NO. 12-7517

IN THE SUPREME COURT OF THE UNITED STATES

Marcus Andrew Burrage,

Petitioner,

-vs.-

United States of America,

Respondent.

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

Reply Brief for the Petitioner

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ARGUMENT

I. PETITIONER APPROPRIATELY PRESERVED ERROR ON THE ISSUE OF WHETHER DISTRIBUTION OF DRUGS CAUSING DEATH IS A STRICT LIABILITY CRIME WITHOUT A MENS REA, FORESEEABILITY, OR PROXIMATE CAUSE REQUIREMENT.

The Respondent asserts that Petitioner "never argued in either the district court or the court of appeals that Section 841(b)(1)(C)'s 'death results' provision requires proof of mens rea." Res. 9. Later, somewhat inconsistently, Respondent acknowledges that "foreseeability is widely defined as an element of proximate cause." Res. 9, fn. This misstates the record and mischaracterizes Petitioner's argument.

Petitioner requested three instructions on point at the trial level, which were quoted in the Court of Appeals decision. Pet. App. 25-27. Petitioner requested the marshaling instruction for Count Two, Proposed Instruction 13, to include the third element, "the use of the heroin was the proximate cause of a death." Pet. App. 26-27. Proposed Instruction 14 read, "The element 'resulting in death'… requires… that the distribution of the heroin was the proximate cause of death." Pet. App. 27. Proposed Instruction 15 defined proximate cause as, "a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a ***reasonably probable consequence of the cause of death…***" Pet. App.27 (emphasis added).

Foreseeability is generally defined as "whether any ordinarily prudent man would have foreseen that damage would probably result from his act." *Consolidated Aluminum Corp. v. C.F. Bean Corp*, 833 F.2d 65, 67 (5th Cir. 1987) (internal

quotations omitted) (detailing definitions of foreseeability and their geneses.) As noted in Respondent's footnote, foreseeability is a common element of proximate cause. Res. 11. As not noted anywhere in the government's brief, foreseeability was actually an element of the proximate cause element proposed by the Petitioner at the trial level, and rejected by the Eighth Circuit in its opinion, because Petitioner requested the language, "reasonably probable consequence of the cause of death." Pet. App. 27. Also as not noted anywhere in the government's brief, foreseeability is well known as a type of *mens rea*. *See* W.La Fave & A. Scott, CRIMINAL LAW 212-15 (2d ed. 1986) (four general types of *mens rea* are purpose, knowledge, recklessness, and negligence); *see also United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985) (reasonably foreseeability is a type of *mens rea*); Matheson, Andrew, *A Critique of United States v. Rybicki: Why Foreseeable Harm Should Be an Aspect of the Mens Rea of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 366 (2004) (noting that circuits characterize the limiting principle of foreseeability of harm in the same way, some explicitly call it *mens rea*, others call it a "reasonableness standard").

As such, the Respondent's position that the Court should decline to hear this case because Petitioner did not raise this issue to the lower courts should be disregarded as an intellectually dishonest approach to the facts and law of this case. Burrage was convicted of a strict liability homicide count without a proximate cause, foreseeability, or *mens rea* requirement. He objected to this exclusion, provided language for jury instructions to the contrary, and raised the issue to the

Eighth Circuit Court of Appeals. His conviction should not stand and the Supreme Court should intervene.

II. DESPITE RESPONDENT'S CONTENTION TO THE CONTRARY, THERE IS CIRCUIT DISAGREEMENT ON THE ISSUE OF THE CORRECT STANDARD OF CAUSATION FOR DISTRIBUTION OF HEROIN CAUSING DEATH.

The Respondent acknowledges that there is a "disagreement" between the Seventh and Eighth Circuits regarding whether it is appropriate for district courts to superimpose a "contributing cause" standard into 21 U.S.C. § 841. Res. 17. However, the Respondent asks this Court to disregard the "disagreement" because it is "only" between the two Circuits, it is "very recent," it has only been "discussed in substance" by "one other federal criminal appellate decision outside the Seventh Circuit," it is "not clear that the circuits disagree about the underlying legal standard," and it is "insufficiently developed to warrant this Court's review at this time." Res. 17. The Petitioner respectfully disagrees with these characterizations of the Circuit split.

The First Circuit in *In Re Goguen* cites the Seventh Circuit's decision on this topic, *United States v. Hatfield*, 591 F.3d 945 (7th 2010) for the admission that causation is "an admittedly confusing concept" to the circuits. *In Re Goguen*, 691 F.3d 62, 68 (1st Cir. 2012). Petitioner submits that the circuits are confused, the issues presented in this case are fully developed, and it is time for the Supreme

Court to step in. The instant dispute regarding causation under 21 §841(b)(1) is Goldilocks-esque.[1]

(1) The first bear, representing our argument in section I, argues that an instruction is required to define "results from" as a form of proximate cause with a foreseeability element. This argument is the most defendant-friendly, as it requires the greatest amount of proof, and *mens rea*, before someone is subjected to a twenty-year deprivation of liberty.

(2) On the opposite end of the spectrum, the second bear, can be located within the instructions given in this case, arguing that it should be much easier for the government to convict a defendant by lowering the causation standard to mere "contributory cause." This argument is the one rejected by *Hatfield,* and embodies the Petitioner's objection to the instructions given in the instant case.

(3) Right down the middle, the third bear, argues that "results from" is "just right" as it is. This is because the statutory phrase is sufficiently clear, proximate cause/foreseeability instructions are too lenient and

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1 "Goldilocks" and "The Three Bears" references a fairy tale which was first published by British author and poet Robert Southey in 1837. The story has a young girl trying out sets of three different items of the bears - three bowls of porridge, three chairs, and three beds - each successively, only to discover the first two of each item to be wrong, and the third to be "just right." This is characterized as the "dialectrical three" where the first item is wrong in one way, the second wrong in the opposite way, and the third, in the middle, is "just right." *See* *http://en.wikipedia.org/wiki/Goldilocks*, last accessed April 1, 2013.

"contributory cause" instructions are too harsh, therefore both should be rejected.

We can see the struggle among these differing theories of causation throughout nearly all of the Circuits, to differing results, for nineteen years. *See United States v. De La Cruz*, 514 F.3d 121, 138 (1st Cir. 2008)(foreseeability not required, but affirming a "but-for" instruction on causation); *United States v. Wall*, 349 F.3d 18, 24-25 (1st Cir. 2003) (accepting the trial court's instruction requiring the cocaine to have "played a significant causal role in bringing about the death…" as possibly being a higher standard of causation than necessary under the statute); *United States v. Soler*, 275 F.3d 146, 152-53 (1st Cir. 2002) (rejecting idea that there is a foreseeability requirement of "death results" but not being asked to address whether it is instead a "contributory cause" standard); *United States v. Robinson*, 167 F.3d 824, 831 (3rd Cir. 1999) (rejecting proximate cause and holding that the statute's language is just right as written, and stating to "simply apply the language of the statute as written"); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994) (rejecting foreseeability requirement, but not addressing contributory cause as an option); *United States v. Santillana*, 604 F.3d 192, 196 (5th Cir. 2010)(refusing to address whether contributing cause, exclusive cause, or proximate cause is the correct standard because the defendant did not raise the argument correctly and there was sufficient evidence under the heightened standard of causation); *Hatfield*, 591 F.3d at 948 (7th Cir. 2010)(rejecting foreseeability, requiring "but for" causation, and reversing as error the inclusion of

"contributory cause" instead); *United States v. McIntosh*, 236 F.3d 968, 973 (8th Cir. 2001) (rejecting both foreseeability and proximate cause, not addressing contributory cause as an embellishment, and stating that the "language is unambiguous" therefore no other requirements should be superimposed); *United States v. Faulkner*, 636 F.3d 1009, 1022 (8th Cir. 2011) (affirming a conviction where the district court utilized foreseeability as the standard for the causation of death); *United States v. Houston*, 406 F.3d 1121, 1124-25 (9th Cir. 2005)(holding trial court's instruction requiring proximate cause and foreseeability to be erroneous); *United States v. Webb*, 655 F.3d 1238, 1255 (11th Cir. 2011) (upholding a "but for" standard of causation, but rejecting a proximate and foreseeability requirement).

This Court could predict how the Sixth Circuit would come down on the issue because of its ruling in *United States v. Martinez*, 588 F.3d 301, 317 (6th Cir. 2009). *Martinez* was the first circuit opinion to address similar language in 18 USC § 1247(2), which contains enhanced penalties for a health care fraud violation where illegal distribution of prescription medications "results in death." *Id.* The *Martinez* court ruled that proximate cause was required under the statute. *Id.* at 318.

Some circuits, like the Ninth, have refused proximate cause and foreseeability instructions under 21 U.S.C. §841, but yet have required such instructions for convictions under other statutes which contain identical "resulting in death" language. *See, e.g., United States v. Pineda-Doval*, 614 F.3d 1019, 1028 (9th Cir. 2010)(government must prove proximate cause for "transportation of

illegal aliens resulting in death" provision of 8 U.S.C. § 1324(a)(1)(A)(ii) & (B)(iv)); *United States v. Spinney*, 795 F.2d 1410,1415 (9th Cir. 1986)(proximate cause and foreseeability required for conviction of committing a misdemeanor resulting in death under 18 U.S.C. § 3623(a)(4)).

In those remaining circuits who have not yet contributed significantly to the causation debate (including the Second, Tenth, Federal and DC Circuits), we still see a history of confusion among their district courts. For example, in a pre-*Apprendi* case,[2] *United States v. Cevalier*, a Vermont district court ruled that the "resulting in death" provision of 21 U.S.C. §841 was a sentencing enhancement provision only, rather than an element of the offense, and only had to be determined at sentencing by a preponderance of the evidence. *United States v. Cevalier*, 776 F.Supp. 853, 860 (D. Vermont 1991).

Even state courts have started commenting about the *Hatfield* line of cases as being improvidently decided. *See State v. Christman*, 249 P.3d 680, 751-52 (Wash. Ct. App. 2011) (Refusing to follow *Hatfield, Houston,* or *Soler* because a defendant's conduct generally must be the proximate cause of the death before criminal liability is applied.)

The confusion, therefore, is manifest, prevalent, and needs Supreme Court intervention. Even though Petitioner suggests to this court that proximate cause and foreseeability are the best choice among the options for causation, Petitioner

2 *Apprendi v. New Jersey*, 530 U.S. 466 (2000), negates this holding, requiring all of these "sentencing enhancements" that can be used to increase a mandatory minimum sentence to be tried to a jury beyond a reasonable doubt.

should still prevail utilizing the "just right" standard. The "just right" standard, without the "contributing cause" language has been, in some form, supported by a majority of the circuits, but rejected solely by the Eighth Circuit in the instant case. The district court embellished the statutory language to dilute what was required to be proven by allowing "contributing cause" to replace the statutory language to the detriment of the defendant.

Without the "contributing cause" embellishment to the jury instructions, there was insufficient evidence to convict Burrage. Under a traditional causation analysis, leaving the statute "as it reads," the death did not, beyond a reasonable doubt, "result from" the use of heroin. The government's experts both testified that they could not say that the user would not have died if he had not used heroin. (TT 280, 293, 316). The government did not establish "but for" causation because their experts could not say "but for ingesting the heroin, the user would not have died." By definition, this must mean that, under the law, his death did not "result" from the use of the heroin beyond a reasonable doubt. Because there is insufficient evidence to justify a conviction when taking the "contributing cause" embellishment out of the jury instruction, the "just right" jury instruction would have yielded a different conclusion in favor of Burrage. The Supreme Court should grant certiorari to remedy this injustice and clarify causation for the confused circuits going forward.

CONCLUSION

For the foregoing reasons, and the reasons stated in his initial application, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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