

No.
24-5027

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

FILED
JUN 20 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOVAN MARQUIS HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Submitted by the pro se petitioner,

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QUESTIONS PRESENTED

1. Did the trial court err when it refused to instruct the jury that the heroin distributed by the defendant was the same heroin that caused the victims' overdoses in violation of this Court's precedent in *Burrage v. United States*?
2. Did the District Court err when it refused to grant Harris an evidentiary hearing in accord with 28 U.S.C. § 2255(b) as there was a contested issue of material fact that would have entitled Harris to relief?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

The pro se petitioner, Jovan Marquis Harris, respectfully prays that a writ of certiorari be issued to review the judgment entered below.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eighth Circuit is not reported and is set forth in the Appendix at page 1.

The Judgment of the United States District Court for the District of North Dakota denying Petitioner's Motion to Vacate, Set Aside, or Correct Judgment Pursuant to Title 28 U.S.C. § 2255 and the accompanying Order are not reported and are set forth in the Appendix at pages 2 - 17.

JURISDICTION

The final judgment order of the United States Court of Appeals for the Eighth Circuit was entered on January 23, 2024. App'x at page 1. This Honorable Court has jurisdiction to review this matter pursuant to Title 28, United States Code, Section 1254(1) and Title 28, United States Code, Section 2253.

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime,...nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS

Unless a circuit justice or judge issues a certificate of appealability, an appeal may be taken to the court of appeals from the final order in a proceeding under section 2255 [28 U.S.C. § 2255]. 28 U.S.C. § 2253(b).

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground the the sentence was imposed in violation of the Constitution or laws of the United States...may move the court which imposed the sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a).

STATEMENT OF THE CASE

Throughout 2015, and likely continuing to this day, there were and are numerous sources from which to purchase heroin in Fargo, North Dakota and/or Moorhead, Minnesota. Following a six-day jury trial, Harris convicted as being one of thoses sources of heroin in the fall of 2015 and spring of 2016. **United States v. Jovan Marquis Harris**, case no. 3:16-cr-00272 (Dist. North Dakota).

On August 27, 2015, Morgan Masters ("Masters") was transported to a hospital in Fargo after overdosing on a combination of controlled substances. Masters fully recovered. Lab results found THC, amphetamines, and opiates in her system. (Trial Transcript "Tr. Trans." at 969). Indeed, Masters testified she was using methamphetamine "meth" and "probably a lot of other things" around the time she overdosed. (Tr. Trans. at 965). Masters then testified she did not have a definitive recollection where she obtained the heroin or other substances that led to her overdose. (Tr. Trans. at 1000). Masters also testified she had multiple sources that she purchased heroin from. (Tr. Trans. at 999).

On September 1, 2015, Tyler McIntosh ("McIntosh") suffered an overdose after he admitted to injecting heroin in the bathroom of a convenience store. McIntosh was Masters boyfriend and one of her sources of heroin. McIntosh fully recovered from his overdose after paramedics administered a dose of Narcan. He refused any further treatment. No lab analysis was conducted in relation to McIntosh's overdose. At Harris's trial, McIntosh testified he regularly bought and sold heroin (Tr. Trans. at 1029-1055). McIntosh could not state where he obtained the heroin that led to his overdose. *Id.* at 1046.

Also on September 1, 2015, Jordan Larry ("Larry") died after injecting heroin and fentanyl in the bathroom of his home. There was no direct evidence that the heroin and fentanyl found at the scene came from Harris. A review of Larry's cell phone did reveal a number of texts that appeared to be drug related between Larry and Alexis Centers ("Centers").

On September 2, 2015, investigating officer Detective Martin interviewed Centers. Detective Martin testified Centers met with Larry at the South Moorhead Dairy Queen at 6:00 p.m. on August 31, 2015, in order to purchase heroin from Larry. Detective Martin also testified he spoke with Zach Speicker ("Speiker"), who was with Larry at the Dairy Queen. Based on these interviews, Detective Martin postulated that Larry had purchased heroin in the parking lot of the Stamart Liquor Mart on August 31, 2015. (Tr. Trans. at 323). (Speiker died from an unrelated overdose prior to the trial in this case).

Detective Martin then obtained surveillance camera video from Stamart. The video shows a blue Ford Taurus purportedly containing Speicker and Larry; a red Chevrolet S10 pickup; and a silver Chrysler 300. Detective Martin testified he could not identify any of the occupants in any of the vehicles or determine any of the license plate numbers. Detective Martin also testified the vehicles passed out of view of the camera without any interaction. Still, Detective Martin assumed that Larry purchased heroin from an unidentified person in the Chrysler during the time the vehicles were out of the camera's view.

Between September 7 and September 15, 2015, law enforcement received a series of telephone calls from an anonymous female who

claimed Harris was distributing heroin in the Fargo area. Subsequent investigation revealed Larry had numerous contacts with a cell phone linked to Harris, which is not surprising considering Larry and Harris were friends. However, Det. Martin testified he could not determine the physical location of the cell phone when those communications occurred. He also could not positively state who had control over the cell phone or who had used it at any given point in time. (Tr. Trans. at 338).

Another investigating officer, Det. Heidbreder, testified Harris was never identified as the source of the heroin that led to Larry's overdose. (Tr. Trans. at 1236). Det. Heidbreder did, however, testify that Jacob Wetch ("Wetch") and Corey Heinze ("Heinze") were being investigated and were subsequently charged in a heroin distribution conspiracy that did not involve Harris. Among others, Wetch and Heinze sold heroin to Larry on multiple occasions, including on August 27, 2015, just days before Larry overdosed. (Tr. Trans. at 1236). At least one of these heroin deals took place in the Stamart parking lot. (Tr. Trans. at 1238). Det. Heidbreder also testified Wetch lived in very close proximity to Stamart. (Tr. Trans. at 1252).

Wetch testified that he and Heinze were selling so much heroin they were "getting it from a lot of different people." (Tr. Trans. at 664). Harris was never identified as one of those sources according to Det. Heidbreder (Tr. Trans. at 1236-38). Wetch also testified his conspiracy ran from August 2015 through January 2016. (Tr. Trans. at 714-15).

Wetch went on to admit that he was not being prosecuted by

federal authorities due to his cooperation in Harris's prosecution. He also admitted that he was told to "target" Harris. (Tr. Trans. at 717-18). Wetch testified he obtained heroin from Harris but could not provide any specific dates, quantities, or offer any evidence of these alleged transactions.

With no definitive proof about who sold what to whom, the investigation stalled until Paul Ramirez was arrested on March 1, 2016, for possession of methamphetamine. In an attempt to avoid responsibility for his crime, "Ramirez informed law enforcement that Harris was a heroin dealer and staying with McIntosh [and Masters]. Law enforcement entered into a confidential informant agreement with Ramirez, and Ramirez went to McIntosh's apartment to buy heroin from Harris. Ramirez did not recall who he gave his [the buy] money to, but he testified that he knew he gave it in exchange for heroin." *United States v. Harris*, 966 F.3d 755, 759 (8th Cir. 2020).

On March 2, 2016, Ramirez participated in a second controlled buy, which was similar to the first controlled buy, except Ramirez left his [the buy] money by the PlayStation game console which Harris was using...After Ramirez left the aptment, law enforcement officers executed a search warrant. The officers found heroin [in the apartment], \$501 on Harris's person, and \$1,389 in a laundry basket next to a Wisconsin instructional permit with Harris's photo and name." *Id.*

"Harris was indicted for the following: conspiracy to posses with intent to distribute and distribute a controlled substance resulting in serious bodily injury or death (Count 1), distribution

of a controlled substance resulting in death (Count 2), distribution of a controlled substance resulting in serious bodily injury (Counts 3, 4, and 5), and distribution of a controlled substance (Counts 6 and 7), all in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846; and 18 U.S.C. § 2." Id.

Prior to trial, Harris informed defense counsel that he could establish that he was not in Fargo in August or September 2015. Harris told counsel his half-brother, Jamarious Cunningham, would testify that Harris was in Milwaukee throughout that time period; Harris's brother, Julious Middel, a resident of Fargo, would testify Harris would always stay with him or their sister whenever he was in Fargo and that he did not stay or even visit either of them in August or September 2015; and Harris's friend, Marquis Eddie, would also testify Harris was in Milwaukee during August and September 2015. Further, Eddie could have testified about what truly happened during the "controlled buys" at McIntosh's apartment as he was present at the time. Counsel refused to call any of Harris's witnesses.

"[D]uring deliberations, the jury asked a question, seeking clarification regarding whether they were required to find Harris simply distributed heroin on or about September 1, 2015, or whether they needed to find that Harris sold heroin to J.L. [a.k.a. Larry] on or about that date." *United States v. Harris*, case no. 16-cr-272 R. 188 at 6. "After much discussion the Court responded with the following:

The answer to your question can be found by looking at elements one, two, and three in Instruction No. 7. The heroin resulting in death or serious bodily injury for Counts One through Five must have been distributed

by Mr. Harris or a conspirator, but did not have to be transferred directly to the person who died or suffered. *Id.* at 7.

As will be discussed below, this instruction violated this Court's holdings in *Burrage v. United States*, 571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014)(holding the controlled substance distributed by a defendant must be the "but for" cause of the overdose) and in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)(holding any element that raises a statutory maximum sentence must be found beyond a reasonable doubt by the jury).

Harris was found guilty on Counts 1, 2, 3, 5, 6, and 7. The jury found Harris not guilty on Count 4. Following post-trial motions and the completion of a presentence investigation report ("PSR"), the District Court sentenced Harris to 300 months of incarceration for Counts 1, 2, 3, and 5, and to 240 months for Counts 6 and 7, with those sentences running concurrently. Harris then filed a direct appeal and his conviction was affirmed. *United States v. Harris*, 966 F.3d 755 (8th Cir. 2020), cert. denied at 211 L.Ed.2d 202 (2021).

Harris then filed a timely motion with the District Court pursuant to 28 U.S.C. § 2255 seeking to vacate, set aside, or correct the judgment in his case. See case no. 16-cr-272, R. 181, which the District Court denied in an unpublished order, R. 188. Harris then filed a notice of appeal followed by an application for a certificate of appealability, which the Eighth Circuit denied. This timely appeal of that denial now follows.

ARGUMENT

1.) WHEN THERE ARE MULTIPLE ONGOING DRUG DISTRIBUTION CONSPIRACIES INVOLVING THE SAME PARTICIPANTS, IS THE GOVERNMENT REQUIRED TO PROVE THE CONTROLLED SUBSTANCE THAT RESULTED IN AN OVERDOSE THAT RESULTED IN DEATH OR SERIOUS BODILY INJURY TO HAVE COME FROM THE DEFENDANT BEFORE THE DEFENDANT IS SUBJECT TO AN ENHANCED SENTENCE?

Left unanswered by this Court in *Burrage v. United States*, 571 U.S. 294 (2014) is the important question whether the controlled substance distributed by the defendant was the proximate cause of the overdose alleged by the government. It is time for the Court to answer this question.

Tragically, at least three people overdosed on heroin that was laced with fentanyl in Fargo, North Dakota between August 27, 2015 and September 1, 2015. Thankfully, two of the three survived after receiving prompt medical assistance. However, both of the survivors testified in this case that they were uncertain who had supplied the heroin that led to their overdoses as they had been buying from multiple sources. See Trial Transcript at 965-999 (Masters testifying she was using "meth" and "probably a lot of other things" when she overdosed and she did not know where the heroin came from); and Trial Transcript at 1029-1055 (McIntosh testifying he was unsure where the heroin had come from as he regularly bought and sold heroin from and to multiple people).

Likewise, Jacob Wetch and Corey Hienze were dealing so much heroin, including to Jordan Larry whose overdose resulted in his death, that they had to get the heroin "from a lot of different people." Trial Transcript at 664. Additionally, Wetch testified

he sold Larry heroin in the Stamart parking lot on multiple occasions, which is the location where the government alleged Larry obtained the heroin that led to his overdose. Trial Transcript at 1236-1252.

Further, it is undisputed that in addition to being a heroin addict, Larry was also selling heroin that he obtained from multiple sources, including Jacob Wetch.

Given Masters and McIntosh both testified they had multiple sources from which they purchased controlled substances including heroin, and Wetch testified he regularly sold heroin to Larry, there is no proof the heroin Harris was convicted of distributing was the proximate cause of any of the overdoses. A fact borne out by the jury's question whether the heroin had to have come from Harris in order for him to be liable for the overdoses.

The Court should grant certiorari in this case in order to answer the question left unanswered in *Burrage*. When there are multiple ongoing drug conspiracies, does the drugs distributed by the defendant have to be the proximate cause of the overdose?

2.) WHEN IS THE DISTRICT COURT REQUIRED TO HOLD AN EVIDENTIARY HEARING IN A 28 U.S.C. § 2255 PROCEEDING?

"Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto."

28 U.S.C. § 2255(b) (emphasis added).

Everyday federal prisoners across the country are faced with the virtually impossible task of proving that their "sentence was imposed in violation of the Constitution or laws of the United States," without the assistance of counsel. The task is made infinitely more difficult when the district court refuses to provide the defendant access to discovery and then refuses to hold an evidentiary hearing, all of which happened in this case.

Federal defendants are left in a vicious circle. On the one hand, the district court denies relief because the defendant failed to provide adequate proof, or as the courts are fond of saying, "unsubstantiated claims." On the other hand, the district courts will not grant access to discovery or hold an evidentiary hearing. Thus, the defendant cannot provide the substantiation for his or her claims.

In this case, Harris made two claims that would have garnered him relief from his unconstitutional sentence. First, as discussed above, he asserted he was not responsible for the heroin/fentanyl that led to the overdoses that were attributed to him. In order to prove this fact, Harris moved the district court for access to discovery and for an evidentiary hearing. R. 182 and 181, respectively. The district court denied both. R. 188 at 13-14.

The need for access to discovery in this case was even more important than normal as the judge that presided over the case was not the same judge that presided over the 2255 motion. Therefore, the judge that ruled on the 2255 motion had never heard the interviews that Harris argued would establish that someone else (Jacob Wetch) was responsible for selling the heroin/fentanyl that caused the overdoses.

Similarly, Harris asserted he had multiple witnesses that would have testified that he was in Wisconsin, not North Dakota, the last week of August and the first week of September 2015. Harris stated he informed defense counsel of this fact, but defense counsel did not properly investigate the matter by interviewing the witnesses. The district court refused to grant Harris an evidentiary hearing because Harris did not provide affidavits from the witnesses. The court then refused Harris's request for an evidentiary hearing. Yet, in response to Harris's claim, the government never obtained an affidavit from defense counsel refuted Harris's claim. Still, the court sided with the government. This double standard is not fair to a pro se prisoner that is doing everything he can to provide the proof the court requires, but denied access to it by the court.

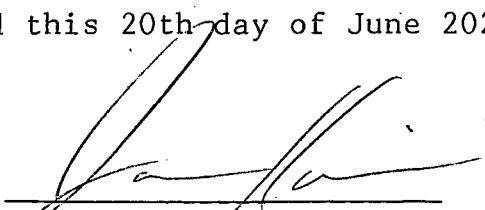
"It is not boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world...Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments." *Brown v. Allen*, 344 U.S. 443, 512, 73 S.Ct. 397, 97 L.Ed. 469 (1953).

When a district court denies a prisoner access to the very evidence that proves his "sentence was imposed in violation of the Constitution or laws of the United States," an injustice has occurred, and this injustice is played out in district courts throughout the United States everyday. It is up to this Court to provide better guidance on when the district court should grant access to discovery and when the district court must hold an evidentiary hearing as required by 28 U.S.C. § 2255(b).

CONCLUSION

WHEREFORE, the pro se defendant Jovan Harris, hereby respectfully moves the Honorable Supreme Court to grant him a writ of certiorari to review the lower courts' rulings denying him relief from a sentence that was imposed in violation of the Constitution and laws of the United States.

Respectfully submitted this 20th day of June 2024 by:



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