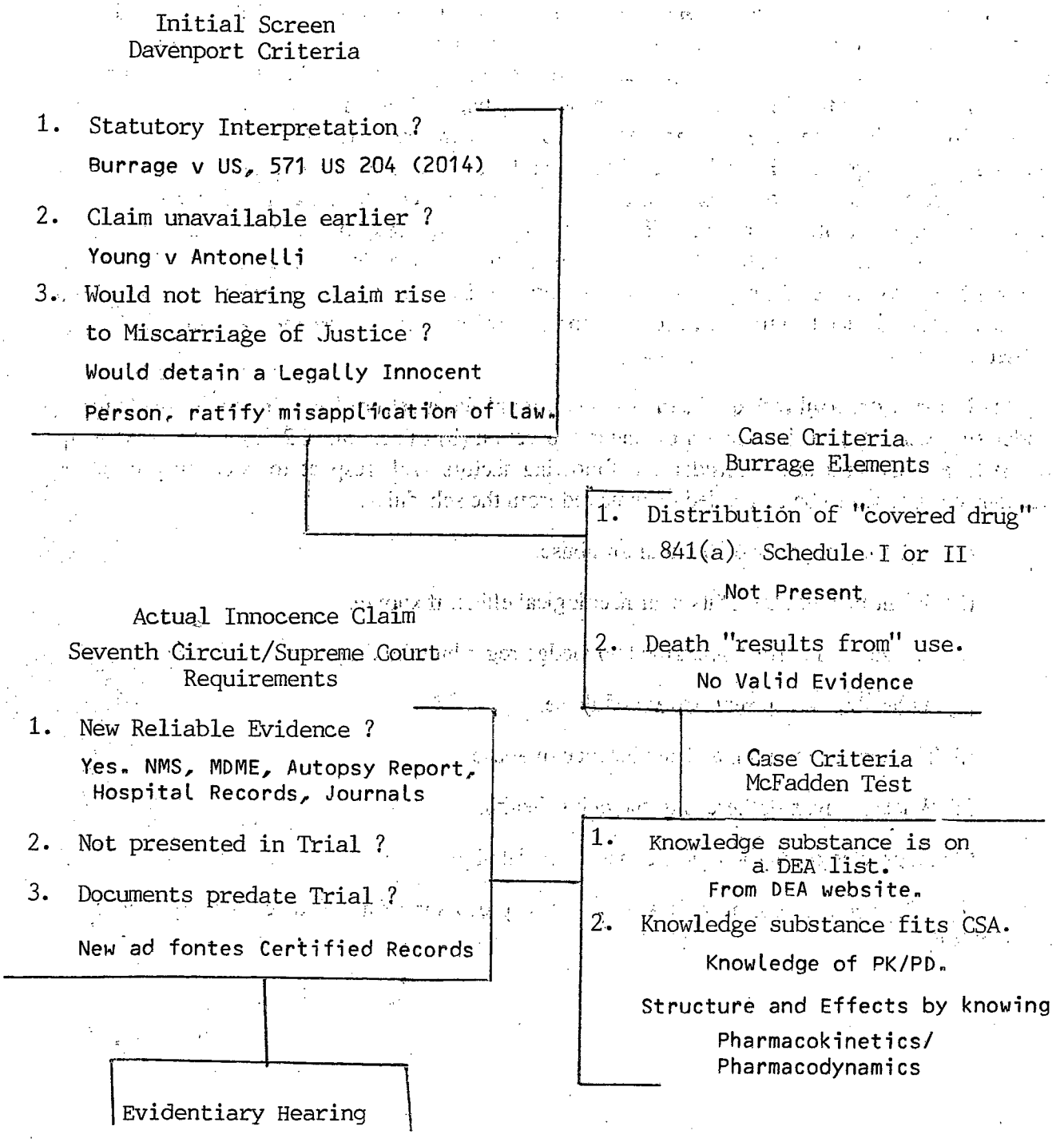
(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this title.

Habeas Flowchart



HISTORY IN PUBLIC LAW

P.L. 91-513 (1970) The Controlled Substance Act

- Congress establishes schedules in § 812
- Penalties vary to schedule
- Per § 811, A.G. can schedule, remove, transfer substances

P.L. 98-473 (1984) Drug Diversion Control Act

- Section (h) added
- Pro tem period: 18-month max, Sch III penalties, 5 yr max
- See **US v Pees**, 645 F Supp 697 (Colo 1986) ftn.

P.L. 99-570 (1986) Anti-Drug Abuse Act of 1986

- Added CSAEA 'C.S. Analogue Enforcement Act'
- Section § 802(32) added
- Later, Congress added § 813 to describe how to 'treat' analogues
- Analogues shall be "treated as Sch I substances"

P.L. 110-425 (2008) Ryan Haight Online Pharmacy Consumer Protection Act

- Sch III substance can be used in "death results" with lesser penalty
- Max. 15 years for first "death results/injury" charge

P.L. 112-144 (2012) Synthetic Drug Abuse Prevention Act of 2012

- Expanded the duration of temporary scheduling to 36 months max

No Amendment Alters Temporary Scheduled Penalties from Sch III

Statement of the Case

Immunity by 28 USC § 1738 Was Never Considered

Drug Enforcement (DEA) has made Linder a professional defendant since March of 1999. Working first with Nevada and then Arizona proxies, Linder has successfully fought and won a series of charges prior to the current federal case in Virginia. Research into the current conviction of Linder, a Nevadan, for a death in New York, yet processed in Virginia, had no probable cause at all.

The timeframes of the Arizona, Nevada, and Virginia cases overlap, with DEA being court ordered to return the same indoles seized from Linder at the midpoint of the brackets of the Virginia case. On another return or product from DEA, on May 1, 2001, the event was recorded in a DEA Drug Intelligence Brief. The court ordered return happened in January 2002 from DEA Headquarters in Lake Havasu City, Arizona.

Biosynth International of Naperville, Illinois was Linder's indole supplier. An email of 6/17/02 notifying Biosynth of withdraw from the U.S. market showed acceptance of responsibility. Legality was not the question as Linder had prevailed in two state cases by then. The concern that summer was the general direction of the market. On 12/01/03 a dozen Virginians took Linder's last asset, an auto, completing financial exhaustion fighting frivolous criminal charges, but only returned a criminal complaint on 7/21/04.

DEA Was Partner, "Laboring Oar" in Arizona and Nevada Cases and Norfolk Complaint Was a Third Bite at the Apple

The classic case, US v Forbes, 806 F. Supp 232 (D. Colo. 1992) is notable for 1) quoting House and Senate reports, 2) declaring the analouge act unconstitutional as applied, and 3) going federal because Colorado did not have an analogue statute.

In 1999, DEA and LVMPD arrested Linder and rearrested him on new fabricated charges. That he could have been charged for analogues and was not satisfies res judicata , issue preclusion and estoppel bars. NRS 453.043 tracks the federal analogue statute verbatim.

As DEA-Norfolk person Justin Schoeman wheeled in a cart load of evidence siezed and returned in state cases, still showing the marks of various raids, Linder told trial counsel Burke, "now is the chance to show immunity from state determinations of legality." For that Burke waived off the exhibits showing collusion with DEA. Burke also held his thumb over the signatory on a false Miami blood test, and other overt acts of sabotage.

It would be unfair to say Burke was "ineffective" because he was an integral sine qua non for gaining a conviction. It is fair to say Linder had an unfair trial but for the presence of a second appointed counsel. The first lawyer fled the case after delivery of a no true bill indictment.

Young v Antonelli (2020) "Changed Fourth Circuit Law"

On 7/2/21 judge Rovner ordered briefing on Fourth Circuit law related to Burrage. Linder had already filed a 28(j) letter citing the Young panel stating Burrage is a substantive change in circuit law. Because prior Fourth Circuit law expressed in Patterson mistakenly determined 841(b)(1)(C) to be an enhancement provable by preponderance of evidence, the Young panel extended Burrage to the Guidelines, 2D1.1. Young was able to proceed under § 2241's saving clause route.

Other cases reiterate Burrage changed Circuit law including:

1. Young v Antonelli, 982 F.3d 914 (4th Cir 2020)
2. Ham v Breckon, 994 F.3d 682 (4th Cir 2021)
3. Ortiz v Warden, US App Lexis 2608 (4th Cir 2021)
4. Courtright v Young, US Dist Lexis 117790 (WD Va 2022)
5. Bell v Streeval, US Dist Lexis 19718 (WD Va 2022)
6. Young v Antonelli, US Dist Lexis 2899 (SC 2022)
7. Grady v Warden, US Dist Lexis 173711 (SC 2022)
8. Grady v Warden, US Dist Lexis 261274 (SC 2021)

The panel elided addressing any of the four original Burrage claims. All claims ultimately questioned the veracity of evidence. A proper Burrage inquiry asks "How good is the evidence?", not correctness of jury instructions. The panel stated nevertheless the instructions were proper thus Burrage fails on the merits. That idea is refuted by Volkman v US, 574 US 955 (2014), where Burrage-compliant instructions still earned a remand to the Sixth Circuit to review the sufficiency of the evidence.

Appellate Specialist AUSA Simpson Told the Panel He Could Not Find Young Despite Being Given it Ex Parte & in a 28(j)

AUSA W.S. Simpson said on July 30, 2021, pg 11:

> "Counsel [] has not found any Fourth Circuit decision predating Linder's conviction that addressed the degree of causation needed for a death results enhancement under Section 841(b)(1).
>
> This alone establishes that Linder could have made a Burrage-type argument on appeal or in his first Section 2255 motion."

Judge Richard A. Posner found Patterson, predating Linder's conviction that squarely addressed the degree of causation needed for Section 841(b)(1)(C), and he characterized it as strict liability.

"The cases are unanimous and emphatic that section 841(b)(1)(C) imposes strict liability," and goes on to cite the three cases cited after Linder's "death results" instructions. The trio of McIntosh, Patterson, and Robinson. US v Hatfield, 591 F.3d 945, 950 (7th Cir 2010).

The panel author misleadingly said [Patterson] "remains good law." However, the Sixth Circuit dissent in US v Jeffries, 958 F.3d 517, 527 (6th Cir 2020) said,

> "In Patterson, the court incorrectly held that the government need only prove the [] enhancement by a preponderance of the evidence. Patterson at 144."

Linder's instructions failed to follow Patterson's required predicate act of Section 841(a), which excludes analogues by definition.

District Court Only Reviewed Jury Instructions in Isolation

On March 17, 2017 USDJ Darrow made her main arguments for determing Linder's claims. She said, 1) "The adequacy of inadequacy of the jury instructions will decide the matter." 2) "The time has passed for Linder to argue the sufficiency of the evidence."

On June 23, 2017 Linder replied that judging instructions in "artificial isolation" is improper, citing:

Waddington v Sarausad, 555 US 179, 191 (2009)
Boyd v California, 494 US 370, 380 (1990)
Cupp v Naughton, 414 US 141, 147 (1973)
Burris v Smith, 819 F.3d 1037, 1041 (7th Cir 2016)

"An erroneously instructed jury is an entirely different and independent problem than a record lacking legally sufficient evidence to support a conviction." US v MacKay, 810 Fed Appx 797, 799 (10th Cir 2015).

Even if a look at instructions only was a proper procedure, the process was incorrectly performed. Judge Darrow dismissed the McFadden claim for the single reason instruction 43 was correct. But the following instruction said the opposite. The instructions 43-44 prove only one thing; that the jury did not carefully read the instructions.

The McFadden Claim Was Dismissed For One Word, "Nature"
District Court Claimed "Nature" Explained the "Two Ways"

The McFadden claims were also given a superficial review of only jury instructions. On 10/26/18, in a Show Cause reply, Linder stated "The Court incorrectly limited review to jury instructions only, which resulted in the more substantive new evidence claims remaining unaddressed." pg 1. The district court hung its McFadden argument on instruction # 43, that was nullified by instruction # 44. The takeaway from the instructions is that the jury did not read them carefully.

Astonishingly the two cancelling instructions read:

#43 "That at the time ... the defendant was familiar with the nature of the substance."

#44 "It is not necessary ... to prove the defendant knew the precise nature of the substance."

Thus, the argument that the "two ways" of knowing illegality cannot ride on the singular word "nature. "Nature" in no way says anything about "regulated" or "unlawful". The two ways of knowing are: 1) Know it is (on some list) 2) Know it fits (knowing PK/PD i.e., structure and effect).

Death Statute Qualifying Substances is Limited to the Class of Named Susbtances in Schedule I & II Giving Notice

21 USC § 841(b)(1)(C) reads "In the case of a controlled substance in schedule I or II". § 802(6) limits the class of controlled substances to those enumerated in schedules I-V. The drug death enhancement is limited to only those named in I and II. This is a finite list of named substances.

P.L. 110-425 amended the Controlled Substances Act (CSA) in § 841(b)(1)(E) to make schedule III substances eligible for a death enhancement with lesser penalties.

C has a mandatory minimum of 20 and life with a prior.

E has a mandatory minimum of 15 and 30 years with a prior.

> "Although in November 1988 Congress amended 21 § 813 to treat analogues like controlled substances, this amendment does not constitute a listing in Schedule I. And it does not change the definition of 21 § 802(32) wherein the terms controlled substance and controlled substance analogue are mutually exclusive."
>
> J. Everett in US v Reichenbach, 29 MJ 128 (1989)

§ 802(32) (C) such term does not include

(i) a controlled substance

By definition, C.S.'s § 802(6) are mutually exclusive to § 802(32) C.S.A.'s.

Burrage refers to the eligible class as "covered drugs". It does not draw from a class of infinite possibilities.

District and Panel Dealt With Claims Not Raised

The fact that no evidentiary hearing was granted in Linder's original § 2255, despite showing two "No Record Found" responses by MiamiDade Medical Examiner, and confirming evidence from National Medical Services, proves the petition was inadequate and ineffective.

The fact that evidence complete with Certificates of Authenticity were elided in the currect habeas shows that without an evidentiary hearing the currect habeas has been rendered ineffective within the meaning of Bousley v US, 523 US 614, 621 (1998) and Hillsborough Twp. v Cromwell, 326 US 620, 629 (1946) by failing to address any of the four evidence-based claims filed February 1, 2015.

The first § 2241 was filed 2/02/15, 1:15cv1055, was assigned to Judge Sara Darrow, Linder v Kreuger.

Ground 1 : The law has changed making Petitioner actually innocent.
Ground 2 : "The evidence at trial does not support the conviction."
Ground 3 : "The evidence at trial does not support the enhancement."
Ground 4 : Prejudice from a death enhancement incorrectly applied demands a new trial.

Linder Was Denied an Appeal
"Altogether"

On motion for leave to file a Pro Se Appellate Brief the Clerk ordered Linder to file through counsel on 11/29/05. Filed through counsel, it was held from 12/19/05 until 9/14/06, by counsel. Case US v Linder, 05-4557 show br. 55 pages, appendix 145 and a 73 page filing mailed certified return receipt to the Court, AUSA, and counsel on 7/04/06. Thus, the Clerk and counsel are responsible for Linder's failed appeal.

Counsel waited until after the date for rehearing making his official excuse for denial of Due Process a "SPAM-blocker" malfunction. In 2013 the Fourth Circuit dealt directly with a "junk mail bot" in Fernandes v Craine, US App Lexis 17377, but refused to correct denial in Linder's pleadings. The panel overlooked two "No Record Found" replies shown in multiple filings.

Sumner v Davis, 340 Fed Appx 937, 933 (4th Cir (2009) dissent by Chief judge Gregory" declared Sumner was "effectively denied an appeal altogether" by attorney error.

7/19/06	Letter referencing "missing brief" filed by Appellant [4439123-1] ~ [4439123] [05-4557] (rhs)
7/24/06	Letter referencing Mr. Gay filed by Appellant [4439126-1] ~ [4439126] [05-4557] (rhs)
7/28/06	Letter referencing motion filed in District Court filed by Appellant [4439129-1] ~ [4439129] [05-4557] (rhs)
9/14/06	Informal brief filed by Appellant David William Linder. Proof of Service[Y/N]?: y # inf.br pages: 55 with appendix pages: 145 & 73. [05-4557] (rhs)
9/15/06	Unpublished per curiam opinion filed. Copies to all parties. [05-4557] (rhs)
9/15/06	Judgment order filed. Decision: Affirmed. . EOD Date: 9/15/06. ~ [4461572] [05-4557] (rhs)

Public Law States Temporary Scheduling Has Schedule III Penalties
DEA has misstated Panalties Since They Were Empowered

The terminus a quo of classification of a substance as an "analogue" is the first time DEA encounters a substance they have not yet controlled.

The terminus a quiem of the "analogue" status is when DEA posts in the Federal Register (FR) of the intent to classify the substance as Schedule I. Notwithstanding that §§ 802(6) and (32) define the two as mutually exclusive, the transition is complete.

That is, if one trusts DEA. Because the "temporary status" is now up to three years, saying the substance is 'Schedule I' is premature. P.L. 98-473, published in USCAAN, pg 3446 states the true penalties during temporary status are to be Schedule III.

21 USC § 811(h), the temporary scheduling law, is the only known law that goes into effect before the required study is done to see whether it was correct to schedule it in the first place.

P.L. 98-473, pg. 3446 of U.S.C.C.A.N. says

> "If a substance is subject to the temporary control provided in new subsection (h) of 21 U.S.C. 811, the penalty for its illegal manufacture, distribution, dispensing, or possession with intent to engage in such illegal conduct, it to be the same as that provided in 21 U.S.C. 841(b)(1)(C) for Schedule III substances."

See US v Pees, 645 F. Supp. 697 Ftn 6 (D Colo 1986); US v Hovey 674 F. Supp 161 (DE 1987) ftn 2.

With Test CT-04-029 Falling, Other Evidence With the Label Fall

Dates, Responses of MiamiDade Medical Examiner's Office

1. December 11, 2005 No Record Found
2. March 26, 2006 Confirmation No Record
3. July 19, 2019 Certified with Raised Seal

Modus tollens P implies Q and Q is false.

Therefore P is false.

Test CT-04-029 is false.

1. Vials (photo) implies Test.

Test is false.

Therefore vials are false.

2. Transcripts imply Test and Test is false.

Therefore transcripts are false.

3. With failure to Test, photos fall.

Photos of vials attempt to connect

vials to Test.

4. Transcripts quote ["CT-04-029"] exactly
Including hyphens. (A tell)

Vial label is a self-evident forgery (6-11).
A flat label placed on the glass of a copy
machine under photo of round vial.

Linder's trial was governed by US v Patterson, 38 F.3d 139 (4th Cir 1994) and US v Klecker, 348 F.3d 69 (2003). Patterson was abrogated by Burrage and Klecker was abrogated by McFadden.

Focus on Expert's made a 180° turn to defendant's knowledge the substance is controlled by either the controlled substance act or the analogue act.

Patterson allowed "additive effect" that morphed into "contributing cause" in the Eighth circuit. US v Linder is irreproducible. If anything remained after a fair evidentiary hearing, it is likely the government would not try the case again.

CONCLUSION

The petition for a writ of certiorari should be granted, or alternatively GVR'd for an evidence hearing.

Respectfully submitted,

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