No. 25-5490

ORIGINAL

In The
Supreme Court of the United States

Travis Broeker,

Petitioner,

v.

United States of America,

Respondent,

Petition for Writ of Certiorari
to the Court of Appeals for the Eighth Circuit

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Questions Presented

Broeker's case set precedent in the 8th Circuit that undermines "Burrage" presuming any drug deal that precedes a death causes it and putting the burden to prove otherwise on the Defendant. In Broeker's case he was not able to meet this burden because evidence in his favor was excluded. He was denied any review of this claim and misapplication of the Certificate of Appealability process has left him with no forum for review of his claim that he was convicted in violation of the Constitution.

I. Where only a "miniscule percentage" of C.O.A. requests are granted, are the lower courts genuinely giving review, as required by 28 U.S.C. §2253? Does "Miller El v. Cockrell," 537 US 322 (2003) prohibit "pro forma" denials "as a matter of course" the way it prohibits similar grants?

II. Can a Court decline to address on §2255 an issue that was dismissed for procedural reasons, like failure to preserve, on direct appeal?

III. By creating a presumption that the last known sale of drugs caused any resulting death, no matter how much time, intervening events, or toxicology reports call this into question, has the 8th Circuit departed from this Court's holding in "Burrage v. United States," 571 US 204 (2014) and created a Circuit Split? Can this presumption be applied where the Court has excluded evidence of other sources of drugs?

IV. Does the "results in death" provision of §841 impermissibly treat as murder unforeseen, and unforeseeable, excessive use or

misuse of controlled substances beyond the Defendant's control and intent? Should this departure from traditional legal liability principles for third party "misuse of product" be reconsidered in light of "Smith & Wesson Brands v. Estados Unidos Americanos Mexicanos," No. 23-114 (2025)?

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Introduction

In 2022, the 8th Circuit denied Broeker's direct appeal, "United States v. Broeker," 27 F4th 1331 (8th Cir., 2022) creating a precedent that has come to haunt defendants charged with distribution of any controlled substance, resulting in bodily injury or death under 28 U.S.C. §841 (b)(1)(C). In the two and a half years since it has been decided, it has been used in at least 28 published opinions.

Broeker's case seriously departs from, or diminishes, the application of "Burrage v. United States," 571 US 204 (2014) that the Government must prove "but-for" causation. As applied in the 8th Circuit, if the Government can prove the defendant sold drugs to the decedant, the Government need not actually prove that it was the Defendant's drugs that killed them. It becomes the Defendant's (often insurmountable) burden to offer evidence of other sources.

While there may be cases where the presumption that a drug deal and subsequent overdose are connected, even causal, as detailed within, this case shows the flaws with a broad, sweeping rule putting the burden of disproof on a Defendant. Cases often involve intervening events or passage of time that at least provide reasonable doubt as to connection. The longer the time, or the more "breaks" involved, the less force this rule holds.

In this instant case, this rule was applied, in large part, due to errors in the trial court, excluding probative evidence. Broeker's appeal explicitly declined to review this exclusion due to procedural default of counsel. Then, Broeker was unable to utilize the §2255 process to receive the review he was denied on

on direct appeal. This is of great practical importance to him, as the removal of the victim's death would reduce his sentence by two decades. But, given the constant citation of Broeker's case, the importance of reviewing whether the initial rule was improvidently made cannot be overstated. The refusal to grant a C.O.A. raises serious questions about the fairness of post-conviction review, and the C.O.A. requirement.

Finally, with the increasing use of, essentially, murder charges to respond to overdose deaths, review of the Constitutionality of holding drug dealers responsible for the misuse of their product is sorely needed. This is especially true in light of "Smith & Wesson Brands, Inc. v. Estados Unidos Americanos Mexicanos," No 23-1142 (2025), holding that gun manufacturers cannot be held liable for criminal actions undertaken with their product. A similar rule should be applied here.

Opinions Below

The 8th Circuit's denial of a C.O.A. in case 25-1305 is unpublished. The denial of rehearing is also unpublished, and both are included at Appendix A.

The District Court's denial of the §2255 in Case No. 4:22cv457HEA is published at 2025 US Dist. LEXIS 251, and is included at Appendix B.

Jurisdiction

The Court of Appeals originally entered judgment on April 2, 2025. Broeker timely filed a petition for rehearing, which was denied on June 4, 2025.

This Court has jurisdiction under 28 U.S.C. §1254(1).

Statutory Provisions

21 U.S.C. §841(b)(1)(C) In the case of a controlled substance in schedule I or II... such person shall be sentenced to a term of imprisonment of not more than twenty 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 $1,000,000.00 if the defendant is an individual or $5,000,000.00 if the defendant is other than an individual, or both.

28 U.S.C. §2253(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the circuit in which the proceeding is held.

(c)(1) Unless a circuit justice or judge issues a Certificate of Appealability, an appeal may not be taken to the Court of Appeals from-

(B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under Paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Statement of the Case

On February 28, 2018, T.Z. sought out Defendant Travis Broeker to purchase 6 capsules containing a heroin-fentanyl mixture. Returning home, he briefly acknowledged his roommate and other individuals before going to his room. Alerted by a loud noise, T.Z.'s roommate rushed up the stairs to find him collapsed on the floor and unresponsive. He called 911 and performed CPR until paramedics arrived. With several doses of Narcan, T.Z. was able to be revived. T.Z. admitted to taking too much Gabapentin and Fentanyl while in transit to St. Anthony's Hospital. T.Z. was away from home about 4 hours; meanwhile, roommate Fedke searched T.Z.'s entire room looking for any drugs he thought to be dangerous. He confiscated the remaining 3 capsules and 5 Lorazepam pills. He also confiscated his cell phone.

The time T.Z. was discharged from the hospital is unknown, he returned home by an unidentified driver around midnight. His whereabouts during this time are also unknown. At home, T.Z. became extremely agitated upon learning that his cell phone was beyond his reach. Though roommate Fedke tried to keep an eye on T.Z., they went to bed around 2:30 am. He would find him the following morning at 6:00 am, dead of another overdose. Paramedics were unable to revive him despite their best efforts.

Detectives were called out to investigate and found several different drugs at the scene. A rubber ball had been cut open containing fentanyl residue inside, no one could identify where this came from. Forensic analysis of his phone uncovered evidence of his drug deal with Broeker. However, several other contacts were also found with names suggesting drug activity or with conversations

alluding to other transactions. Despite the obvious relevance, none of these other sources were investigated. Instead, a buy was set up with Broeker to buy more of the same capsules he sold T.Z.. This transaction was completed leading to Broeker's arrest. Upon testing, these capsules contained a heroin-fentanyl mixture. Notably, while numerous substances were found in T.Z.'s system, heroin was not one of them. Additionally, T.Z. tested positive for 6 different substances. Expert Dr. Riley stated that the Gabapentin and Lorazepam T.Z. consumed could have by itself caused his death, as one works as an accelerant to the other. Yet, Dr. Riley was not prepared to give her opinion on the cause of death despite it being an obvious coin flip.

While Broeker readily admitted he sold T.Z. drugs, he denied culpability for his death, and took the matter to trial. At several points during cross examinations counsel attempted to introduce evidence of these other sources of drugs. The government objected, and the Court sustained, denying the jury the most probative evidence. Not surprisingly, the jury found Broeker guilty. Noting the significant evidence of other sources for drugs, trial counsel requested a new trial or directed verdict, but was summarily denied.

On appeal, new counsel renewed these arguments, noting there was no evidence that the drugs Broeker sold T.Z. caused his death, and that the District Court erred in stopping counsel from introducing evidence of other drug transactions. The 8th Circuit held that the evidence Broeker sold T.Z. drugs shortly before his first overdose, and the absence of evidence of other possibilities in the record justified denying his insufficiency argument. As to the argument that the Court erred in denying the evidence which would

undermine its sufficiency argument, the 8th Circuit found it was improperly preserved, and dismissed it, without a ruling on the merits. Certiorari was not sought.

On §2255, Broeker challenged trial counsel's effectiveness in not preserving these issues for appellate review. Incredibly, the Eastern District of Missouri held that these issues had already been adjudicated on the merits, directly at odds with the 8th Circuit's ruling. This created a split within Broeker's case and raised serious res judicata and law of the case concerns. As Broeker was denied on a demonstratably incorrect procedural ground, and he is claiming evidence that he is not guilty of causing T.Z.'s death was improperly excluded, the court should have granted C.O.A. to discuss the matter further, but the 8th Circuit declined it without explanation. A re-hearing was denied 06-02-2025.

Reasons to Grant the Writ

I. The Certificate of Appealability Process, As Currently Used, Raises Due Process Concerns Due to its High Risk of Improper Denial

With the AEDPA, Congress engrafted the Certificate of Probable Cause requirement, formerly only applicable to state petitioners seeking federal review of state convictions, to federal habeas petitions under §2255 as well. Codified at 28 U.S.C. §2253, petitioners wishing to obtain further review of denial of a federal habeas petition must first seek a Certificate of Appealability, making a "substantial showing of a denial of a Constitutional right" and that "reasonable jurists" could debate the resolution of his §2255 motion.

Though the purpose of the Certificate requirement was to filter out plainly frivolous appeals, §2253 has led to wildly divergent standards and significant confusion amongst the 11 Circuits. The C.O.A. process is either being misunderstood or misused, and is leading to large numbers of inmates being denied their day in Court. Cases like this call into question whether §2253 is being used as Congress intended and cry out for this Court's discretionary review.

A. The Sheer Number of Denials is Strong Evidence that the C.O.A. is Being Improperly Applied

According to Counsel in "Kendall Streb v. United States," No. 24-939 (2025) the numbers of reported requests for C.O.A. vs. grants is telling in and of itself. Over 99% of all petitions are denied (pg. 12). While not the worst in the country, the record in the 8th Circuit (where Broeker is out of) is especially bleak. Only 109 Certificates have been granted in the ten year period between 2015 and 2025. This is a comparable numer of grants to the 4th Circuit, and, if we assume a similar number of peitions, which, there, was about 8500 (pg. 2-4), would mean a grant rate of 1.28%, which is almost impossibly low. The numbers supplied by Justice Sotomeyer in "McGee v. McFadden," 204 LEd 2d 1160, 1163 (2019) are slightly better, but not significantly so. C.O.A.s are only granted in about 8%.

Whichever of these numbers we accept, the overwhelming majority of cases are denied review altogether. As Streb argued, it is simply not plausible to suggest that not only do more than 92% of cases deserve no further review, but that not even a single issue in these cases can be debated (pg. 27). Given that C.O.A.s are rarely granted

on every issue sought, the already low number of petitions granted actually overrepresents the review given on individual issues, which even this Court has described as a "miniscule percentage," "Bannister v. Davis," 207 LEd 2d 58, 62 (2020).

This has not just diminished the number of cases getting relief, it means that fewer cases receive review today than received relief prior to the AEDPA. In the years leading up to the AEDPA, nearly 40% of capital cases, and approximately 1% of non-capital cases prevailed on appeal in a habeas case. After the AEDPA, those numbers dropped to 12% and 1 out of 264 (about 0.38%) respectively. Randy Hertz & James Liebman, Federal Habeas Corpus Practice and Procedure, 7th Ed §3.2 n38 (collecting studies). Today, even under "McFadden's" optimistic numbers, 8% of C.O.A. requests are granted, and only 6% of those granted get relief, a total incidence of success of 0.48% on all filings.

It defies common sense to insist that the quality of petitions has gone so dramatically down, even in a vacuum. That successful petitions have declined while more inmates can afford post-conviction attorneys than any time in history, rather than proceeding pro se, further undermines that idea.

Rather, as Justice Sotomeyer says, the data strongly suggests that the process has become little more than a rubber stamp of the lower court's decision, "frustrating ... not ... facilitating" the habeas process, "McFadden," at 1163-64. This Court has had to instruct the lower courts several times on not being unduly restrictive at this stage, id. Those instructors have plainly fallen on deaf ears. Much like this Court has cautioned that grants of C.O.A.'s should not be routine, "Miller-El v. Cockrell," 537 US 322, 337

(2003), neither should denials.

B. Summary Denials Prevent Meaningful Review, Frustrating Both Individual and Governmental Objectives

A denial of C.O.A. prevents a petitioner from getting appellate review of the merits of their claims, but it does more; it essentially forecloses Certiorari as a possibility for an average petitioner. Since 2016, only 6 denials of a C.O.A. have received Certiorari, "Edwards v. Vannoy," 209 LEd 2d 651 (2021); "Ayestas v. Davis, Dir, Tex. Dept. of Criminal Justice," 200 LEd 2d 376 (2018); "Thorpe v. Sellers," 199 LEd 2d 424 (2018); "Davila v. Davis," 198 LEd 2d 603 (2017); "Buck v. Davis," 197 LEd 2d 1 (2017); "Foster v. Chapman," 195 LEd 2d 1 (2016) and "Welch v. United States," 193 LEd 2d 782 (2016). Notably, not one of them involved a summary denial.

To some level, this is to be expected in a properly functioning system. If the Court of Appeals is genuinely engaging in proper review, it is determining that an appeal is frivolous; it doesn't warrant any more review. A large number of reviews would seemingly indicate the system isn't working.

However, the denial of a C.O.A. creates a barrier to review regardless of and independent of the merits of the claims made. A denial of C.O.A. is a case specific procedural flaw. WHere an individual is denied on a procedural ground they must show that both the procedural ruling is flawed and that the underlying claim is meritorious, "Slack v. McDaniel," 529 US 473, 478 (2000). At the Supreme Court level, this would mean a Certiorari worthy procedural question (and presumably a merits one, too). This will be an ex-

ceedingly rare case, even when the decision is wrong. An individual can be denied a C.O.A. on plainly incorrect basis, getting no review at all simply because their denial, no matter how egregious, affects only them.

While "Ayestas," at 385 n1, suggested that this Court might more liberally grant review of incorrect procedural denials, it required that they used flawed reasoning—which requires a written opinion. Yet the 8th Circuit, like most of its sister Circuits, issues summary one sentence denials wiht no reasoning at all. It is never clear if the 8th Circuit agrees with the lower court, or finds an independent reason for denial. In such cases, the petitioner cannot meet any burden, no matter how low it is.

Further, at least the 10th Circuit has held that a denial of C.O.A. is a categorical bar to a petition for rehearing en banc, even where it presents good reasons to overturn prior precedent that can only be done by the full court, see "United States v. Cesspooch," 790 Fed Appx 881, 883 (10th Cir., 2019).

While this Court has never forbidden summary procedures where appropriate, it has also required that there be enough in the record to show that the lower courts are fairly considering and deciding the issues, "Garrison v. Patterson," 391 US 464, 466-67 (1968) (citing "Carafas v. LaVallee," 391 US 234, 242 (1968)). On a very large scale, such procedures are now occurring as the rule, not the exception, and with no indication that any review is actually occurring.

C. The "Reasonable Jurist" Standard Has Caused Confusion Below and Led to a Circuit Split

The probability of getting a C.O.A. varies significantly by District. As noted, the 1st, 4th, and 8th Circuits grant 10 or less C.O.A.s a year on average, with the 1st Circuit granting a miserly 45 C.O.A.s over the entire 10 year period, "Streb," at 26-28. All three Circuits use the summary denial procedure just outlined. At the other end, you have the 9th Circuit, which states that the C.O.A. standard is "lenient," which is a "low threshold" meant to weed out only the plainly incorrect and obviously frivlous cases, "Hayward v. Marshall," 603 F3d 546, 553 (9th Cir., 2008).

The 9th Circuit merely glances at the "face of the complaint," to see if a plausible claim of denial of Constitutional rights is facially alleged, and grants the C.O.A. if it is, "Lopez v. Schriro," 491 F3d 1029, 1040 (9th Cir., 2007). The 5th Circuit holds that "any doubts" about the C.O.A. should be resolved in the Petitioner's favor, "Escamilla v. Stephens," 749 F3d 380, 387 (5th Cir., 2014). The 2nd Circuit merely instructs that the C.O.A. is an "exceptionally low" bar to clear, "Wright v. Po," 2021 US Dist. LEXIS 124457 at *57-58 (ED NY, 2021). And the District of Massachusetts seems alone in the 1st Circuit in agreeing with this conclusion, "Morris v. Divris," 658 FSupp 3d 1, 7 (2023).

The lower courts cannot agree on how demanding the standard is, meaning that cases are routinely being denied in some Circuits that would be granted in others. Such a Circuit split alone warrants guidance. But, more importantly, no one seems to agree on what the standard itself is, or what a "reasonable jurist" is. This Court has never truly defined the term, and the lower courts have struggled in the lack of concrete guidance to give that term substance.

In "Cesspooch," for example, the dissent asked if the reason-

able jurist test was satisfied if the applicant could point to another C.O.A. granted by that Court on a similar issue in similar circumstances. What about if other courts had granted C.O.A.s in similar cases, at 883 (collecting cases). Apparently, the answer was no, as no C.O.A. was granted.

The 8th Circuit ruled similarly in "Dansby v. Hobbs," 691 F3d 934, 937 (8th Cir., 2012), finding that "just because one or more judges may agree" with any petitioner's claim or claims "does not mean that reasonable jurists could debate the merits of the district court's ruling." The 6th Circuit went even further, finding that another judge granting a C.O.A. in that case didn't mean a reasonable jurist could agree. If already convincing a judge your case has merit does not qualify, it's hard to imagine what would. And, in "Griffin v. Secretary, Florida Dept. of Corr.," 187 F3d 1086, 1094-95 (11th Cir., 2015), that Court likewise cautioned that a C.O.A. could not be granted just because an actual judge might look at that case and come to an opposite conclusion. That would turn an "objective standard into a subjective one."

Such rulings reduce the reasonable jurist test to meaninglessness. It is impossible to square them with these precedents, and requires this Court's intervention to prevent dilution or departures from its rules.

D. Broeker's Case is an Ideal Vehicle to Examine This Rule

As examined more in Grounds II and III, Broeker's case is an ideal vehicle to address the problems in the C.O.A. process. His original case set a rule that is lowering the Government's burden of proof, in cases involving overdose deaths, and that rule runs

contrary to this Court's precedent in "Burrage v. United States," 571 US 204 (2014), requiring that the drugs a Defendant sold were the "but-for" cause of a Defendant's death. The original rule was based on upon errors committed by the District Court.

The original rule was incorrect as per the facts of this case and has caused recurring problems in the 8th Circuit (Ground III). The District Court excluded evidence calling into question Broeker's guilt, and then the 8th Circuit found that this objection had not been preserved below, so it declined to reach it. This issue is worthy of review.

Broeker was, however, denied §2255 review on this issue based on claims preclusion doctrine. The District Court held that he could not relitigate this issue after losing it on direct appeal. This decision was demonstratably erroneous, as the 8th Circuit explicitly declined to rule on these issues. Not only could reasonable jurists debate this ruling, it is objectively wrong. Moreover, this misuse of claims preclusion seems to be a genuine problem in the 8th Circuit (Ground II).

This procedural error is denying Broeker review of a ruling that took away away almost a quarter century of his life. That the 8th Circuit denied review raises serious concerns that the C.O.A. process is being abused. And this is at least the 3rd time this year such challengs have been brought to this Court.

Thomas Gordon, beloved of the founders, once put forward that "It is the the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publicly scann'd." Or, as the more modern aphorism would put it, "Sunlight

is the best detergent." The C.O.A. process shrouds denials in secrecy. It largely leaves to district judges the power to determine whether their rulings are reviewed, something long recognized as dangerous, "Jones v. Barnes," 463 US 745, 756 n1 (1983) and even recent opinions in this Court have called into question the ability of judges to impartially guage their own rulings.

The sheer numbers of denials show that the Circuits are not exercising their responsibility to review these denials. And this case is a good opportunity to provide guidance as to correct reviewing procedures as the lower court rubber stamped an obviously incorrect procedural denial.

Certiorari should issue.

II. Refusal to Address Preserved, but Unadjudicated, Claims on Habeas Flies in the Face of this Court's Precedent

There is no more familiar standard than that a motion under §2255 is no substitute for a direct appeal. Prisoners may not use §2255 to raise claims that they could have, but didn't, raise on direct appeal. Nor may they use a §2255 motion to relitigate issues decided against them on direct appeal, "Foster v. Chapman," 195 LEd 2d 1, 14 (2016). Here, Broeker has raised issues which fall into neither category - they were preserved on direct appeal, but, for procedural reasons, were not decided. Despite this, the District Court declined to reach them and the 8th Circuit denied a C.O.A. This misuses this Court's precedent.

Though Broeker, through Counsel, directly appealed several issues, including the improper exclusion of evidence that the victim in this case had other sources of drugs, which would raise

reasonable doubt as to Broeker's guilt, the 8th Circuit explicitly declined to address them. Broeker's trial lawyer had failed to adequately preserve them in the District Court, "Broeker," at *16.

As the issues were not decided on the merits, Broeker filed a §2255 motion alleging that he was denied an adjudication on this issue due to Counsel's failings. The District Court ruled that this reraising was precluded, as the 8th Circuit addressed and rejected this for reasons unrelated to Counsel's performance, 2025 US Dist. LEXIS 251 at *9 (ED MO, 2025). This ruling was not objectively wrong, it directly violated law of the case doctrine by effectively re-writing the prior appellate court decision.

It is impossible to know exactly how often this has occurred, but Broeker has found several cases where the 8th Circuit has dismissed issues on procedural grounds only to have the District Court then refuse to address them as already litigated on §2255, see "United States v. Beyers," 854 F3d 1041 (8th Cir., 2016); 4:18-cv-00061-BP (WD MO, 2019); "United States v. Eaton," 692 Fed Appx 321 (8th Cir., 2017); 3:19-cv-05064-RK (WD MO, 2020); "United States v. Simpson," 2023 US Dist. LEXIS 235851 (ED MO, 2023); 2019 US App LEXIS 27426 (8th Cir., 2019).

While habeas employs a version of claims or issue preclusion, it has never been thought to violate that version to reraise unadjudicated claims, "Magwood v. Patterson," 177 LEd 2d 592, 611 (2010). Issue preclusion in all of its forms precludes a party from relitigating issues decided adversely to them in prior proceedings, "Brownback v. King," 209 LEd 2d 33, 41 n3 (2021). See also "Bobby v. Bies," 556 US 825, 834 (2009). It can't be presumed, the issue must actually have been decided and must have been central to the

ruling, "Allen v. McCurry," 449 US 90, 94 (1980). Here that clearly was not the case; the District Court misused claims preclusion.

Important as procedural rules may be, careful application of such rules is essential. These doctrines only apply in certain circumstances and after certain requirements have been met. This preserves our "deeply rooted historical traditions that everyone should have his day in court," "Richards v. Jefferson County," 517 US 793, 798 (1996). Here, the incorrect application of those doctrines denied Broeker the one full and fair shot at habeas Congress intended, and this could mean the difference in decades of Broeker's life. He either gets sentenced as the petty drug dealer he actually is, or remains incorrectly labelled as a murderer. Correct application of procedural rules could not be more important.

Because the lower courts radically departed from this Court's precedents, Certiorari is warranted to prevent further departures. This is especially true as Broeker's case is not just a one off mistake, but seems to be a recurring problem of inadequate consideration and inattention in habeas petitions. This requires further review.

III. The Ruling in Broeker's Original Case Eases the Government's Burden of Proof in Conflict With "Burrage"

"Broeker" was wrong the day it was decided, and it has not improved with age. In Broeker's original case, the 8th Circuit weakened the "but-for" causation requirement of "Burrage v. United States," 187 LEd 2d 715 (2014), instead allowing the Government to prove certain facts: (a) that a Defendant sold drugs; (b) that the purchaser died; and (c) that there is some temporal nexus between

the two (though the nexus can be extremely loose) and allowing a presumption that those are connected. The burden of proof then shifts to the Defendant to prove another cause.

In this case, Broeker's "inability to rebut" stemmed from the erroneous exclusion of evidence in the District Court. But, even without the evidence, the decision in "Broeker" falls short of what this Court required in "Burrage," and amounts to impermissible burden shifting. Nor has the damage been limited to this case. This precedent has allowed numerous questionable convictions to stand, as described within.

A. The 8th Circuit's Holding is Objectively Wrong and in Conflict with "Burrage"

As Counsel noted in the original appeal, the tragedy of an overdose death leaves people looking for someone to blame, and Broeker happened to be very visible. No matter how much sympathy one has for T.Z.'s family, affirming Broeker's conviction required hammering a square peg into a round hole. Even under extreme deference, the 8th Circuit's opinion fails to set forward facts satisfying the "but-for causation" test of "Burrage."

The panel held that, because Broeker's sale of drugs happened 30 minutes before the first overdose, and because T.Z. had no way to obtain more drugs after he got home, there was ample evidence to convict Broeker at *11. This assumes several causal connections where none are established and ignores significant evidence that undermines this "chain." This is just "inference puled upon inference," which this Court forbids, "United States v. Lopez," 514 US 549, 567 (1995).

At best we can presume that Broeker's drug sale contributed to T.Z.'s first overdose. Yet, because T.Z. did not die, we have no testing to verify it. It may be a reasonable assumption, but it is just that, an assumption. We don't know what else, if anything, was in his system, or if he had dangerous levels of fentanyl in his system at that time. In reality we have nothing but questions.

Not only is there no reason to automatically presume Broeker is connected to the 2nd overdose, the record is replete with evidence requiring us to reject it. Even from the limited recounting above, at least two intervening events-his hospitalization and unknown escorted trip home-occurred. Moreover, T.Z.'s roommate took his drugs. The remaining pills Broeker sold T.Z. were turned over to police; we know for a fact T.Z. did not O.D. on those pills.

The pills turned over to police tested positive for heroin, but T.Z. had no heroin or derivative in his system. And the Government's witness testified that any such illicit substance would show up as metabolized in the blood or other bodily fluids, at *7. Pure fentanyl was found in T.Z.'s room and in his system, however. We know he got these drugs from somewhere else, we just don't know where. Since we had already identified Broeker, he got the blame, even if the face of sizeable evidence he didn't do it.

While the 8th Circuit cited, and purported to follow, "Burrage," the departure from it couldn't be starker. There was not only no proof that the heroin fentanyl mixture Broeker sold T.Z. was the cause (under any burden of proof) of T.Z.'s untimely death, the evidence showed it played no part at all.

While there may be cases involving a close enough temporal nexus that such a presumption is warranted, see "United States v.

Seals," 915 F3d 1203 (8th Cir., 2019) (victim died 7 minutes after drug transaction with defendant caught on camera), that window must be narrow. The longer the time between sale and overdose, and the more intervening events that occur, the harder the presumption is to justify. Not only is the rule in this case not limited, it has resulted in upholding several convictions where there are serious reasons to question the Defendant's guilt. See "United States v. Cardwell," 71 F4th 1122 (8th Cir., 2023) (text messages showed Defendant trying to purchase drugs from the victim, as he didn't have any); "United States v. Foster," 2024 US App LEXIS 14928 (8th Cir., 2024) (victim had no quinine in blood, even though Defendant's pills included quinine); "United States v. Ross," 990 F3d 636 (8th Cir., 2021) (no furanyl fentanol found in blood, even though in pills). And far from limiting the temporal nexus, it seems to be "last known dealer," "Ross" (36 hours prior); "United States v. Moore," 71 F4th 678 (8th Cir., 2023) (sometime the previous day).

The 8th Circuit has gone even further than its pre-"Burrage" precedent. At least then, it was requiring prosecutors prove the drugs at least contributed to the death. Now, it is not necessary to show even that. This is not just a radical departure from this Court's precedent, it is an unsound rule on its own merits, and should not be the basis of depriving a man of a quarter of a century of his life.

B. Broeker and Progeny Have Created a Circuit Split

In "United States v. Ewing," 749 FAppx 317 (6th Cir., 2018), in circumstances similar to this case, a conviction was overturned for selling heroin resulting in death when there was no metabolized

heroin in the deceased's system. It simply wasn't possible, that court held, that heroin killed the victim but left no trace in their system. No rational jury could find a Defendant guilty on such evidence.

The 8th Circuit has been made aware of "Ewing." In "Foster," at *13-14, it was confronted with a nearly identical claim. Recognizing that it has repeatedly affirmed such convictions (including in Broeker's case), it refused to let the fact that the drugs the Defendant sold were not in the victim's system undermine the verdict. In the absence of evidence of other dealers, it must be presumed the Defendant sold another type of drug.

Whether we view this as assuming facts not in evidence or as ignoring evidence that is in the record, contradicting the Government's theory, the 8th Circuit's approach allows for conviction on less than proof beyond a reasonable doubt. Resolving this conflict warrants Certiorari.

C. The "Lack of Evidence" in This Case Caused By Court Error

In cases like this, missing evidence is common. According to "Burrage," at 725, almost half of these cases involve multiple other drugs which investigators have no idea where they came from. Currently, the 8th Circuit is either disregarding such evidence as irrelevant, see "United States v. Morgan," 2022 US App LEXIS 33145 at 7 (8th Cir., 2022) (citing "United States v. Parker," 993 F3d 595, 606 (8th Cir., 2021)), or are presuming that the Defendant also sold the victim the unknown substances, even where there is no evidence to support such a presumption, "Foster," at *8-9.

Such a rule is hard to defend, even before one sees how it

how it works in practice. As the investigating agency, the Government is the decider of what leads, if any, get chased down. It is not merely that the Government is in a "superior position" to conduct such investigations (though it is), it is that, if the Government fails to investigate, it may be impossible for a private entity to correct an oversight of that nature later. If evidence is not preserved at the time, suspects identified, and data recovered, a Defendant may have no practical way months, or even years, later, to do so. Lack of evidence will likely never come from malice, but it is never proper to blame the Defendant when that lack occurs. It will almost always be due to forces beyond his or her control.

But, here, Broeker actually had evidence of numerous other drug contacts. At the time of the first overdose, T.Z. was actively trying to obtain drugs from other sources. Numerous other pills were found in his room after the first overdose, most of which are not linked to Broeker. Other substances were found in his system at the time of his death, some of which do not match any other pills found. Pure fentanyl residue was found in a rubber ball, which no one knows where it came from. Such other sources of drugs are of obvious relevance to Broeker's innocence or guilt. It is not "idle speculation" to note T.Z. could have gotten drugs elsewhere, when we have clear and undisputable evidence that he did.

This should have been addressed the first time Broeker raised it. Yet the injustice that he has personally suffered is being dwarfed by the problems reccuring by the perpetuation of the mistake made in his case. To perserve its precedent, sold the Circuit Split created, and prevent unsound application of the law, this Court's review is badly needed.

IV. §841's Imposition of Criminal Liability on Drug Dealers Due to Later Misuse of Their Product is Truly Unprecedented and Should Be Revisited in Light of "Smith & Wesson v. Estados Unidos Mexicanos"

As Counsel noted on direct appeal, the significant increase in overdose deaths had led to numerous laws criminalizing the preceding sales. "The growing sympathy for victims of overdose deaths corresponds with a heightened investment in finding a culprit to blame." (Appellant brief pg. 30). Even where the drugs in any given case can be matched to a victim, imposing liability for accidental later overdose is alien to our legal traditions. Giving the same criminal penalty for deliberate homicide while dispensing with such necessary prerequisites as mens rea, intent, or normal causation raises serious Constitutional questions.

It is instructive that the President has stated drug overdoses are now a bigger problem than car accidents or gun deaths, 82 Fed. Reg 50305 (Oct. 26, 2017) for we do not ever hold gun or car manufacturers responsible for the resulting deaths. Only in the context of illegal drugs do we hold sellers responsible for how their product is used afterwards, no matter how obviously unwise. While this case is extreme, it shows the infirmities of treating average drug dealers, often little more than addicts themselves, as cold blooded killers.

A. In Any Other Context, Knowing Misuse Precludes Liability

A producer or seller may not be held liable where misuse of a product is the sole cause of the injury complained of, "Hernandez v.

Pitco Frialator, Inc.," 2019 US Dist. LEXIS 187690 at *25 (WD NY, 2019), (collecting cases); "City of Stewart v. 3M Co.," 2023 US Dist. LEXIS 87988 at *14 (D SC, 2023). While people who sell products are expected to exercise some care and put some safeguards into place to try and prevent harm, they can't be held responsible for every possible use of their product "no matter how careless or even reckless," "Almonte v. Batenfield of America Inc.," 1998 US Dist. LEXIS 23284 at *16-17 (ED NY, 1998).

Tragic as every overdose is for the family of the victim, the data strongly suggests that, in almost every case, a drug overdose is due to blatantly unsafe and obviously unwise mixtures and overuse, not inherently dangerous or potent products. "Burrage" at 725 noted that 46% of all overdoses involved a combination of at least two illegal substances. Large numbers of decedents mix alcohol, "United States v. Cardwell," 71 F4th 1122 at *22 (8th Cir., 2023). And, all too often, prescription drugs are mixed in, too.

As noted earlier, T.Z.'s first overdose resulted in no testing, so we have no data on what he actually had in his system. But, it appears he took, at a minimum, three heroin-fentanyl mixture pills, which he specifically asked for, according to Government evidence, because they were stronger than normal. Tripling the dosage was inherently risky, even if he mixed it with nothing else. Then, after his overdose, after nearly dying from that dose, he took an equivalent amount again, and added lorazapam and gabapentanol as well, in an amount that could also be fatal on their own.

Perhaps T.Z. "did not dive into an empty swimming pool," but he nevertheless "Obviously misused the product beyond any degree" that anyone in Broeker's shoes would (or could) expect, "Parsons

v. Honeywell, Inc.," 929 F3d 901, 909 (2nd Cir., 1991). Even assuming Broeker could be held properly liable for the first overdose, the second was such obviously dangerous behavior on T.Z.'s part that it cannot reasonably be laid at anyone's feet but T.Z.'s own. There is no question that medical personnel in the hospital expressly warned him not to take anything else; he simply disregarded that advice. T.Z. disregarded his own safety, which sadly cost him his life.

It is always possible that people will use a product to excess whether through accident or deliberately. Any person who buys strong alcohol may consume too much and die of alcohol poisoning or even drive drunk. These are foreseeable consequences which occur far more frequently than what happened here. Anyone who purchases a gun could use it to kill themselves or others, see "In re Firearms Cases," Cal App 4th 959 (2005). Yet, we do not hold such sellers responsible. There is no strong reason to depart from the normal rule here, and, comparing it to legal drug use further showing why we should not.

B. Legal Opioids Operate Under the Opposite Presumption

Over 40% of all overdoses every year are due to prescription opioids, "McKesson Corp v. Hembree," 2018 US Dist. LEXIS 3700 at *4 (ND OK, 2018). Put another way, legal opioid prescriptions caused almost as many substance abuse deaths as all other causes combined. In these cases, however, despite the harm to the victims and the families being the same, manufacturers and suppliers are not held to be liable in such deaths absent proof of direct culpability and knowledge of individual abuse.

In "City & County of San Francisco v. Purdue Pharma, LP," 491

FSupp 3d 610, (ND Cal, 2020), a pharmaceutical company was sued for a multitude of woes California suffered due to the "epidemic" of abuse that this company supposedly caused, or at least contributed to. The judge dismissed the majority of the Government's complaints, but let ones proceed that alleged that the company directly participated in, or encouraged over-prescribing and circumventing California drug laws. The claims of other negative consequences, no matter how foreseeable-or even certain, could not be directly attributed to the company.

So, too, doctors can only be held responsible for abuses of prescription medicine that they knowingly facilitate. Lying to a doctor to get a prescription is a crime, 21 U.S.C. §843(a)(3), and abuse of a prescription can disqualify you from government benefits, 42 U.S.C. §12111(6)(A). Where an individual overdoses due to a doctor prescribing medicine in similar circumstances to here, it has to be proved the doctor was aware the recipient of the pills would abuse them or was already taking other illegal drugs, e.g. "Toguchi v. Chung," 391 F3d 1051, 1060 (9th Cir., 2004).

Likewise, with common law "dram shop" rules involving liability for harms caused by overserving alcohol to customers, the server can only be held responsible when the person served is visibly intoxicated and the server is aware (or should be aware) of this fact. See, for example, "Botkin v. Tokio Marine & Nichito Fire Ins. Co.," 956 FSupp 2d 795, 800 (ED KY, 2013); "Phoung Luc v Wyndham Mgmt Corp," 496 F3d 85, 89 (1st Cir., 2007).

Contrasting the drug sale with these comparable (if legal) products shows how foreign this rule is to our system. Given the similar, or greater, harm of prescription abuse, this disparity is hard to justify.

C. §841 Dispences with Mens Rea/Intent Requirements for Murder

Given the above, the "Burrage" Court's "but-for causation" standard requires the use of legal fictions. Much like in "Paroline v. United States," 188 LEd 2d 714, 729-30 (2014), to find any given Defendant "proximately caused" the decedent's injuries requires the use of chains of inference or highly attenuated connections. Cases routinely involve breaks in the chain of "causality," "Purdue Pharma," at 679.

§841 carries a more fundamental problem. With a 20 year minimum it imposes the same sort of penalty as, at least, 2nd degree murder (see U.S.S.G. §2A1.1, starting at a base offense of 38, for a Guideline range of 235-298 months at Category I). Yet, unlike its functional equivalent, it requires no showing of intent to cause death, nor indifference to the likelihood or possibility of such a result. In most cases, defendants could actually disprove that intent, (both because death is generally bad for business (killing one's customers tends to harm the dealer's economic interests) and as this attracts police attention.

Moreover, as the product need not be inherently unsafe, there will likely be no recklessness or negligence as a Defendant cannot know his sale will be abused. That there are more than 2 million people addicted to opioids alone, but there are only about 65,000 deaths a year from all drugs and alcohol combined. The dealer can never know his buyer is going to mix drugs, add alcohol, take in excess, or give it a second go after being revived from an OD. This behavior is rare and almost exclusively happens outside their presence.

Punishing a Defendant for murder without any of the hallmarks

or showings of murder is rightfully criticized, not just as bad policy, but as transgressing fundamental principles of fairness and law, see Drug Policy All., An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws are Counterproductive and Inhumane (2017).

D. This Court Should Apply the Holdings of "Smith & Wesson" Here

While "Smith & Wesson" involved guns being sold to cartels, the amount of deaths due to misuse of firearms every year is on par with overdoses. Manufacturers know a certain amount of people will use their products to commit crimes. This Court just held that such facts are insufficient to apply civil liability to gun manufacturers.

The same logic that "Smith & Wesson" rejected in one context is being applied in the §841 context. It is every bit as illegitimate. Yet, if the Constitution prohibits imposition of civil sanctions on this basis, it must be an invalid basis to imprison a man for decades. To maintain consistency in the law, this Court should hear this case and harmonize these two precedents.

Consclusion

For the reasons contained within, Writ of Certiorari should be granted.

Respectfully submitted this 1st day of Aug, 2025,

Travis Broeker

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