

No. _____

In The
SUPREME COURT OF THE UNITED STATES
KENNETH R. WRIGHT, Petitioner
vs.
CONNIE HORTON, Warden, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 750.317a, a strict liability section of the Michigan Compiled Laws' unconstitutionality can convict a person for the distribution of schedule I heroin drug causing death provision which lacks *mens rea* exposing the Petitioner to an enhanced punishment when heroin was alleged to have "caused death" even though the State's experts determined the victim died from a "mixed drug intoxication" and thus an intervening factor which does not relieve the State to sufficiently and independently prove the Petitioner was the cause-in-fact of the victim's death.
2. Whether MCL 750.317a's ambiguity allows the lower court to grant the prosecution's request to instruct the jury on "aiding and abetting" to cure the statute's vagueness lacking "actus reus" and "mens rea" in spite of the defense objection alerting the court the Petitioner was not charged with aiding and abetting under MCL 769.39, nor did the prosecution submitted any evidence indicating the Petitioner intended, encouraged others, or conspired to provide heroin to an intoxicated person with a life-long history of drug addiction, alcohol abuse and serious cardiovascular problems; thus in light of Alleyne are facts or elements that must be submitted to the jury and proven beyond a reasonable doubt.
3. Whether the United States Court of Appeals for the Sixth Circuit's decision affirming the District Court's decision holding that Burrage was not applicable to this case was contrary to "clearly established Federal law" in spite of the Petitioner's position arguing that Burrage's genesis was rooted to the precedent it relied upon and the Sixth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the Sixth Circuit denying rehearing en banc as to which certiorari is sought is reported as **Kenneth R. Wright v. Connie Harton, Warden, Case No. 17-1363** (December 20, 2017). **Appendix A.** On September 19, 2017, the Sixth Circuit Court of Appeals affirmed the district court's opinion and order denying a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. **Appendix B.**

On March 16, 2017, the United States District Court for the Eastern District of Michigan denied the Petitioner's petition for Writ o Habeas Corpus pursuant to 28 U.S.C. § 2254. **Appendix C.**

The Michigan Court of Appeals affirmed the Petitioner's conviction and sentence reported as **People v. Wright**, No. 308765; 2013 WL 6692747 (Mich. Ct. App. Dec. 19, 2013). **Appendix D.**

Petitioner appealed to the Michigan Supreme Court which was denied by an standard order. **People v. Wright**, 846 NW2d 567 (2014), and denied reconsideration without prejudice allowing the Petitioner to seek relief from judgment based on **Burrage v. United States**, 134 S.Ct. 881 (2014). See **People v. Wright**, 854 NW2d 728 (Mich. 2014). **Appendix E.**

BASIS OF JURISDICTION IN THIS COURT

The Opinion of the Court of Appeals for the Sixth Circuit was filed on September 19, 2017, and the petitioner's timely-filed Petition for Rehearing En Banc was Denied by an Order filed on December 20, 2017. This petition is being filed within ninety (90) days of this later date re required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The indictment upon which the petitioner was tried stated offenses against the State of Michigan, defined in the Michigan Compiled Law (MCL) 750.317a. The trial court had subject matter jurisdiction over the the proceedings. A timely notice of Appeal from the Judgment of Conviction and Sentence entered by the trial court was filed, and the State Appellate Court was vested with jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Sixth Amendment

Fourteenth Amendment

Michigan Compiled Law Statute:

MCL 750.317a

INTRODUCTION

This case entails a critical intersection between the Court's Fifth, Sixth and Fourteenth Amendment's jurisprudence that carries grave repercussions for defendants sentenced under our nation's drug laws. Under the Fifth Amendment, criminal statutes are presumed to contain at least a **knowledge-based mens rea** to avoid constitutional concerns and presumption of fundamental unfairness. See e.g., Flores-Figuera v. United States, 556 U.S. 646, 655 (2009); Rosemond v. United States, 134 S.Ct. 1240, 1251 (2014).

Under the Sixth Amendment, any fact exposing a defendant to an enhanced punishment beyond the prescribed statutory sentencing guidelines' range must be proved to a jury beyond a reasonable doubt. See Alleyne v. United States, 133 S.Ct. 2151 (2013); Apprendi v. New Jersey, 530 U.S. 446 (2000). Both Apprendi and Alleyne's holding relied In re Winship, 397 U.S. 357 (1970).

The genesis of this Court's jurisprudence is the Constitution itself. However, in spite of this Court's Fifth, Sixth and Fourteenth Amendment jurisprudence, thousands of criminal defendants are sentenced on strict liability basis because ambiguous or unconstitutional statutes relieve prosecutors from proving beyond a reasonable doubt that the accused had knowledge of the drug type and quantity triggering an exponentially higher penalty.

Reason why the Petitioner prays this Honorable Court will identify this case present an ideal vehicle to "state what the law is," and "establish uniformity on judicial decisions." Marbury v. Madison, 5 U.S. 12 (1 Cranch) 133, 137; 2 L.Ed. 60 (1803).

STATEMENT OF THE CASE

The Charges:

The Petitioner was charged with one count of delivery of a controlled substance causing death in violation of MCL 750.317a, a strict liability statute that combines schedule I and schedule II controlled substances of MCL 333.7212(1)(b). See MCL 750.317a. The State also charged Wendy Delozier (Wendy) and Starr Thompson (Starr) and both pled guilty to delivery of a controlled substance causing death. (Vol. II, pp. 21, 171) The genesis of this case is rooted to the February 23, 2010, events involving a small drug sell-transaction.

The Government's Evidence:

The State promised Wendy and Starr a three (3) year sentence in exchange for their testimony against the Petitioner. (Vol. II, p. 172). Robert Gotshaw (Gotshaw), testified that he knew Robert Wilcox (Mr. Wilcox) for sixth months. Mr. Wilcox suffered from a life long history of drug addiction to opiates and heroin. (Vol. II., pp. 123-124). Gotshaw stated he and Mr. Wilcox resided in the same trailer park and he did errands for Mr. Wilcox and also did small maintenance on his trailer. Gotshaw testified the he took Mr. Wilcox at least twice to a local hospital's emergency after Mr. Wilcox overdosed on heroine.

On February 23, 2010, Mr. Wilcox called him and asked him to take him to the Dixieland Hotel adding he was not sure of the name of the hotel. (T.T. Vol. I, p. 161-162, 175). They pick up Wendy whom Mr. Wilcox asserted could get drugs for him. They drove her to a drug store (CVS) and once they arrived at the drug store's parking lot she went in another vehicle, a silver Tahoe that was parked in that lot where she got the drug and drove her back to the hotel. Gotshaw saw the girls administering the drug on Mr. Wilcox, which he assumed was heroine. (Vol. I, pp. 164, 165). Mr. Wilcox fell on the ground immediately

after Starr injected the drug into Mr. Wilcox's body. (Vol. I, pp. 165-166, 177-179, 193). Gotshaw, Wendy and Starr carried and put Mr. Wilcox into the back seat of the car and Gotshaw drove Mr. Wilcox to his residence since he had the key. Wendy accompanied him. Once they arrived, Wendy and Gotshaw identified Mr. Wilcox was in need for medical attention but Wendy persuaded Wilcox to go inside the victim's home so they could have sex and inject more drugs. An hour or more later Gotshaw decided to call 9-11. (Vol. I, pp. 166-168). When the 9-11 staff arrived, Wendy went inside Mr. Wilcox's residence and Gotshaw got Mr. Wilcox out of the car at the request of 9-11 operator. (Vol. I. p. 169). Wendy testified that she knew Starr from the streets since both of them engaged in prostitution for living. (Vol. II., pp. 23-24). Wendy admitted she went to purchase heroin after Mr. Wilcox requested it. She allegedly bought \$400 worth of heroine and crack. Part of the money belonged to Mr. Wilcox and part belonged to Starr. (Vol. II., pp. 33). Upon her return to the hotel she handed the drugs to Mr. Wilcox whom she stated gave a packet of heroin to each of them. (Vol. II., pp: 30-35). Starr cooked the heroin and Wendy used a syringe and injected Mr. Wilcox with it. (Vol. II., pp. 35-37, 61). [The quantity of drugs was never established]

Chief Toxicologist's Determinations:

The government's expert toxicologist, Dr. Gary Kunsman (Dr. Kunsman) testified that he was the Oakland County Chief Toxicologist, and explained that several drugs (opiates) were found in Mr. Wilcox's body in addition to alcohol such as 1) benzodiazepines (Clonazepan), prescribed for treatment of obsessive compulsive disorder (OCD) or seizures, (PE. 9/1/11, p. 11-12); 2) Venlafaxine which is prescribed for depression and pain, 3) Hydroxyzine prescribed for sleeping disorder, and 4) Mitazapine. (Vol II., pp. 245-246).

When asked whether the level of morphine found in Mr. Wilcox's body could

have caused death, Dr. Kunsman stated: "[i]t's difficult to directly determine the level of morphine present in the blood is consistent with use before death that would be directly related to the cause of death, and I apologize, I don't think that's all that clear." (PE. 9/1/11, p. 14). The prosecution asked Dr. Kunsman if in the "[a]bsent the morphine and any other natural disease, would the remaining drugs located in the decedent--would those drugs have been to cause the death of the decedent," and he stated "Yes. . . ." (PE. 9/1/11, p. 14). On further examination Dr. Kunsman admitted he found alcohol in Mr. Wilcox's body stated that a combination of the opiates found in Mr. Wilcox's body with alcohol alone "would be an adequate basis for cause of death." (PE. 9/1/11, p. 14-15).

The Government's Pathologist Determinations:

The government's pathologist expert, Dr. B. Pacris stated that he was the Oakland County Medical Examiner. Dr. Pacris had performed an autopsy of Mr. Wilcox's body and he determined "[t]he cause of death [was] drug abuse." He found vomit on Mr. Wilcox's mouth and hands, and went on to state that morphine and alcohol was the combination of drugs that caused Mr. Wilcox's death," and admitted that he reached such determination because he "also rely on the investigator's report in this case," emphasizing that "[a]ll deaths that we examine in the county, we rely on the investigator" report. (PE. 9/1/11, p. 53). On cross examination Dr. Pacris stated he found Mr. Wilcox's death "undeterminable" because "all drug-related deaths are considered undeterminable" as a matter of policy. (Vol. II, pp. 96, 99-100). He added that the level of morphine in Mr. Wilcox's body was not necessarily lethal, and explained that the combination of morphine and alcohol causes a depression on the nervous system. (Vol. II., p. 102-103). See Attached Autopsy Report (Appendix).

In his report, Dr. Pacris's report indicated Mr. Wilcox suffered from advance arterioesclorosis of his heart's arteries. id. at p. 4. In reference to Dr. Pancris-'s "Pathological Diagnosis" he indicated Mr. Wilcox suffered from the following diseases:

I. Drug Abuse

- A. Morphine in the Blood
- B. Pulmonary edema

II. Hypertensive and Arteriosclerotic Cardiovascular Disease

- A. Cardiomegaly with left vetricular hypertrophy
- B. Granular Kidneys
- C. Moderate arteriosclerosis, calcifications and luminal narrowing of the left anterior descending and left circumflex arteries
- D. Severe atherosclerosis of the aorta.

III. Benign Prostatic Hypertrophy

IV. Left Pleura Adhesions

OPINION: This 62-year-old white male, Robert Wilcox, died of **drug abuse**. Based on the circumstances surrounding this death, the results of post-mortem examination, and toxicological analysis, the manner of death is **undeterminable**. (emphasis added) id. Appendix F

Jury Instructions:

At the conclusion of trial defense counsel requested "CJI2d 16.15 over the prosecution's objecteion. The court rejected CJI2d 16.15 which provides:

[There may be more than one cause of death.] It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [Mr. Wilcox] was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural or necessarily result of the defendant's act.

The notes for the use of this instruction explain that it applies "when there is an issue as to whether an act of the defendant caused death, or whether death was caused by some intervening cause." id.

The court then granted the prosecution's proposed jury instruction which provides:

The defendant is charged with the crime of illegally delivering a controlled substance that caused a death of

another. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt; First, that the defendant delivered a controlled substance to a person. Deliver means the defendant transferred or attempted to transfer the substance to another person knowing that it was a controlled substance. The person to whom the defendant gave controlled substances **does not have to be the decedent.**

Second, that the substance was consumed by a person.

Third, that consuming the controlled substance caused the death of Robert Wilcox. (emphasis added).

There may be more than one cause of death. The controlled substance delivered by the defendant does not need to be the sole cause of Robert Wilcox's death. The controlled substance **only needs to be a contributing cause that was a substantial factor in the death of Robert Wilcox. It does not matter if there was another contributing cause of death.** (emphasis added). (Vol. III., p. 190) id.

If you find the defendant delivered the heroin that was consumed by the decedent **that failure of a third party to provide medical treatment does not brake the chain of causation.** The absence of an intervening force to break the chain of the consequences of defendant's conduct is not a defense to the crime charged. (Vol. III., p. 191)

The trial court went on further to instruct the jury on "criminal intent" and "knowledge" under the aider and abettor thoery instructing the jury that:

Anyone who intentionally assist someone else in committing a crime is as guilty as the person who directly commits it and can be convicted to that crime as an aider and abettor.

To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt: First, that the alleged crime was **actually** committed either by the defendant or someone else.

Second, that before or during the crime the defendant did something to **assist** in the delivery of the controlled substance that caused the death.

Third, the defendant must have **intended** the delivery of the controlled substance **or must have known** that the other person intended its delivery at the time of giving assistance. (Vol. III., p. 191)

The jury retired to deliberate and found the Petitioner guilty.

REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit Court of Appeals' opinion exemplifies plain error when it based its decision on a reading of MCL 750.317a unconstitutionality that conflicts with this Court's decisions in Moresette v. United States, Staples v. United States, United States v. Gympsum Co., Burrage v. United States, infra, when such jurisprudence is rooted to the Constitution as clarified In re Winship, and the precedent in which relied upon and, as such calls for an exercise of this Court supervisory power to establish uniformity on judicial decisions.

A. This Court should resolve MCL 750.317a's strict liability unconstitutionality when it prescribes the same punishment as murder for distributing drugs causing death without a mens rea, foreseeability, or proximate cause requirement.

On direct appeal as he did in the Sixth Circuit Court of Appeals, the Petitioner challenged MCL 750.317a's constitutional infirmity and called the reviewing court's attention to this Court's decision in Morissette v. United States, 342 U.S. 246 (1952), clarifying a long-standing presumption that all crimes carry with them the requirement that the criminal act be an intentional violation of the law, because mens rea of criminal intent should be inferred into the statute in the absence of express language of converting government property to his personal use.

This court held it is basic to most crime that there needs to be a criminal intent. id. at 250-251. In Staples v. United States, 511 U.S. 600, 604 (1994), this Court held that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Even when a statute fails to include the term mens rea within it, this Court have instructed lower courts that "offenses that require no mens rea generally are disfavored," and courts should look for congressional indication of mens rea before dispensing it as an element of the crime.

Staples, 511 U.S. at 604.

MCL 750.317a took effect on January 1, 2006. MCL 750.317a provides:

"A person who delivers a schedule 1 or 2 controlled substance, other than marijuana, to another person in violation of section 7401, that is consumed by that person or any other persons, that causes the death of that person is guilty of a felony punishable by imprisonment for life or any term of years."

In this case, the prosecution alleged the Petitioner sold heroin to Wendy Delozier. The heroin was ordered by Starr Thompson who alleged the Petitioner sold drugs to her on previous occasions. Wendy cooked the heroin and injected it in Mr. Wilcox's arm and he fell on the floor immediately thereafter. Gotshaw, Mr. Wilcox's friend, and Wendy dragged him towards his own car and left him inside. Both admitted being fully aware that Mr. Wilcox was alive and in need for emergency medical help. In spite of it, both knowingly left him to die while they, Wendy Delozier and Robert Gotshaw, went inside Mr. Wilcox's residence to use more heroin and have sex.

The prosecution never claimed or argued he charged the Petitioner **with conspiracy**, or that he knew, intended to, or encouraged Wendy Delozier, Starr Thompson, or Gotshaw that the heroin would go to and be administered to an intoxicated man with a life-long history of addiction to heroine and opiates who also suffered from serious cardiovascular disease.

In fact and in law, it can hardly be presumed the Petitioner "intended" to or "knowingly" sold heroin as alleged by the State to Wendy to "cause" Mr. Wilcox's death. Again, in Morrisette, supra, this Court held that rule of construction reflects the basic principle that "wrongdoing must be **conscious** to be criminal." id. at 250. Importantly enough, over a century and a half the Michigan Supreme Court established that **mens rea** is a crucial "ingredient of every crime." See Pond v. People, 8 Mich 150, 174 (1866), Justice Campbell observed:

"A criminal intent is a necessary ingredient of every crime. And therefore it is well remarked by Baron Parke in *Reginal v. Thurboin*, 2 C & K 832, that 'as a rule of law founded on justice and reason, is that *actus non faci reum, nisi mens sit rea*, the guilt of the accused must depend on circumstances as they appear to him.' And Mr. Bishop has expressed the same rule very clearly, by declaring that 'in all cases where a party, without fault or carelessness, is misled concerning fact and acts as he would be justified in doing if the facts were what he believed them to be, he is legally as he is morally innocent.'" 1 Bish Cr 1, § 242."

Justice Fitzgerald adverted to this principle in quoting Gegan Criminal Homicide in Revised New York Penn Law, 12 N.Y. L. Forum 565, 586 (1966), in People v. Aaron, 409 Mich 672, 705; 299 NW2d 304 (1980):

"If one had to choose the most basic principle of the criminal law in general * * * it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.'" id.

As written, MCL 750.317a is unconstitutionally vague and fundamental rights rooted in our Constitution compels this Court's supervisory power to prevent its arbitrary and discriminatory enforcement. Hill v. Colorado, 530 U.S. 703, 732 (2000).

- B. No court can legally grant a prosecution's request to instruct a jury on "aider and abettor" to cure a statute's [MCL 750.317a] unconstitutional infirmity lacking "actus reus" and "mens rea" to establish that a defendant or petitioner "actually" intended to aid others to commit a crime with "knowledge" of other individuals actual and foreseeable conduct causing death.

The record indicates the Sixth Circuit Court of Appeals committed plain error by failing to observe that, as in Burrage, the trial court in this case favored the prosecution's request to illegally instruct the jury. In this case, the lower court gave the "aider and abettor" instruction to the jury, and also instructed the jury that they could find the Petitioner guilty if they found that he:

"[I]ntentionally assist[ed] someone else in committing a crime is guilty as the person who directly committed it and can be convicted to that crime as an aider and abettor." id. Appendix

F.

In so providing such instructions, the trial court effectively cured or amended MCL 750.317a vagueness relieving the prosecution from its burden of proof while shifting that burden of proof to the Petitioner. The law on "aiding and abetting" is well established. Here, the defense objected to the "aider and abetting" instruction requested by the prosecution arguing that:

"[T]he Defendant was not charged in the information, the charging document as an aider and abettor. I think that's totally inappropriate." (Vol. III., p. 105). (emphasis added) Appendix E.

The court asked for the prosecution's position concerning the defense objections and the prosecution asserted:

Judge, there's no requirement that anybody be charged as an aider and abettor. You're automatically considered an aider and abettor even if you are the principal. Because there are three people in this particular case who all have been charged with the same offense the jury could, in fact, find maybe the defendant was aiding and abetting Starr and Wendy as apposed to whether or not he was the actual principal.

So we don't have to give notice. It's an alternate - -It's just an alternate theory. So we never have to give notice of aiding and abetting. And I think . . . a jury could, in fact, find maybe because he didn't put [the heroin] in the descendent's arm that he actually was the aider and abettor. (emphasis added) (Vol. III., p. 106).

The problem is --"aider and abettor" is an "Statutory Crime." Further, the trial court could not instruct the jury on "aiding and abetting" since there is not separate crime of "accessory before the fact" or "aiding and abetting" in the State of Michigan; rather, Michigan's statute declares, with a catch-line, "Abolition of distinction between accessory and principal," that:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, and tried and on conviction shall be punished as if he had directly committed such offense. MCL 769.39.

In Michigan, the abolition of the common-law distinctions between accessories before the fact and principals is of reasonable ancient vintage, existing in this state for at least a century and a half. See e.g. People v. Brigham, 2 Mich 550 (1853), noting that § 1, chap. 161, title 30 makes an accessory before the fact to any felony, punishable in the same manner as may be prescribed for the punishment of the principal felon," and in Shannon v. People, 5 Mich 71 (1858), the court observed that "[T]he act of 1855, section 19 (Laws of 1885, p. 145; sec 6065 of Compiled Laws), enact "that distinction between accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned with the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may hereafter be indicted, tried, and punished as principals, as in the case of a misdemeanor."

Simply stated, to abet another to commit a murder is to command, procure, or counsel another to commit it. See e.g. People v. Pitts, 84 Mich App 656, 659-660 (1978). "Aid and 'abet' are nearly synonymous terms as generally used; but, strictly speaking, the former term does not imply guilty knowledge or felonious intent; whereas the word 'abet' includes knowledge of the wrongful purpose and counsel and encouragement in the commission of the crime." Pitts, at 659-660.

Therefore, the aiding and abetting instructions given in this case violated the Petitioner's Fifth, Sixth and Fourteenth Amendment rights because it was not charged in the indictment or information and thus effectively disarmed him from preparing a defense on such charge.

The Petitioner enjoys a right to confront the prosecution and compel the prosecution to produce and submit evidence indicating: 1) that the Petitioner

knew Wendy Delozier, Starr Thompson, and Gotshaw intended provide with and to inject the heroin on Mr. Wilcox's arm, 2) that aided them in deciding to leave Mr. Wilcox to die as they admitted it, and 3) that the Petitioner knew Mr. Wilcox suffered from cardiovascular disease and a life-long addiction to opiates and heroin which he knowingly mixed with alcohol. No Michigan law can declare the Petitioner criminally responsible. See e.g., People v. Knapp, 26 Mich 112, 115 (1872) holding:

There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for anyone to do it. id.

This Court observed long ago, that "under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven guilty in accordance with due process." Parr v. United States, 363 U.S. 370, 394 (1960) (reversing mail fraud conviction where mailing did not fall within the scope of the statute).

This Court should reverse the Court of Appeals' decision and reinforce the principle that, no matter how culpable the defendant's behavior, a conviction may only be obtained under a statute that clearly encompasses the conduct at issue. Moreover, in light of the principle that "unless [a Legislature] conveys its purpose clearly, it will not be deemed to have significantly the federal-state balance." United States v. Bass, 404 U.S. 336, 349 (1971).

To the extent ambiguity remains after this Court has interpreted the Statute in Burrage, the statute at issue, MCL 750.317a's ambiguity, "the tide must go to the defendant" under the rule of lenity. United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion); see e.g. Skilling v. United States, 561 U.S. 358, 410-11 (2010).

Simply put, it would be illegal to authorize prosecutors to cure a statute's ambiguity based on the crime of aiding and abetting.

- C. The Burrage decision is concerned about what burden of proof is constitutionally valid in a given statute as announced by this Court nearly a half of a century In re Winship establishing what should be proved, and Alleyne and Burrage could not make that clearer.

There is not dispute the lower courts interpreted MCL 750.317a substantial law and its applicability; however, their decision was flawed. MCL 750.317a is, and the State conceded, is a strict liability statute. The state, however, was dismissive about the fact that it exposes a defendant to an enhanced punishment without defining the mens rea or actus reus elements that are necessary to determine that a defendant's act(s) in fact "caused" a person's death.

Importantly enough, just as the statute challenged in Burrage did, MCL 750.317a conflates schedule I or II to sneakily subject a defendant to the enhanced sentence without proof or assertion of the quantity of a given drug.

The Due Process Clause of the United States Constitution prohibits the States from depriving any person of life, liberty, or property without due process of law and, the Equal Protection Clause, forbids the States from denying "any person within its jurisdiction the equal protection of the laws." Smith v. Robins, 528 U.S. 259, 276; 120 S.Ct. 746; 145 L.Ed.2d 756 (2000). Nor can State grant relief to some litigants and capriciously or arbitrarily deny it to others. Smith v. Bennet, 365 U.S. 708, 712-714; 81 S.Ct. 895; 6 L.Ed.2d 39 (1961). This is precisely what the Sixth Circuit Court of Appeals did in this case in spite of this Court repeated admonitions holding that "clearly established Federal law" means decisions by this Court. See e.g., Parker v. Mathews, 567 U.S. 37, 38; 132 S.Ct. 2148; 183 L.Ed.2d 32 (2012), where this Court reversed the Sixth Circuit's decision "based on the flimsiest of rationales," and held that it previously admonished that Court in Renico v. Lett, and repeated that "clearly established Federal Law" under "AEDPA" means

decisions announced by that Court, and not Sixth Circuit precedent. id.

Law of the Land:

In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 340-341; 4 L.Ed. 97 (1816), this Court reiterated the Constitution as being the Supreme Law of the Land and the obligation of the State courts to comply with it. Two years later in McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 426; 4 L.Ed. 579 (1819), this Court noted: ". . . the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States and cannot be controlled by them." id.

Further, in Cooper v. Aaron, 358 U.S. 1, 18; 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), the Court held that its interpretation of the Fourteenth Amendment is the supreme law of the land, and Article VI makes it binding on the States.

Three decades later in Maryland, supra, this Court reaffirmed that no state law is above the Constitution, and, in Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516; 112 S.Ct. 2608; 120 L.Ed.2d 407 (1992), this Court noted that a state law which conflicts with the Constitution and federal law is without effect.

In this case, MCL 750.317a unconstitutionally empowers the State to arbitrarily enhance a defendant's punishment without notice of what constitutes the elements showing that the Petitioner "caused" Mr. Wilcox's death. Subject to constitutional limitations, state legislatures have the "substantive power to **define crimes** and prescribe punishments." Jones v. Thomas, 491 U.S. 376, 381; 109 S.Ct. 2522; 105 L.Ed.2d 322 (1989).

And, a facial challenge to a statute will survive if the challenger demonstrates that the application or enforcement of a statute is unconstitutional "as applied" to the challenger. Troxel v. Granville, 530 U.S. 57, 73; 120 S.Ct. 2054; 147 L.Ed.2d 49 (2000).

The Burrage Decision and its Genesis:

The Petitioner in this case argued the district court committed plain error by holding that Burrage entailed a challenge to a federal statute and therefore it was "inapposite," and therefore it had "no application." On rehearing, the Petitioner moved the Sixth Circuit Court of Appeals to consider this Court's jurisprudence holding that when a court interprets a statute's substantive law, its decision is fully retroactive. The Sixth Circuit rejected the Petitioner's position arguing that the district court's decision based on Sixth Circuit's precedent was not "clearly established Federal law," and therefore subject to review. id.

In addition, the Petitioner moved the Sixth Circuit Court of Appeals entire Panel to notice the striking similarities between Burrage's charges and record facts, and asked that court to notice that in Burrage, this Court interpreted the applicability of the Controlled Substance Act as defined in a Federal Statute, and this Court's holding in Alleyne v. United States, 133 S.Ct. 2151 (2013), requiring that any fact which imposes or increases an applicable sentencing range must be submitted to a jury and proven beyond a reasonable doubt.

The Petitioner argued that it is the reasoning behind that conclusion that has importance in this case because: "the core crime and the fact triggering [an enhanced] sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." Alleyne, 133 S.Ct. at 2163.

Furthermore, "[t]he law has long considered causation a hybrid concept consistent with two constituent parts: actual cause and legal cause." Burrage, 134 S.Ct. at 887. This Court explained that "actual cause" is a cause in fact, while "the 'legal' cause [is] often the 'proximate cause.'" id.

The Petitioner argued that the genesis of his constitutional claims is the

Sixth and Fourteenth Amendments to the United States Constitution and the precedent Burrage relied upon. i.e., Alleyne, 133 S.Ct. 2151, 136 L.Ed.2d 314 (2013); which relied on In re Winship, 397 U.S. 357; 90 S.Ct. 1068' 25 L.Ed.2d 368 (1970). In re Winship this Court reversed the State court's decision and held that:

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. (emphasis added)

Winship, 90 S.Ct. at 1071; 397 U.S. at 361.

This Court went on to state that standard of proof is "a requirement of due process," which "reflects a profound judgment about the way in which law should be enforced and justice administered." (citing Duncan v. Louisiana, 391 U.S. 145, 155; 88 S.Ct. 1444; 20 L.Ed.2d 491 (1968)). id. 90 S.Ct. at 1071. It further explained that "many opinions of this court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." (emphasis added) (internal citations omitted). id. 90 S.Ct. at 1071. Highlighting a prosecutor's duty, this Court went on further to explained that:

Mr. Justice Frankfurter stated that "[i]t is the duty of the Government to establish * * * guilt beyond a reasonable doubt. This notion--basic in our law and rightly one the boasts of a free society--is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process'" Leland v. Oregon, (343 U.S. 790, 795; 72 S.Ct. 1002, 1005-1006, 1009; 96 L.Ed. 1302 (1952))

In Re Winship, 90 S.Ct. at 1071.

Clearly, neither Alleyne or Burrage announced a new rule. It simply clarified the Sixth Amendment's requirement that every **fact** or **element** of any crime be proved beyond a reasonable doubt, and the Petitioner's claims undeniably finds its genesis in the Constitution and the precedent that Alleyne

and Burrage relied upon to reach its decision. The Winship Panel so held because:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." (internal citation omitted) (emphasis added)

Winship, 90 S.Ct. at 1072.

According to the district court as affirmed by the Sixth Court of Appeals, Burrage is inapplicable because it entailed this Court's interpretation of a Federal statute. If the the lower courts decision is right in this case, then this Court's decision in Graham v. Florida, 560 U.S. 48; 130 S.Ct. 2011; 176 L.Ed.2d 285 (2010); Miller v. Alabama, 132 S.Ct. 2455; 183 L.Ed.2d 407 (2012); Montgomery v. Louisiana, 136 S.Ct. 718; 193 L.Ed.2d 599 (2016), declaring that those States' statues which allowed children to be treated and sentenced in the same manner as adults was unconstitutional -would only apply to the State's challenger.

The same result would apply to this Court's decision in Welch v. United States, 136 S.Ct. 1257 (2016) (where this Court applied its interpretation of the Federal Carrier Act Statute declaring it was unconstitutional in Johnson v. United States, 135 S.Ct. 2551 (2015) and therefore, it was substantive law subject to full retroactivity on collateral review. In addition, this Court's decision in Alleyne invalidated statutory sentencing schemes all over our Country even though Alleyne entailed a federal sentencing scheme.

The Petitioner respectfully submits the Sixth Circuit Court of Appeals conclusions would render this Court's jurisprudence concerning the Constitution's guaranteed protections inapplicable in every case. Amazing enough, just recently in Hancock v. United States, 2018 U.S. App. LEXIS 433

(6th Cir. Jan. 5, 2018), the Sixth Circuit held the government was correct in conceding this Court's decision in Burrage was retroactive, and explained:

A rule is substantive and therefore retroactive "if it alters the range of conduct of the class of persons that the law punishes." Schriro v. Summerlin, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). The government concedes, as it has been in other cases, that Burrage narrowed the range of conduct subject to the statutory penalty enhancement when death or serious bodily injury results and therefore announced a substantive rule that applies retroactively on collateral review." (emphasis added) (internal citations omitted).

(Hancock, 2018 U.S. App. at *4-5).

That was precisely the Petitioner's basis for appeal in the Sixth Circuit, i.e., Alleyne prohibited an enhancement of his sentence based on facts or elements which MCL 7502.317a unconstitutionally omits in contradiction of this Court's decision In re Winship and Alleyne, adding Buarrage was retroactive. The Sixth Circuit Court of Appeals rejected that argument while ruling the opposite in Hancock. See Attached Decision (Appendix A). The Petitioner respectfully submits that this case finds support in this Court's decision in Volkman v. United States, 135 S.Ct. 13; 190 L.Ed.2d 286 (2014), granting certiorari and reversing the Sixth Circuit's decision in light of Burrage.

The Petitioner prays and respectfully moves this Honorable Court to consider the Sixth Circuit Court of Appeals reversal rate by this Court as reported by the "Michigan Lawyers' Weekly," publishing the "American Bar Association" report indicating in pertinent part:

"In the seven Supreme Court terms completed since the fall of 2005," the story said, 'the 6th Circuit has been reversed 31 out 38 times, for an 81.6 percent reversal rate, based on the figures compiled by two Philadelphia lawyers.'" (emphasis added) Appendix G.

The Petitioner therefore, submits, the district court and the Sixth Circuit Court of Appeals' decision in this case concerning retroactivity not only conflicts with this Court's jurisprudence, but historically got wrong in 8 out every 10 cases. This fact all and by itself justify the granting of a writ

in this case.

The Law on Retroactivity:

In determining a retroactivity analysis, courts must first determine whether a rule applies retroactively to cases presented on collateral review constitutes a "new rule" as defined by Tague v. Lane, 489 U.S. 288, 299-301; 109 S.Ct. 1060; 103 L.Ed.2d 334 (1989) (opinion by O'Connor, J.), and Perry v. Lynaugh, 492 U.S. 302, 329; 109 S.Ct. 2934; 106 L.Ed.2d 256 (1989). A rule is "new" if the rule announces a principle of law not previously articulated or recognized by this Court's precedent. Williams . Taylor, 529 U.S. 362, 381; 120 S.Ct. 1495; 146 L.Ed.2d 389 (2000) (opinion by Stevens, J.).

If the rule is not a "new rule," then the general rule of nonretroactivity is inapplicable; the rule will be applied retroactively even to cases that became final for purposes of direct appellate review before the case on which a petitioner or defendant relies for the rule was decided. Whortin v. Bockting, 549 U.S. 406, 416; 127 S.Ct. 1173; 167 L.Ed.2d 1 (2007).

This Court's decision In re Winship, supra, made clear that any fact or elements of a crime must be submitted to a jury and proven beyond a reasonable doubt, and the bedrock principle was crystallized in Apprendi and Alleyne, and the lower court's decision should be reversed.

As previously argued, supra, this Court established in Johnson, Welch, Miller, and Montgomery, that when a court interprets a statute's substantive law, such decisions are subject to full retroactivity. This Court's decision in Burrage interpreting the Statute's and deciding its was unconstitutional as dictated In re Winship, and clarified in Burrage applies to this case.

The Marbury Court aptly held the Constitution provides this Court with the authority to say what the law is and establish uniformity on judicial decisions, and this case provides an appropriate vehicle.

SUMMARY ARGUMENT

The Petitioner will respectfully submit his summary argument based on those three (3) points indicated in the "Questions Presented." i.e., (1) MCL 750.317a's is unconstitutional because it lacks or fails to define what proof a prosecutor must submit to establish mens rea, (2) a trial court commits plain error when it allows a prosecution to cure MCL 750.317a's ambiguity by illegally granting a prosecutor's request to provide a jury with "aiding and abetting" instructions, and (3) whether the Sixth Circuit Court of Appeals decision affirming the district court's decision holding that Burrage was inapplicable in this case was "contrary to" and "an unreasonable" application of "clearly established law.

1. The use of the word "cause" as used in MCL 750.317a's vagueness fails to require proof concerning a defendant's intent establishing that his/her actions was in fact the legal or "proximate cause" of the resulting injury.

Long ago this Court established and made clear that the conduct proscribed by a criminal statute must be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Failure to adhere to the established principle will continue to produce infirmity on judicial decisions, and also will produce adverse consequences that the Due Process Clause is designed to prevent. The lack of clarity in MCL 750.317a regarding what mens rea and actus reus to impose criminal liability should be resolved pursuant to this Court's jurisprudence In re Winship, Alleyne, Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995), Burrage, and the precedent those decisions relied upon to uphold the Constitution's intent.

The principle that the scope of criminal offenses is limited to the reach of its unambiguous plain language is rooted to fundamental constitutional principles. "A conviction fails to comport with due process if the statute

under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." United States v. Williams, 553 U.S. 285, 304 (2008); see also Skilling v. United States, 561 U.S. 358, 402 (2010) (criminal offense must be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited.") (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

Statutory language that is ambiguous by definition cannot provide the requisite fair notice. "Penal statutes prohibiting the doing of certain things, and providing a punishment for the violation, should not admit of such double meaning that the citizens may act upon the one conception of its requirement and the courts upon another." Conally v. General Constr. Co., 269 U.S. 385, 393 (1926).

For that reason, this Court follows "the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" Yates v. United States, 135 S.Ct. 1074, 1088 (2015) (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000)); see also Liparota v. United States, 471 U.S. 419, 427 (1985) ("[a]pplication of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct considered illegal.>"). (emphasis added)

Providing fair notice of conduct that is criminal is the chief reason why a criminal offense is limited to the acts unambiguously encompassed within the statutory language, but this principle serves other important purposes as well -- "[s]trik[ing] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." Liparota, 471 U.S. at 427.

In a similar vein, this Court has reiterated that crimes are defined by the State's Legislature or Congress at the Federal level, -not the courts. United States v. Lanier, 520 U.S. 259, 267 n. 6 (1997); see also United States

v. Bass, 404 U.S. 336, 348 (1971) ([B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); United States v. Evans, 333 U.S. 483, 486 (1948) ("defining crimes and fixing penalties are legislative, not judicial functions."). Imposing criminal liability based on ambiguous statutory text carries the significant risk of exceeding the bounds authorized by the Constitution or Legislatures.

Moreover, when prosecutors or courts are allowed to expand the scope of criminal liability based on ambiguous statutory language only opens the door to "arbitrary and discriminatory enforcement." Skilling, 561 U.S. at 402-03 (quoting Kolender, 461 U.S. at 357). It will "allow[] policemen, prosecutors, and juries to pursue their personal predilection." Kolender, 461 U.S. at 358 (quotation marks omitted).

In recent years, this Court has been required to rule in a number of cases of attempts by the government to expand the scope of criminal liability beyond a statute's plain language. Yates, 135 S.Ct. at 1088 ("In determining the meaning of 'tangible object' in [MCL 750.317a] 'it is appropriate, before we choose the harsher alternative, to require that [a Legislature] should have spoken the language that is clear and definite."); Burrage v. United States, 134 S.Ct. 881, 887, 892 (2014) (interpreting statute imposing a sentence when "death or serious bodily injury result from the use of [a controlled] substance" to require proof that prohibited conduct was a but-for cause of death, rather than a contributing cause, because the lower courts' reading of MCL 750.317a "cannot be squared * * * with the need to express criminal law in terms ordinary person can comprehend.") (quotation marks omitted) (emphasis added).

2. No court can legally grant a prosecutor's request to instruct a jury on an uncharged "aiding and abetting" offense to cure a statute's (MCL 750.317a) ambiguity; specially when the prosecution never submitted any proof establishing the Petitioner "actually" encouraged and assisted others, or that he intended the heroin to go to an intoxicated man who was an unknown person to the Petitioner.

The record in this case indicates the defense counsel requested the court to provide a specific jury instruction to the jury. The prosecution objected and moved the court to provide its own version of a jury instruction, including an instruction on aiding and abetting. The defense renewed his objection alerting the court that: "the defendant was not charged in the information, the charging document as an aider and abettor." (Vol. III., p. 105) Appendix E. The prosecution maintained its office "don't have to give notice," because the defendant is "automatically considered an aider and abettor." (Vol III, p. 106) Appendix E. The court agreed with the prosecution and it instructed the jury as indicated supra, (pp. 5-6). Appendix E.

The rulings and approach taken by the lower courts is inconsistent with the evidence in this case. The commission of an "aiding and abetting" offense requires the prosecution to produce proof of affirmative action to encourage the offense, and must also produce evidence that the Petitioner intended the result caused by others, i.e., (1) that he knew the heroin the prosecution alleged he provided to Wendy Delozier will be provided to the victim, Mr. Wilcox, (2) that the Petitioner knew Mr. Wilcox habitually mixed alcohol with controlled substances, and (3) that the Petitioner knew Mr. Wilcox suffered from serious cardiovascular problems.

Suffice to state, the prosecution's chief evidence was Wendy Delozier testimony who claimed she got the heroine from the Petitioner at the CVS's parking lot. Yet, the prosecution never produced the CVS's surveillance tape. Clearly the facts reject the notion that the Petitioner aided and abetted the

principal.

For centuries, the law has been settled requiring proof that a person aided and abetted the commission of a crime, and the required proof is twofold: (1) that a charged defendant "d[id] some act to render aid to the actual perpetrator thereof" or "encourage or set another on to commit a crime," Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic dictionary of Law* 5, 41-42 (1901 ed.), and (2) the defendant did so with the "design to encourage, incite, or in some manner afford aid or consent to the particular act." 1 Francis Wharton, *A Treatise on Criminal Law* § 211, at 229 (10th ed., Philadelphia, Kay & Brother 1896).

One fact is worth mentioning: In the decade before Congress enacted the federal aiding and abetting statute, this Court reversed a criminal conviction because the "defective" jury instruction did not require proof of both of these "condition[s]" for accomplice liability. Hicks . United States, 150 U.S. 442, 448-449 (1983). Presently, these two prerequisites are so well established that even the government recognizes that accomplice liability requires proof that a defendant "acted in some affirmative manner designed to aid" an offense with the "specific intent to facilitate the commission of a crime by another." See U.S. Dep't of Justice, U.S. Attorney's Manual, tit. 9, Criminal Resource Manual § 2474 (Oct. 1999); id. § 2475.

This case requires the application of these two bedrock requirements to the crime of "providing schedule I or II" causing death which imposes a "severe penalty" of between a number of years or life imprisonment without proof that a defendant both (1) "committed all the acts necessary to be subjected to punishment for" a drug transaction crime, and (2) that he aided and abetted "during and in relation to" that offense. United States v. Rodriguez-Moreno, 526 U.S. 275, 280 (1999).

The lower court's rulings collapsed two distinct offenses into one strict liability crime without any proof consistent with the above two bedrock principles of aiding an abetting law. Here, the jury returned "a general verdict," which may have rested on the "legally invalid theory" of aiding and abetting. Skilling v. United States, 130 s.Ct. 2896, 2934 (2010). Because there is concomitant evidence that Wendy Delozier injected heroine on Mr. Wilcox's arm and knew he was in need of medical attention but knowing and intentionally left him to die so she could use more heroin with Gotshaw, who never claimed the Petitioner aided and abetted them; it is clear that the Petitioner "did not encourage" Wendy or Gotshaw's acts to justify the verdict obtained on the basis of aiding and abetting.

Statutory interpretation must always "start * * * with the language of the statute," giving words their "ordinary or natural meaning," Bailey v. United States, 516 U.S. 137, 144-145 (1995), considering "the specific context in which that language is used," McNeil v. United States, 131 S.Ct. 2218, 2221 (2011) (internal quotation omitted). Because the text of MCL 750.317a is unclear as to *mens rea* or *actus reus*, the distinct and specific aiding and abetting offense was not only uncharged but the jury was illegally instructed on such theory and the verdict is invalid.

The word "aid" and "abet" are universally understood to require that a person act affirmatively to facilitate or encourage the completion of an objective. e.g., Webster's Third New International Dictionary 44 (2002) (defining "aid" as "to give help or support to: FURTHER, FACILITATE, ASSIST"); id. at 3 (defining "abet" as "to incite, encourage, instigate, or countenance" or "to assist or or support in the achievement of a purpose"); Black's Law Dictionary 81 (9th ed. 2009). Oddly enough, the Sixth Circuit Comm. on Pattern Crim. Jury Instruction, Pattern Crim. Jury Instruction § 4.01 (2013) provides

that the government must prove "that the defendant helped to commit the crime [or encouraged someone else to commit the crime]" and "intended" to do so (bracket in original).

3. The Sixth Circuit Court of Appeals' decision affirming the district court's opinion ruling that Burrage was not applicable to this case is "contrary to" and "an unreasonable application" of "clearly established Federal" law when Burrage's principles are rooted to this Court's jurisprudence interpreting the Constitution.

This Court stated long ago that "under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime for which he was not charged, proven and found guilty in accordance with due process." Parr v. United States, 363 U.S. 370, 394 (1960) (reversing a mail fraud conviction where mailing did not fall within the scope of the statute). In 2016, this Court unanimously reaffirmed this principle in a case it found "distasteful" and "tawdry;" this Court nonetheless rejected "the broader legal implications the Government's boundless interpretation of the federal bribery statute" and further rejected the government's argument that performing ordinary political favors constitutes a federal criminal offense. McDonnell v. United States, 2016 U.S. LEXIS 4062, at *51 (June 27, 2016).

This case warrant similar treatment. The government charged the Petitioner under MCL 750.317a asserting he "caused" Mr. Wilcox's death who, according to his friend Gotshaw, habitually mixed controlled substances with alcohol in spite of suffering from serious cardiovascular problems. An important fact worth noticing is that the Petitioner did not know Mr. Wilcox, nor he knew the drugs the government alleged he provided to Wendy Delozier will be provided and administered to Mr. Wilcox by Wendy Delozier. The charges and record facts in this case virtually mirrors the Burrage's record facts.

For example, Burrage was convicted in the United District Court of Iowa on charges of distribution of heroin resulting in death. 21 U.S.C. § 841(a)(1),

(b)(1)(A)-(C). In this case, the government charged the Petitioner delivered "Schedule I" controlled substance which "cause[d]" death. MCL 750.317a. The Controlled Substance Act, MCL 333.7401(2)(a) exposes a defendant to different degrees of punishment, "which are dependent on the amount of controlled substance that was delivered." id. People v. Collins, 298 Mich App 458, 463; 828 NW2d 392 (2012). Michigan conflate MCL 750.317a and MCL 333.7401(2)(a) without defining what elements constitutes the "cause" of death.

In Burrage, this Court identified § 841(b)(1)(C)'s "death results" enhancing the punishment to which "Buarrge was exposed, is an element that must be submitted to the jury" which the statute fails to define. 21 U.S.C. § 841(B)(1)(C) prescribes, in pertinent part that: ". . . if death or serious bodily injury results from the use of such substance [a defendant] shall be sentenced to a term of imprisonment of not less than twenty years or more than life . . ." id. MCL 750.317a prescribes that if the controlled substance "cause[d]" death, a defendant is exposed to a sentence of any number of years or life.

Just as the government did in Burrage, in this case the government called two experts, Dr. Gary Kunsman, a Toxicologist, and Dr. B. Pacris, the Oakland County Medical Examiner who performed the autopsy of Mr. Wilcox's body. Dr. Kunsman testified that several opiates were found in Mr. Wilcox's system prescribed for "OCD," others for depression, pain, and sleeping disorders. (PE. 9/1/11, pp. 11-12); (Vol. II., pp. 245-246). Dr. Kusnman went on to testify that it was his expert conclusion that it was "difficult to determine the level of morphine present in [Mr. Wilcox's] blood," and added: "I don't think that's all that clear." (PE. 9/1/11, p. 14). When asked by the prosecution that if "in the absenc[e] of morphine, and any other natural disease, would the remaining drugs" could have caused his death, Dr. Kunsman stated: "Yes." (PE.

9/1/11, 14).

The State's Pathology Expert, Dr. B. Pacris stated he performed the autopsy of Mr. Wilcox's body and he determined "[t]he cause of death [was] drug abuse," and explained that "all drug-related deaths are considered 'undeterminable'" as a matter of policy. (Vol. II., pp. 96, 99-100). He added that the level of morphine in Mr. Wilcox's body was not necessarily lethal; he also stated that the combination of morphine and alcohol causes depression of the nervous system. (Vol. II., pp. 102-103). Strkingly enough, in Burrage as did in this case, the expert testified that he could not said that had Mr. Wilcox not taken the heroin he would no have died.

Relying on Alleyne and precedent predating Alleyne and Burrage, this Court held that a fact that results in death exposing a defendant to an enhanced sentence "is an element that must be submitted to the jury and found beyond a reasonable doubt. Burrage v. U.S., 134 S.Ct. 881, 886-887 (2014). This Court identified the lower "court also declined to give Burrage's proposed jury instructions regarding causation [which] would have required the Government to prove that heroin use 'was the proximate cause of [Banka's] death.'" Burrage, 134 S.Ct. at 886.

This is precisely what also took place in this case. Amazingly enough, this Court identified that: "Burrage's superseding indictment has two principal elements . . . (ii) death caused by (resulting from") the use of that drug. § 841(b)(1)(C)." Burrage, 134 S.Ct. at 887. This is precisely the issue present in this case. However, the lower courts discounted all these striking similar record-facts between Burrage and the Petitioner's case, and ruled this Court's decision in Burrage was inapplicable because it entailed a federal statute.

The Petitioner submits that conclusion could not be more "unreasonable" and "contrary to" this Court's jurisprudence interpreting the constitutionality

of a statute and how it violated the Constitution. After all, this Court's jurisprudence found its genesis in the Constitution. Therefore, retroactivity can hardly be an issue. Therefore, the Petitioner submits that this Court's decision in Burrage simply clarified existing precedent holding that the Sixth Amendment requires the government must prove beyond a reasonable doubt any element affecting a sentence. This principal was crystallized by this Court In re Winship, supra, and this case should be reversed based on this Court's holding in Alleyne, Burrage, and the precedent it relied upon. For example, in Burrage this Court clarified that:

The law long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. (internal citation omitted) When a crime requires "not merely conduct but also a specified result of conduct," a defendant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result." (internal citation omitted).

(Burrage, 134 S.Ct. at 887)

This Court recognized that: "'[r]esults from' imposes, in other words, a requirement of actual casualty." id. at 887. Explaining what could have "caused" an individual's death, this Court explained:

Thus, "where A shots B, who is hit and dies, we can say that A [actually] caused B's death, since but A's conduct B would not have died." LaFave 467-468 (italics omitted). The same conclusion follows if the predicate act combines which other factors to produce the result, so long as the other factors alone would not have done so--if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part on his demise, so long as, without the incremental effect of the poison, he would have lived. (emphasis added) (internal citation omitted)

(Burrage, 134 S.Ct. at 888.

This Court went on to aptly note that "it makes little sense to say that an event result from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the vent." id. at

888. As to the "interpretation" of a criminal statute, this Court held such statute is "subject to the rule of lenity," because the Court "cannot give the text a meaning that is different from its ordinary meaning, and that disfavors the defendant." id. Burrage, 134 S.Ct. at 891. Reconsidering the experts; testimony as to what percentage could the heroin played in causing Banka's death, this Court held:

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. See United States v. L. Cohen Grocery Co., 255 U.S. 81, 89-90, 41 S.Ct. 298, 65 L.Ed. 516 (1921).

We hold that, at least where the use of the drug distributed by the defendant is not independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of [MCL 750.317a] unless such use is a but-for cause of death or injury." (emphasis added)

(Burrage, 134 S.Ct. at 892)

In this case, the government did not provide nor it submitted any evidence indicating the Petitioner was the cause-in-fact of Mr. Wilcox's death. Here, the Petitioner lacked "full knowledge of the circumstances constituting the charged offense," nor he had knowledge that Wendy Delozier who alleged she got the heroin from the Petitioner, intended the heroin to go to an intoxicated and medically frail man.

"As a matter of simply justice," its is "obvious" that the procedural safeguard the Constitution designed "to protect" the Petitioner were violated. Grossly enough, obvious is also the fact that the jury convicted the Petitioner on the basis of the uncharged offense of aiding and abetting to cure the statute's vagueness and expose him to a harsher punishment while the real perpetrators of the crime received an extremely generous three-year sentence in exchange for their testimony.

This Court's is the Petitioner's last resort to ensure his Constitutional

rights and the rights of other similarly situated will not be violated by prosecutors unauthorized methods to obtain a conviction the Sixth and Fourteenth Amendment prohibits.

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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DATED: February 23, 2018.