No. 18-____

IN THE

Supreme Court of the United States

RICHARD ASHBAUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2006, Petitioner Richard Ashbaugh pleaded guilty to distributing heroin, which, because of the "resulting-in-death" sentence enhancement contained in 21 U.S.C. § 841(b)(1)(C), carried a mandatory minimum sentence of twenty years. Petitioner was sentenced to this mandatory minimum, even though the evidence showed only that the drugs he provided, in combination with a cocktail of several other drugs, caused the victim's death.

Eight years later, in *Burrage v. United States*, 571 U.S. 204 (2014), this Court held that Section 841(b)(1)(C)'s sentence enhancement could be imposed only if the drugs provided were the "but-for" cause of death. Since this Court decided *Burrage*, Mr. Ashbaugh has sought habeas review, given that he is actually innocent of the "resulting-in-death" sentence enhancement. The courts below denied him relief, reasoning that *Burrage* does not apply retroactively on collateral review. These rulings join a deep and intractable circuit split: Four federal courts of appeal, the Fifth, Sixth, Seventh, and Eighth Circuits, hold that *Burrage* does indeed apply retroactively on collateral review, while two federal courts of appeal, the Third and Fourth Circuits, as reasoned below, hold that *Burrage* does not.

The question presented is: Whether the courts below erred by failing to hold that this Court's decision in *Burrage*, announced a substantive rule that courts must apply retroactively to cases on collateral review.

PARTIES TO THE PROCEEDING

All parties appear on the caption to the case found on the cover page. Richard Ashbaugh was the Defendant - Appellant below in the United States Court of Appeals for the Fourth Circuit. The United States was the Plaintiff - Appellee below.

No corporations are involved in this proceeding.

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The decision of the United States Court of Appeals for the Fourth Circuit is not reported but is reproduced in the appendix. Pet.App.1a–3a. The decision of the United States District Court for the Northern District of West Virginia is not reported, but is reproduced in the appendix. Pet.App.4a–6a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its decision on September 7, 2018, and denied rehearing on November 14, 2018. On February 1, 2019, the Chief Justice extended the time to file a petition for a writ of certiorari to April 12, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutory provisions is set forth in the appendix. Pet.App.26a–33a.

INTRODUCTION

This case squarely presents an important and recurring question that has divided the federal courts of appeals: whether this Court's interpretation of the "results from" clause of 21 U.S.C. § 841(b)(1)(C) in *Burrage v. United States*, 571 U.S. 204 (2014), announced a new substantive rule retroactively applicable to cases on collateral review.

The Fifth, Sixth, Seventh, and Eighth Circuits have held that it did. The Third and Fourth Circuits have concluded that it did not, meaning that individuals—like Mr. Ashbaugh—who were convicted for conduct that this Court has now held is not criminalized by § 841(b)(1)(C), but who began serving their sentences

before this Court narrowed the range of prohibited conduct may now be unable to challenge their illegal sentences.

The minority rule applied by the courts below is impossible to square with this Court's precedents. Given that this critical issue is implicated in hundreds of habeas proceedings throughout the nation, the Court's intervention is urgently needed to ensure fair and uniform treatment of prisoners across the country.

STATEMENT OF THE CASE

1. On March 20, 2006, Petitioner Richard Ashbaugh was sentenced to serve the then-mandatory minimum sentence in prison for Aiding and Abetting the Distribution of Heroin Resulting in Death, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(C) because his conduct contributed to another's death. Pet.App.45a–46a. This Court subsequently considered "whether the mandatory-minimum provision applies when use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim's death or injury." *Burrage*, 571 U.S. at 206. There, the decedent had died from "'mixed drug intoxication' with heroin, oxycodone, alprazolam, and clonazepam all playing a 'contributing' role." *Id.* at 207. This Court held that the sentence enhancement under § 841(b)(1)(C) could not be applied to defendants unless their conduct was the "but-for" cause of death. *See id.* at 211. The Court reasoned that the statute's "results from" language "imposes . . . a requirement of actual causality." *Id.* In particular, it held that the phrase "requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Id.* (in-

ternal quotation marks and citation omitted). Accordingly, because the drug distributed by Burrage was not the "but-for" cause of death, Burrage's conviction under § 841(b)(1)(C) was reversed. *See id.* at 218-19.

2. On September 1, 2005, a couple, Joann Christian and her boyfriend, Jonathan Parks, invited Mr. Ashbaugh and his girlfriend, Claire Dunleavy, to their motel in Charles Town, West Virginia. JA90, JA188[1]. Christian and Parks asked Mr. Ashbaugh to buy the four of them heroin and gave him sixty dollars to do so. JA188. Mr. Ashbaugh and Dunleavy agreed, drove to Baltimore, Maryland, to buy the heroin, and returned to the motel, where the four of them then split the heroin into equal shares.[2] JA188. Mr. Ashbaugh and Dunleavy injected themselves with the heroin, and Parks requested to be injected as well. JA188. After taking the heroin, Mr. Ashbaugh and Dunleavy left the motel while Christian left the bedroom to take a shower and Parks remained—now alone—in the bedroom. JA188. When Christian came back, she found Parks unresponsive. JA188. She called for help, but he could not be revived. JA188.

When Mr. Ashbaugh learned that the police were looking for him in connection with Parks' death, he voluntarily turned himself in. JA188. He cooperated with authorities. JA188. Indeed, during the investi-

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[1] Citations to the "JA" refer to Volume I of the Joint Appendix from the Fourth Circuit docket (No. 18-6105), filed on April 27, 2018.

[2] Although Christian was not present when the heroin was divided, another woman (Stephanie Spencer) was in the room, and she used a share of it. JA188.

gation, he was "forthright and truthful with the authorities . . . promptly express[ing] his remorse, accept[ing] responsibility for this offense [and] d[oing] so in a timely fashion." JA188.

3. Parks' autopsy and toxicology report showed that he died "as a result of *combined* cocaine, heroin, phencyclidine, alprazolam and diazepam intoxication." JA208 (emphasis added). The heroin in his system was not the "but-for" cause of his death, and there was no evidence proving otherwise. In fact, the three people with whom Parks shared and ingested the heroin—Mr. Ashbaugh, Dunleavy, and Spencer—experienced no adverse effects from the heroin. JA189, n.3.

4. Nonetheless, Mr. Ashbaugh pleaded guilty to Aiding and Abetting the Distribution of Heroin Resulting in Death, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1). *See* 21 U.S.C. § 841(b)(1)(C). Because of his plea agreement, the district court sentenced Mr. Ashbaugh to 240 months, the mandatory minimum pursuant to the Sentencing Guidelines, based on a total offense level of 35[3] and a criminal history category of VI. Pet.App.8a, 13a–14a; JA209.

5. On September 29, 2006, Mr. Ashbaugh filed his first, timely § 2255 petition, arguing that the evidence against him, including the autopsy results, time of death, and the presence of other individuals in the room after the victim's death, was inconclusive and in-

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[3] The Guidelines impose an offense level of 38 if "death or serious bodily injury resulted from the use of the substance." U.S.S.G. § 2D1.1(a)(2). Mr. Ashbaugh then received a three-point reduction for acceptance of responsibility.

sufficient to support his conviction and that his counsel was ineffective. Pet.App.46a. On October 25, 2007, without adjudicating his claims on the merits, the district court dismissed his petition because it found that, pursuant to his plea agreement, Mr. Ashbaugh had "knowingly, intelligently, and voluntarily waived the right to collaterally attack the conviction."[4] JA131.

6. On March 12, 2014, Mr. Ashbaugh filed a *pro se* motion to vacate, set aside, or correct a sentence pursuant to 21 U.S.C. § 2255, this time arguing that, pursuant to *Burrage*, the sentence enhancement provision of Section 841(b)(1)(C) could not validly be applied to his conduct because the drug he provided was only a contributing cause to the death, not the but-for cause. Pet.App.47a. On April 10, 2014, the Government filed a motion to dismiss, claiming that Mr. Ashbaugh's motion should be classified as a second or successive petition and that, in any event, *Burrage* was not retroactively applicable to cases on collateral review. Pet.App.45a. Again, without adjudicating his claims on the merits, the district court dismissed Mr. Ashbaugh's § 2255 petition because it found that "if granted the requested relief to file a second or successive § 2255 petition, the petitioner must do so in a new action." Pet.App.9a.

On September 22, 2014, Mr. Ashbaugh filed a Motion for Relief under Federal Rules of Civil Procedure

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[4] Although the district court held that Mr. Ashbaugh had waived his right to challenge his *conviction*, his plea agreement waives only the right to collaterally attack his *sentence*, as the magistrate judge properly held. *See* JA134. Later in the same opinion, the district court correctly noted that Mr. Ashbaugh had "waived his right to appeal and to collaterally attack his sentence." *See* JA134.

60(b)(6), again relying on *Burrage*, and explaining that he was "factually and actually innocent of the sentence enhancement he received for Distribution Resulting in Death" because his conduct was not the but-for cause of the victim's death. JA163–64. The district court denied this motion on September 29, 2014, reasoning that Mr. Ashbaugh did not "argue that he [was] imprisoned for an offense which is no longer a crime" but instead "argue[d] that he was not assessed the penalty enhancement based upon a jury verdict." Pet.App.20a. In addition, the district court held that *Burrage* was not retroactively applicable to cases on collateral review. Pet.App.14a. The court also held that Mr. Ashbaugh was ineligible for relief pursuant to 28 U.S.C. § 2241 because the "actual innocence" savings clause involved "actual innocence of the underlying, substantive offense, not innocence of a sentencing factor." Pet.App.23a. In conclusion, the court held that, "[b]ecause Ashbaugh has not satisfied the requirements of § 2255's savings clause, he cannot 'open the portal' to argue the merits of his claim." Pet.App.23a–24a.

Mr. Ashbaugh then filed a second Rule 60(b) motion on May 22, 2015, again arguing that he was "factually and actually innocent of the sentence enhancement he received" and was being "held liable for a crime he did not commit" based on *Burrage* but with the additional support of *Ragland v. United States*, 784 F.3d 1213 (8th Cir. 2015) (per curiam), in which the Government had conceded that *Burrage* applied retroactively on collateral review. Pet.App.41a–42a. On June 23, 2015, the district court dismissed this second Rule 60(b) motion, finding it instead to be a second or suc-

cessive petition that had been denied pre-filing authorization, notwithstanding that Mr. Ashbaugh's first habeas petition had not been decided on the merits. Pet.App.13a–16a.

7. On March 20, 2017, Mr. Ashbaugh, by counsel, filed an Unopposed Motion for an Amended Sentence, arguing that the heroin was not the but-for cause of Parks' death and that his 2006 petition should be reopened so that he could pursue relief under the rule announced in *Burrage*. JA187–98. In particular, Mr. Ashbaugh explained that, once his 2006 petition was reopened, "[t]he government, acting through the United States Attorney's Office for the Northern District of West Virginia, would respond to the habeas action by agreeing to strike the 'resulting in death' portion of the count of conviction." JA196. He further explained that the parties would then "jointly ask the court to resentence Ashbaugh to a term that would produce a projected release date approximately 12 months into the future." JA196. On April 18, 2017, the district court denied the Motion, reasoning that it lacked authority to reopen the petition or could find no authority that would allow the Government to strike the sentence enhancement count of conviction. Pet.App.7a.

On July 20, 2017, Mr. Ashbaugh filed a Motion for Reconsideration, again pointing out that the United States Attorney's Office for the Northern District of West Virginia had "no objection to Mr. Ashbaugh's filings regarding a reduction of his sentence, given the unique circumstances of his case," and later filed supplemental pleadings in support of this motion on January 12, 2018. JA205. On January 23, 2018, the dis-

trict court denied his motion, although it "was admittedly tempted at times to entertain the thought of crafting some form of relief for this defendant." Pet.App.5a. On January 31, 2018, Mr. Ashbaugh appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.

8. On appeal, the Government argued that, notwithstanding *Burrage*, Mr. Ashbaugh had knowingly and voluntarily entered a plea agreement that "contained all factual and legal admissions necessary to support the criminal charge that Ashbaugh aided and abetted the distribution of heroin that resulted in a death." Appellee's Brief at 7, *United States v. Ashbaugh*, No. 18-6105 (4th Cir. May 16, 2018). On that basis, the Government argued that Mr. Ashbaugh had waived the right to attack his conviction in a collateral proceeding. Pet.App.35a. Addressing Mr. Ashbaugh's separate path to relief, the Government argued that "*Burrage* did not narrow the scope of any criminal statute" and did "not alter the range of conduct that the law punishes." Pet.App.37a. As such, the Government reasoned, "*Burrage* is not retroactive." Pet.App.39a. It attempted to distinguish cases concluding otherwise because, in those cases, unlike this one, the Government had conceded *Burrage*'s retroactivity. Pet.App.38a. On September 7, 2018, in an unpublished opinion, the Fourth Circuit vacated the district court's order and remanded with instructions to dismiss Mr. Ashbaugh's motion for lack of jurisdiction, holding Mr. Ashbaugh's motion was a second or successive petition and denying authorization to file a second or successive Section 2255 petition. Pet.App.1a–3a.

On September 21, 2018, Mr. Ashbaugh filed a Petition for Rehearing *En Banc*, reasserting his argument that *Burrage* should apply retroactively and that his Rule 60(b) motion to reconsider was not a second or successive habeas petition because his prior filings were never adjudicated on the merits. On November 14, 2018, the Fourth Circuit denied his Petition for Rehearing *En Banc*. Pet.App.25a.

REASONS FOR GRANTING THE PETITION

The Court should grant Mr. Ashbaugh's petition for a writ of certiorari.

First, there is a deep and intractable circuit split on the question presented, with two circuits adhering to the rule applied by the Fourth Circuit in this case, and four circuits applying a directly conflicting rule. On the one hand, the Third and Fourth Circuits hold that *Burrage* is not retroactive to cases on collateral review. On the other hand, the Fifth, Sixth, Seventh, and Eighth Circuits have reached the opposite conclusion, reasoning that *Burrage* announced a new substantive rule that is retroactive to cases on collateral review.

Second, the question presented is a legal issue of critical importance. Whether *Burrage* announced a new substantive rule applicable to cases on collateral review affects countless individuals who—like Mr. Ashbaugh—pleaded guilty to or were convicted of an offense based on conduct this Court later clarified was not criminalized by the statute. Indeed, whether *Burrage* applies retroactively to cases on collateral review has already been examined by courts in dozens of cases. The square conflict among the federal appellate courts means that a petitioner's ability to have his

unlawful sentence vacated pursuant to 28 U.S.C. § 2255 can and will turn entirely on the location of the proceedings.

Third, the Fourth Circuit's decision is manifestly incorrect and in substantial tension with this Court's precedents. Under this Court's precedents such as *Schriro v. Summerlin*, 542 U.S. 348 (2004), and *Teague v. Lane*, 489 U.S. 288 (1989), a substantive rule (*i.e.*, one that alters the range of prohibited conduct or narrows the scope of a criminal statute by interpreting its terms) must be applied by courts retroactively to cases on collateral review.

And, *fourth*, this case is an excellent vehicle for resolving this question because it was fully developed below and is dispositive of Mr. Ashbaugh's petition to vacate his sentence. Indeed, the Government extensively briefed the issue of whether *Burrage* was retroactive, effectively conceding that, if it were, Mr. Ashbaugh would be entitled to relief.

I. The Circuit Courts Are Deeply and Intractably Split Regarding Whether *Burrage* Announced a Substantive Rule that Courts Must Apply Retroactively to Cases on Collateral Review.

1. Five years ago in *Burrage*, this Court held that the resulting-in-death penalty enhancement of 21 U.S.C. § 841(b)(l)(C) applies only when use of the drug distributed by a defendant is the but-for cause of death, rather than merely a contributing cause. 571 U.S. 204. There, an individual had died from "'mixed drug intoxication' with heroin, oxycodone, alprazolam, and clonazepam, all playing a 'contributing' role." *Id.* at 207. The defendant had provided the heroin in the

decedent's system. *See id.* As an initial matter, this Court held that, because Section 841(b)(1)(C)'s sentence "enhancement increase[s] the minimum and maximum sentences to which [defendants are] exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 210. With respect to the statute's requirement of but-for causation, this Court explained that the term "results from" "imposes . . . a requirement of actual causality." *Id.* at 211. In general, then, the phrase "requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Id.* (internal quotation marks and citation omitted). The Court further explained that "it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter," while it "makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event." *Id.* at 212. In short, the Court reasoned that its holding that the phrase "results from" "imposes a requirement of but-for causation" was simply "one of the traditional background principles against which Congress legislates." *Id.* at 214 (internal quotation marks and citation omitted). For these reasons, this Court reversed the defendant's conviction under Section 841(b)(1)(C) because "[t]he language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." *Id.* at 216. The Court specifically noted that Congress could have enacted different language with different consequences—including "a modified

causation test tailored to cases involving concurrent causes"—but "[i]t chose instead to use language that imports but-for causality." *Id.*

The question now is whether *Burrage* announced a substantive rule that courts must apply retroactively when collaterally reviewing a conviction or sentence.

2. The Courts of Appeals are currently split on this question.

a. The Courts of Appeals for the Fifth, Sixth, Seventh, and Eighth Circuits—three of which analyzed *Burrage*'s retroactivity pursuant to this Court's decisions in *Schriro*, 542 U.S. 348, or *Teague*, 489 U.S. 288, and one of which, the Eighth Circuit, accepted the Government's concession of the issue—have held that the rule is retroactive. *See Harrington v. Ormond,* 900 F.3d 246, 249 (6th Cir. 2018) ("It is also clear that *Burrage* is retroactive, as the Government commendably concedes. Substantive decisions that 'narrow the scope of a criminal statute by interpreting its terms' apply retroactively to cases on collateral review." (citations omitted)); *Santillana v. Upton,* 846 F.3d 779, 784 (5th Cir. 2017) ("In sum, as a substantive decision narrowing the scope [of] a federal criminal statute, *Burrage* applies retroactively to cases on collateral review."); *Gaylord v. United States*, 829 F.3d 500, 505 (7th Cir. 2016) (holding that *Burrage* narrowed "the 'death results' enhancement of § 841(b)(1)(C) and thus applies retroactively"); *Krieger v. United States,* 842 F.3d 490, 497-500 (7th Cir. 2016) (collecting cases in which the Government conceded that *Burrage* announces a substantive rule that must be applied retroactively on collateral review and holding that, even without the concession, the court would reach the same conclusion); *Ragland,* 784 F.3d

at 1214 (accepting a similar concession by the Government).

In *Harrington*, the petitioner "was sentenced to life in prison for his role in a drug-distribution conspiracy that resulted in the death of another and thus implicated the 'death results' penalty enhancement of 21 U.S.C. § 841(b)(1)." 900 F.3d at 248. In light of *Burrage*'s requirement of but-for causation, the Sixth Circuit held that the petitioner's Section 2241 claim "is properly construed as one of actual innocence" because § 841(b)(1)(C)'s sentence enhancement is "a substantive, statutory element of a crime." *Id.* at 249. Although the Government "commendably concede[d]" that *Burrage* was retroactive, the Sixth Circuit nonetheless held independently that it was "clear that *Burrage* is retroactive" because it "narrow[ed] the scope of a criminal statute by interpreting its terms." *Id.* (quoting *Schriro*, 542 U.S. at 351).

In *Santillana*, the district court held that the petitioner, who had been convicted under § 841(b)(1)(C)'s sentence enhancement, could not satisfy § 2255(e)'s savings clause because *Burrage* was not retroactively applicable on collateral review. 846 F.3d at 781. The Fifth Circuit disagreed, reasoning that its case law established that Supreme Court "decisions interpreting federal statutes that substantively define criminal offenses automatically apply retroactively." *Id.* at 782 (quoting *Garland v. Roy*, 615 F.3d 391, 396 (5th Cir. 2010)). Moreover, the court explained that, "[o]n its face, *Burrage* is a substantive decision that interprets the scope of a federal criminal statute." *Id.* at 783. It explained that *Burrage* "narrows the scope of a criminal statute, because but-for causation is a stricter requirement

than are some alternative interpretations of 'results.'" *Id.* (internal quotation marks and citation omitted). Finally, the Fifth Circuit explained that the courts that had concluded that *Burrage* is not retroactively applicable to cases on collateral review are "simply incorrect" because its "holding is not about who decides a given question (judge or jury) or what the burden of proof is (preponderance versus proof beyond a reasonable doubt) . . . but is rather about what must be proved." *Id.* at 783-84 (emphasis, internal quotation marks, and citations omitted).

In *Gaylord*, the petitioner was sentenced to the mandatory minimum under § 841(b)(1)(C) and subsequently challenged his conviction and sentence under Section 2255 based on *Burrage*. 829 F.3d at 505. In that case, the Government "acknowledge[d] that *Burrage* narrowed the scope of the 'death results' enhancement of § 841(b)(1)(C) and thus applies retroactively." *Id. See also Ragland,* 784 F.3d 1213 at 1214 (relying on a similar concession by the Government). To support its conclusion, the Seventh Circuit quoted *Schriro*, 542 U.S. at 351, for the proposition that "[n]ew substantive rules generally apply retroactively" and "[t]his includes decisions that narrow the scope of a criminal statute by interpreting its terms." *See id.* (emphasis omitted). The Seventh Circuit later recounted various instances in which the Government had conceded this point. *See Krieger*, 842 at 498–99. But the court explained that it was "not bound to accept the government's concession when the point at issue is a question of law." *Id.* at 499. Nevertheless, the court accepted the concession because it "seem[ed] apt" and because courts that had refused to hold that *Burrage* was retroactive had

focused on the irrelevant fact that the Supreme Court had not itself held that it was retroactive or "were simply incorrect" in the belief that *Burrage* was an extension of procedural rules previously announced by this Court. *Id.* The court concluded that "the rule announced in *Burrage* altered the range of conduct that the law punishes" and "narrowed the scope of the behavior subject to punishment for 'death resulting' by requiring that the drug at issue was the but-for cause of the victim's death rather than merely a contributing cause of death." *Id.* at 500.

b. In a series of opinions, however, the Court of Appeals for the Third Circuit has reached the opposite conclusion. *See Dixon v. Warden of FCI Schuylkill,* 647 F. App'x 62, 64 (3d Cir. 2016) (rejecting the argument that *Burrage* is retroactive and concluding that a prisoner cannot rely on that case to bring a petition under 28 U.S.C. § 2241); *Upshaw v. Lewisburg USP,* 634 F. App'x 357 (3d Cir. 2016) (same). In *Dixon*, the Third Circuit reasoned that "*Burrage* did not decriminalize the conduct for which Dixon was convicted" and instead "merely applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and one of *Apprendi*'s progeny, *Alleyne v. United States*, 133 S. Ct. 2151 (2013). 647 F. App'x at 64. Similarly, in *Upshaw*, the Third Circuit reasoned that, "in *Burrage*, the Supreme Court extended *Alleyne* to hold that the 'death results' penalty enhancement is an element that must be submitted to the jury and found beyond a reasonable doubt." 634 F. App'x at 359.

In its decision in this case, the Court of Appeals for the Fourth Circuit joined the Third Circuit by holding that Mr. Ashbaugh's petition was second or successive without allowing for an exception for retroactive

application of the substantive rule announced in *Burrage*. This decision is consistent with previous holdings from the Fourth Circuit. *See Atkins v. O'Brien,* 148 F. Supp. 3d 547, 552 (N.D. W. Va. 2015) (holding that *Burrage* "has not been applied retroactively to cases on collateral review"), *aff'd* 64 F. App'x 254, 255 (4th Cir. 2016) (affirming "for the reasons stated by the district court").

This division among the circuits, between the Third and Fourth Circuits on one side, and the Fifth, Sixth, Seventh, and Eighth Circuits, on the other, is clear. Because it could serve only to deepen the existing split, no further percolation would be helpful. Accordingly, the Court should grant this petition and resolve this mature and intractable split.

II. The Question Presented Is Exceptionally Important and Recurring.

1. The question presented, upon which the circuit courts are sharply divided, has profound ramifications for any individual currently imprisoned who received the sentence enhancement under § 841(b)(1)(C) for conduct that did not amount to the but-for cause of another's death or bodily injury. It is the difference between having one's sentence vacated and being resentenced for a crime actually committed or being forced to serve out an illegal sentence for conduct this Court has clearly held does not violate the law.

This Court has previously explained that, where an individual is convicted or punished "for an act that the law does not make criminal," "[t]here can be no room for doubt" that the situation "'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief

under § 2255." *Davis v. United States*, 417 U.S. 333, 346-47 (1974). This case implicates this precise concern. In particular, prior to this Court's decision in *Burrage*, individuals like Mr. Ashbaugh could have their sentences enhanced pursuant to 21 U.S.C. § 841(b)(1)(C) even if their conduct merely contributed to, without being a but-for cause of, another's death. *Burrage*, however, eliminated this possibility by holding that, when a "drug distributed by the defendant is not an independently sufficient cause of the victim's death . . . , a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." 571 U.S. at 218–19.

But Mr. Ashbaugh, and others like him, had already pleaded guilty and been given an enhanced sentence under the statute by the time this Court announced the but-for causation requirement. Because there was no evidence that the drug Mr. Ashbaugh provided was independently sufficient to cause the victim's death and there was no evidence that it was the but-for cause of that death, Mr. Ashbaugh now stands convicted and punished for an act that the Supreme Court of the United States has held § 841(b)(1)(C) does not criminalize. The resulting "complete miscarriage of justice" is manifest and could not be of greater importance.

2. Whether *Burrage* is retroactive has already arisen in dozens of federal cases. *See, e.g.*, *Perrone v. United States*, 889 F.3d 898 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 654 (2018); *Hancock v. United States*, No. 16-6504, 2018 WL 1666119, at *2 (6th Cir. Jan. 5, 2018), *cert. denied*, 139 S. Ct. 198 (2018); *United States v. Snider*, 180 F. Supp. 3d 780 (D. Or. 2016);

United States v. Schneider, 112 F. Supp. 3d 1197, 1207 (D. Kan. 2015), *aff'd*, 665 F. App'x 668 (10th Cir. 2016); *Weldon v. United States*, No. 14–0691-DRH, 2015 WL 1806253, at *3 (S.D. Ill. Apr. 17, 2015), *vacated on other grounds*, 840 F.3d 865 (7th Cir. 2016). And *Burrage*'s causation standard has been examined in hundreds more. *See*, *e.g.*, *United States v. Sica*, 676 F. App'x 81 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 181 (2017); *United States v. Smith*, 656 F. App'x 70 (6th Cir. 2016); *United States v. Schnippel*, No. 1:15-cv-69, 2015 WL 4358052 (E.D. Va. 2015). Moreover, defendants in Mr. Ashbaugh's exact position—having been convicted and sentenced pursuant to Section 841(b)(1)(C) *without* evidence of but-for causation—have had their sentences vacated on numerous occasions. *See, e.g.*, *Santillana*, 846 F.3d at 785; *Krieger*, 842 F.3d at 497-500; *United States v. Ford*, 750 F.3d 952, 955 (8th Cir. 2014) (reversing Ford's conviction after holding "the government proved only that the heroin was a contributing factor to Scolaro's death, not that heroin was a but-for cause of Scolaro's death").

Courts have done so because, without evidence of but-for causation, such individuals are being punished for "a nonexistent offense." *Santillana*, 846 F.3d at 785.

3. Without a resolution by this Court, identically situated defendants will have their sentences vacated pursuant to *Burrage*, or not, based solely on their geographic location. Those defendants in the Third and Fourth Circuits, including Mr. Ashbaugh, will remain in federal prison for "nonexistent offenses," while those in the Fifth, Sixth, Seventh, and Eighth Circuits will rightly have their sentences vacated and will be resentenced for offenses they actually

committed. This result is both fundamentally unfair and contrary to the nature of the federal criminal system, which seeks to impose a single set of laws on the entire country.

III. The Fourth Circuit Is Wrong: *Burrage* Announced a Substantive Rule that Courts Must Apply Retroactively to Cases on Collateral Review.

1. The Fifth, Sixth, Seventh, and Eighth Circuits—each of which concluded that *Burrage* applies retroactively to cases on collateral review—properly analyzed the issue in light of this Court's rulings and statements in *Schriro*, 542 U.S. 348, or *Teague*, 489 U.S. 288. In reaching the opposite conclusion, the Third Circuit has held that *Burrage* merely requires the results-in-death sentence enhancement to be decided by the jury, while the Fourth Circuit provided no analysis of the issue whatsoever.

This Court established the framework for determining the retroactive effect of new criminal rules in *Teague*, 489 U.S. 288, and *Schriro*, 542 U.S. 348. In general, new criminal rules apply only on direct review. *See Teague*, 489 U.S. at 303–04. Two categories of new rules, however, "fall outside this general bar." *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 181 (3d Cir. 2017). First are new "watershed rules of criminal procedure." *Schriro*, 542 U.S. at 352; *see Teague*, 489 U.S. at 311–13. Second, and relevant here, are "[n]ew substantive rules." *Schriro*, 542 U.S. at 351 (emphasis omitted); *see Teague*, 489 U.S. at 307, 311.

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis omitted). The new rule is "substantive" if it "alters the range of conduct . . . that the law punishes." *Schriro*, 542 U.S. at 353. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Id.* "Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (internal quotation marks and citation omitted).

2. Under these principles, this Court's decision in *Burrage* is undoubtedly a new substantive rule that applies retroactively to cases on collateral review. As relevant to this determination, the *Burrage* Court interpreted the meaning of the term "results from," as used in 21 U.S.C. § 841(b)(1)(C), and narrowed the previously understood scope of the statute's prohibition. In particular, prior to this Court's holding in *Burrage*, the Government could obtain a conviction and sentence enhancement by proving only that the substance in question was a "contributing cause" of the individual's death. *Burrage*, 571 U.S. at 208. In *Burrage*, however, this "contributing cause" standard was eliminated in favor of a narrower and heightened "but-for" causation standard. Indeed, after rejecting the broad "contributing cause" formulation, the Court explained that, "where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant *cannot* be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) *unless* such use is

a *but-for cause* of the death or injury." *Id.* at 218-19 (emphases added).

To reach this result, the *Burrage* Court focused on the particular "result[s] from" language Congress used in § 841(b)(1)(C). The statute requires "death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." *Id.* at 216. This Court explained that, if Congress intended to cover situations where the drug merely *contributed to* the death or serious bodily injury, it could have used "contributes to" in the statute to convey its intent. *Id.* Its failure to do so was both intentional and significant.

3. The Court's new statutory interpretation in *Burrage* necessarily limited the relevant conduct for which an individual could be convicted and have a sentence enhancement imposed. The enhancement is no longer available in situations, like Mr. Ashbaugh's, where the victim ingested a cocktail of drugs, all of which contributed to his demise but none of which independently caused it. Instead, to obtain the enhancement, the Government must prove beyond a reasonable doubt that, but for the distributed drug, the victim would not have died. *See id.* Because it both "alters the range of conduct . . . that the law punishes" and "narrow[s] the scope of a criminal statute by interpreting its terms," *Schriro*, 542 U.S. at 351, 353, *Burrage*'s new statutory interpretation is a substantive rule that applies retroactively to cases on collateral review. *Id.*; *Teague*, 489 U.S. at 307, 311.

4. Additionally, as described above, three of the four circuits that have held that *Burrage* applies retroactively to cases on collateral review undertook thorough retroactivity analyses and concluded that

the case announced a new substantive rule that alters the range of conduct prohibited by Section 841(b)(1)(C). *See Harrington*, 900 F.3d at 249 (holding that it was "clear that *Burrage* is retroactive" because it "narrow[ed] the scope of a criminal statute by interpreting its terms" (quoting *Schriro*, 542 U.S. at 351)); *Santillana*, 846 F.3d at 783 (holding that, "[o]n its face, *Burrage* is a substantive decision that interprets the scope of a federal criminal statute" and, more specifically, "narrow[s] the scope of a criminal statute, because but-for causation is a stricter requirement than are some alternative interpretations of 'results'" (internal quotation marks and citation omitted)); *Gaylord*, 829 F.3d at 505 (quoting *Schriro* for the proposition that "[n]ew substantive rules generally apply retroactively" and "[t]his includes decisions that narrow the scope of a criminal statute by interpreting its terms" (emphasis omitted)). The additional circuit to conclude that *Burrage* is retroactively applicable to cases on collateral review relied upon the Government's concession that it so applies. *See Ragland*, 784 F.3d at 1214.

The two circuits that reached the opposite conclusion, on the other hand, either conducted no analysis under *Schriro* or *Teague* or incorrectly concluded that *Burrage* merely announced a procedural rule that did not alter the range of prohibited conduct. In particular, the Third Circuit held that "*Burrage* did not decriminalize" any conduct and instead "merely applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and one of *Apprendi*'s progeny, *Alleyne v. United States*, 133 S. Ct. 2151 (2013). *Dixon,* 647 F. App'x at 64; *Upshaw*, 634 F. App'x at 359 (reasoning that, "in *Burrage*, the Supreme Court extended *Alleyne* to hold that the

'death results' penalty enhancement is an element that must be submitted to the jury and found beyond a reasonable doubt"). But, as the Fifth Circuit explained, those decisions are "simply incorrect" because *Burrage* "is not about who decides a given question (judge or jury) or what the burden of proof is (preponderance versus proof beyond a reasonable doubt) . . . but is rather about what must be proved." *Santillana*, 846 F.3d at 783-84 (emphasis, internal quotation marks, and citations omitted). Indeed, the Seventh Circuit has also addressed the error of this holding directly. *See Krieger*, 842 at 499–500 (holding that cases holding that *Burrage* is not retroactive "were simply incorrect" in the belief that *Burrage* was an extension of procedural rules previously announced by this Court when, in fact, "the rule announced in *Burrage* altered the range of conduct that the law punishes" and "narrowed the scope of the behavior subject to punishment for 'death resulting' by requiring that the drug at issue was the but-for cause of the victim's death rather than merely a contributing cause of death").

5. Moreover, this Court has held in an analogous case that a similar statutory interpretation announced a new substantive rule that applied retroactively to cases on collateral review. *See Bousley v. United States*, 523 U.S. 614 (1998). Bousley had pleaded guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1) in 1990, even though the firearm was stored in another room at the time he allegedly "used" it. *See id.* at 616. Five years later, this Court held that the statutory term "use" required the Government to prove "active employment of the firearm."

Bailey v. United States, 516 U.S. 137, 144 (1995), *superseded by statute* as stated in *Welch v. United States*, 136 S. Ct. 1257 (2016). The *Bailey* Court had further explained that "active employment includes uses such as brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire the weapon," but would "not include mere possession [or storage] of a firearm." *Bousley*, 523 at 617 (internal quotation marks and citations omitted). In permitting his habeas challenge to proceed, the *Bousley* Court necessarily held that its statutory interpretation in *Bailey*, which narrowed the range of conduct prohibited by the statute, was a new substantive rule applicable to cases on collateral review. *See id.* at 623.

Here, Mr. Ashbaugh's situation is almost identical to Bousley's: They both pleaded guilty to violating a statute; this Court subsequently narrowed the range of conduct prohibited by the statute by interpreting a central term it used; and they both sought to have this Court's narrowing construction applied to him via collateral review of his conviction and sentence. There is no basis to hold that *Bailey*'s narrowing construction was a "new substantive rule" but *Burrage*'s was not. *Burrage* announced a new substantive rule. The Fourth and Third Circuit decisions to the contrary are in substantial tension with *Bousley*. They are in similar tension with this Court's decision in *Schriro* because they permit convictions and sentences to stand unchallenged even though they "necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." 542 U.S. at 352 (citation omitted).

IV. This Case Is an Excellent Vehicle to Address the Question Presented and Resolve the Circuit Split.

1. The question presented manifestly matters and was fully developed below, including in the parties' briefing to the Fourth Circuit. In particular, in its Fourth Circuit briefing, the Government argued that "*Burrage* did not narrow the scope of any criminal statute" and did "not alter the range of conduct that the law punishes." Pet.App.37a. As such, the Government reasoned, "*Burrage* is not retroactive." Pet.App.39a. It attempted to distinguish cases concluding otherwise because, in those cases, unlike this one, the Government had conceded *Burrage*'s retroactivity. Pet.App.38a. Notwithstanding the lack of a concession here about *Burrage*'s retroactivity, the Government is plainly wrong about *Burrage* and the rule it announced.

In addition, the question presented here is outcome-determinative: The case turns on whether *Burrage* is, in fact, retroactive. If it is, Mr. Ashbaugh is entitled to habeas relief and is entitled to be resentenced for a crime he actually committed, rather than being punished for an offense that this Court has made clear is not prohibited by law—namely, providing a drug that merely "contributed to" another's death.

2. The district and circuit courts' conclusion that Mr. Ashbaugh's 2014 petition pursuant to § 2255, and the associated motions to reopen that petition, were "second or successive" petitions that must satisfy § 2255(h)'s requirements is plainly incorrect and does not counsel against this Court's review. As an initial matter, Mr. Ashbaugh's 2014 petition and the associated motions to reopen it are not "second or

successive" because his 2006 "first" petition was dismissed based on the waiver in his plea agreement, and no court ever reached the merits of that petition. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 638 (1998) (holding that "dismissal of a first habeas petition for technical procedural reasons, having nothing to do with the claim's merits," does not render a later-filed petition "second or successive"); *Slack v. McDaniel*, 529 U.S. 473, 475 (2000) (holding that "a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits . . . is not a 'second or successive' petition as that term is understood in the habeas corpus context"). Without the predicate adjudication of his claims on the merits, Mr. Ashbaugh's 2014 petition could not have been "second or successive." Indeed, Mr. Ashbaugh's habeas claims regarding *Burrage* have never been adjudicated on the merits—his 2006 petition was dismissed because of the waiver of collateral review rights, his 2014 petition was dismissed because he had not obtained authorization to file a "second or successive" petition, and his efforts to reopen that petition were denied.

Moreover, the 2014 petition and associated motions cannot be "second or successive" because the grounds they raised—*i.e.*, that, based on a proper understanding of the statute, (1) the district court had no authority to impose the sentence enhancement, (2) his plea agreement was invalid, and (3) he was actually innocent of the offense because the Government could not prove that his conduct was the but-for cause of death—could not have been raised prior to this Court's decision in *Burrage*. *See, e.g.*, *In re Weathersby*, 717 F.3d 1108, 1111 (10th Cir. 2013)

(collecting cases and holding that a newly filed Section 2255 petition is not "second or successive" if "the basis for [the] proposed § 2255 claim did not exist when [the initial Section 2255] proceedings were ongoing"); *United States v. Hairston*, 754 F.3d 258, 259–62 (4th Cir. 2014) (similar).

A contrary decision would subvert the underlying purposes of habeas relief—namely, to provide prisoners with equitable remedies—and would instead require Mr. Ashbaugh and similarly situated prisoners to serve sentences courts had no authority to impose based on conduct that does not violate the statute in question.

Finally, the Government effectively conceded below that whether the petition was second or successive is "irrelevant." Pet.App.35a. Instead, it premised its arguments on the waiver of collateral attack rights in Mr. Ashbaugh's plea agreement, the validity of which has not been tested in light of *Burrage*, and its argument that *Burrage* is not retroactively applicable to cases on collateral review. The Government's position fails to appreciate the interplay between those two issues—namely, if *Burrage* announced a substantive rule retroactively applicable to cases on collateral review, then Mr. Ashbaugh's waiver of collateral attack rights was necessarily unknowing and, thus, invalid. Once this Court resolves the retroactivity issue, the Government concession that whether the petition was "second or successive" is "irrelevant" controls the outcome.

3. Indeed, Mr. Ashbaugh's plea agreement, which included a waiver of the right to have his sentence collaterally reviewed, is no obstacle to this Court's review. On this point, *Bousley* is once again

instructive. There, this Court explained that a guilty plea is "constitutionally invalid" when a district court, based on its misunderstanding of a statutory term that is later clarified by the Supreme Court, misinforms a petitioner about the elements of the criminal offense. *Bousley*, 523 U.S. at 618-19. This Court explained that the district court's incorrect explanation of the statutory term "use" rendered a guilty plea unintelligent because "neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Id.* at 618.

The exact same is true of Mr. Ashbaugh. Neither he, nor his counsel, nor the district court understood at the time that the statutory phrase "results from" required but-for causation. Both parties and the court operated under the mistaken impression that contributory causation was sufficient to warrant a sentence enhancement under § 841(b)(1)(C). Thus, Mr. Ashbaugh's plea is constitutionally invalid and may be challenged in a habeas petition, at least where, as here, the petitioner can establish that he is "actually innocent" of the charged offense. *Id.* at 624. It is unquestionable that Mr. Ashbaugh can make such a showing here. Indeed, there was *no evidence whatsoever* showing that his conduct was a but-for cause of the victim's death. Pet.App.42a. As such, the waiver is invalid and is no barrier to Mr. Ashbaugh's attempts to vacate his conviction and sentence under § 841(b)(1)(C).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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