No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID WILLIAM LINDER - PETITIONER

VS.

LAMMER, Warden - RESPONDENT

Motion For Extension of Time to File Certiorari

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1. Certiorari is from a Seventh Circuit's denial of a Rehearing and rehearing En Banc issued August 24, 2022. Currently certiorari is due November 21, 2022.

2. In light of Jones v Hendrix, which is to deal with § 2241 issues, and given the certiorari to be filed began as a § 2241, a ninety day extension is requested, to absorb tomorrow's oral argument on the matter.

3. Relevant case numbers are 18-2812 in the Seventh Circuit and 15-1055 in the Central District of Illinois district court case.

[redacted]

Dated: October 31, 2022

Respectfully submitted,

D.W. Linder

A CERTIFIED COPY IS MAILED FIRST CLASS TO THE Soliciter General

Solicitor General
DOJ Rm 5616
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Washington, DC 2-530-0001

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 15, 2022
Decided June 17, 2022

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-2812

DAVID WILLIAM LINDER,
Petitioner-Appellant,

v.

BRIAN LAMMER,
Respondent-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 1:15-cv-01055-SLD

Sara Darrow,
Chief Judge.

ORDER

David Linder appeals the district court's denial of his petition under 28 U.S.C. § 2241 and the saving clause of §2255(e). We summarily affirm the judgment.

Background

In 2005, a jury in the Eastern District of Virginia convicted Linder on 27 counts for his role in unlawful drug distribution. No. 2:04-CR-00191 (E.D. Va. Feb. 15, 2005). Relevant here, Linder was convicted of one count of conspiracy to distribute 5-MeO-DiPT (commonly called "Foxy"), and other controlled-substance analogues, 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 802(32), 813, 846. The jury also found that a death resulted from

Under that rule, there is no debatable claim here. Linder's jury instructions required the government to prove beyond a reasonable doubt that (1) "the defendant did know that some type of controlled substance analogue was distributed," *and* (2) "at the time of such distribution the defendant was familiar with the nature of the substance." And the instructions further explained, using the language of § 802(32), the characteristics that make a substance an analogue under the Act—it has a chemical structure that is substantially similar to the chemical structure of a controlled substance in schedule I, and it has a hallucinogenic effect on the central nervous system that is substantially similar to or greater than the effect of a controlled substance in schedule I. These instructions comport with *McFadden*'s requirements. There are no grounds for further review of this claim.

b. The *Burrage* Claim

Linder's *Burrage* claim is more complicated—but in any event, he proposes no plausible argument that it qualifies for saving-clause review. Under *Burrage*, the government must prove beyond a reasonable doubt that the substances were a but-for (or sufficient) cause of the victim's death. 571 U.S. at 210-16. The Supreme Court concluded that this requirement of but-for causation is evident from the plain language of § 841, which requires that death "results from" the use of the substance. In *Burrage* the trial court had erred by giving jurors an extra instruction that the government need only prove that the distributed drug had merely *contributed to* the cause of death.

We have said that in most if not all cases, simply repeating the statute's "results from" language will adequately alert jurors that but-for or sufficient causation is needed. *See, e.g., Harden v. United States*, 986 F.3d 701, 705–07 (7th Cir. 2021). But here the instructions added a potentially problematic overlay: "a finding by you that, but for the victim Phillip Conklin ingesting the charged controlled substance analogues distributed or caused to be distributed by the defendant, if you find the analogues were intended for human consumption, the victims would not have died, *satisfies this standard*." (Emphasis added.) Linder contends that this language was too permissive; jurors, he worries, could take it to mean that there are other ways to satisfy the standard, ways not involving but-for or sufficient causation.

But we need not resolve the merits of this argument, because § 2255(e) does not permit the petition to be "entertained" if Linder cannot show that an ordinary § 2255 motion and direct appeal would have been inadequate vehicles to contest the jury instructions. Specifically, Linder has failed to meet his burden of establishing that

United States v. Alvarado, 816 F.3d 242, 249 (4th Cir. 2016) (opining that Fourth Circuit's pre-*Burrage* precedent on proximate cause "remains good law"). Indeed, the *Patterson* court declined to address specifically whether § 841(b)(1)(C) requires but-for causation or whether "there is an intervening or superseding cause exception to [its] application." *Patterson*, 38 F.3d at 146. The court concluded that the facts did not support any intervening or superseding cause in Patterson's case. In short, there is no colorable argument that *Patterson*'s holding on foreseeability and proximate causation foreclosed a *Burrage*-like claim about but-for causation.

Because Linder has not identified any Fourth Circuit decision foreclosing the *Burrage* argument he now seeks to make, he has failed to satisfy § 2255(e)'s saving clause. Under that statute, then, his request for habeas review in this circuit "shall not be entertained." 28 U.S.C. § 2255(e).

Finally, to the extent that Linder means to contest the sufficiency of the evidence supporting his conviction and sentence, that claim does not rely on any new statutory interpretation by judges. Indeed, Linder was free to raise that challenge at the time of his direct appeal.

Accordingly, we summarily affirm the district court's judgment. Linder has filed a motion to stay an evidentiary hearing he says is scheduled in the district court. We do not see that any proceedings are ongoing in the district court. In any event, we deny Linder's motion.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 24, 2022

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-2812

DAVID WILLIAM LINDER.,
Petitioner-Appellant,

v.

BRIAN LAMMER.,
Respondent-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 1:15-cv-01055-SLD

Sara Darrow,
Chief Judge.

ORDER

No judge of the court having called for a vote on the Petition for Rehearing and Rehearing En Banc, filed by Petitioner-Appellant on August 1, 2022, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing and Rehearing En Banc is **DENIED.**