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IN THE SUPREME COURT OF THE UNITED STATES

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MARCUS ANDREW BURRAGE, :

Petitioner : No. 12-7515

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Tuesday, November 12, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 a.m.

APPEARANCES:

ANGELA L. CAMPBELL, ESQ., Appointed by this Court, Des Moines, Iowa; on behalf of Petitioner.

BENJAMIN J. HORWICH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

Official

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P R O C E E D I N G S

(10:58 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 12-7515, *Burrage v. United States*. Ms. Campbell.

ORAL ARGUMENT OF ANGELA L. CAMPBELL,  
APPOINTED BY THIS COURT,  
ON BEHALF OF THE PETITIONER

MS. CAMPBELL: Mr. Chief Justice, and may it please the Court:

Marcus Burrage is serving a 20-year mandatory minimum sentence for selling heroin that, according to the jury instruction that was given to the jury at the time of the trial, was not the primary cause of the death, but, rather, merely played a part in the death.

This lesser standard of contributing causation was neither articulated by Congress within the words of the statute, nor was it generally accepted at the time the statute was passed, as an acceptable version of causation.

Congress's selection of the word "results" instead should be interpreted to mean the traditional notions of causation; those of factual cause or but-for cause and proximate cause.

1                   Now, the parties don't disagree that  
2 "results in" means causation. That it's a causation  
3 analysis. And regardless of whether you look to the  
4 common law or the treatises or the legal commentators,  
5 causation triggers, at the very minimum, a but-for  
6 causation analysis. In this particular case, but for  
7 the use of the heroin, the victim would not have died.

8                   Now, the Solicitor General suggests a lesser  
9 causation standard, one that expands the notion of  
10 but-for causation. But if we instead look to the case  
11 law and this Court's precedent, we are not actually  
12 trying to expand but-for causation in most cases, we are  
13 trying to limit it. Because but-for causation can be  
14 extrapolated beyond what we are willing to give  
15 liability for.

16                   JUSTICE GINSBURG: How would you respond to  
17 the hypothetical that the government poses on 24 of its  
18 brief, that it's the three drops of poison, each  
19 defendant puts in one drop, one drop will not do it,  
20 three drops will, and none of them would be chargeable  
21 because it takes three drops?

22                   MS. CAMPBELL: Well, I would disagree with  
23 the premise that they are not chargeable. Each  
24 individual person that put the drop of poison in that  
25 cup could be charged with attempted murder if they were

1 trying to kill a person. But under standard causation  
2 analysis, you -- you do not have but-for causation.  
3 Each individual drop of poison was not the but-for  
4 causation and so you -- you don't have causation.

5 CHIEF JUSTICE ROBERTS: But you would if --  
6 if you knew that there were two drops in and you added  
7 the third drop after the two drops. Right?

8 MS. CAMPBELL: Then --

9 CHIEF JUSTICE ROBERTS: I'm sorry. I've  
10 lost sight of this. Is this each drop is enough or --

11 JUSTICE GINSBURG: Three -- three drops.

12 CHIEF JUSTICE ROBERTS: It takes three.

13 MS. CAMPBELL: In the government's -- in the  
14 government's hypothetical, each person individually puts  
15 in one drop and you need three drops in order to -- to  
16 kill the person.

17 CHIEF JUSTICE ROBERTS: All right. Well,  
18 there's but-for causation when you are the third person.  
19 Your drop caused the death, and the death would not have  
20 been caused without your drop.

21 MS. CAMPBELL: That would be correct, that  
22 there would be but-for causation.

23 JUSTICE SCALIA: But each one is the third  
24 person. I mean, each one of them is the third person.  
25 It seems to me each one is a but-for cause. And I don't

1 know why you don't say there's but-for causation there.

2 MS. CAMPBELL: Well --

3 JUSTICE SCALIA: As I understand -- as I  
4 understood the evidence in this case, the experts  
5 testified they could not say that he would not have died  
6 but for the cocaine.

7 MS. CAMPBELL: That's --

8 JUSTICE SCALIA: That's quite different from  
9 this case where what is put to you is he -- you could  
10 say he would not have died but for the drop that each  
11 one of them put in.

12 MS. CAMPBELL: Yes, you could say that.

13 And that -- and --

14 JUSTICE SCALIA: So why isn't that but-for  
15 causation?

16 MS. CAMPBELL: It's a form of but-for  
17 causation that I think --

18 JUSTICE SCALIA: I don't care if it's a form  
19 of but-for causation. It's but-for causation.

20 MS. CAMPBELL: It -- it can be. And I think  
21 that certain -- that specific hypothetical, while it  
22 warrants special consideration by this Court, whether or  
23 not in criminal context, we're going to expand the  
24 criminal liability to that is not this case, Justice  
25 Scalia.

1 JUSTICE KAGAN: Well, I thought the  
2 hypothetical was a bit different. I thought it only  
3 takes two drops to kill him. And that's what creates  
4 the problem where you don't have but-for causation  
5 because you don't know whether you are the extraneous  
6 drop or whether you were the drop that actually killed  
7 him.

8 MS. CAMPBELL: Correct. If there is a  
9 hypothetical that changes it just slightly, you would  
10 not have but-for causation in that circumstance, because  
11 each individual drop was not the but-for cause. And  
12 that's more like our hypothetical.

13 And, again, with a poison hypothetical,  
14 because it's an intentional act by the defendant, you  
15 would still have liability, criminal liability for  
16 attempt or assault or something along those lines, but  
17 you would not have each individual person liable for the  
18 actual death.

19 JUSTICE ALITO: But part of your argument is  
20 that but-for causation isn't sufficient, right? It also  
21 has to be foreseeable.

22 MS. CAMPBELL: Correct.

23 JUSTICE ALITO: Is that your argument?

24 MS. CAMPBELL: That is our argument.

25 JUSTICE ALITO: Now, give me an example of a

1 situation where a heroin dealer deals -- sells drugs to  
2 somebody, and foresees that the drugs that are sold will  
3 cause death?

4 MS. CAMPBELL: Well, I think you can look to  
5 the actual case law. There is, for those types of  
6 hypotheticals, when the heroin dealer is actually using  
7 with the particular purchaser of the heroin and knows  
8 that he is overdosing. If the heroin dealer is the one  
9 injecting the drugs into the system, certainly those  
10 circumstances are foreseeable. And the government --

11 JUSTICE ALITO: Those are very unusual  
12 circumstances. In all other circumstances where  
13 somebody is just selling heroin there wouldn't be  
14 foreseeable, so the statute wouldn't -- foreseeability;  
15 the statute wouldn't apply?

16 MS. CAMPBELL: No, I disagree with that.  
17 Foreseeability could be read into those circumstances  
18 where you simply have a heroin dealer that is selling  
19 heroin and you would take that foreseeability question,  
20 the proximate cause question, and you would charge it to  
21 the jury.

22 JUSTICE SCALIA: I think "foreseeability" is  
23 the wrong word. I don't think, you know, in tort law  
24 we -- we use the word "foreseeability" for Palsgraf.  
25 It's a matter of scope of the risk. It may not be

1 foreseeable. It may be an unusual situation that will  
2 cause it, but it's within the scope of the risk. And  
3 when you sell drugs, you know that one of the things  
4 that can happen is that the drugs will produce an  
5 overdose.

6 I'm not sure -- I wouldn't call it  
7 foreseeability. I would call it scope of the risk.

8 MS. CAMPBELL: Both scope in the risk and  
9 foreseeability are versions of saying proximate cause.  
10 And either standard in this circumstance would be better  
11 than the contributing cause standard that was given to  
12 the jury, because it did not use scope of the risk  
13 language. It didn't use foreseeability language. It  
14 didn't use reasonably probable --

15 JUSTICE SOTOMAYOR: I think this is all  
16 being sort of tied up together. I always thought  
17 foreseeability and proximate cause were the same.

18 I think the issue doesn't do with either  
19 foreseeability, scope of risk, or proximate cause. It  
20 has to do with what you started with, which is what's  
21 the level of factual causation that we want to set.  
22 What definition are we going to give for the legal  
23 causation standard. And you're saying that it has to be  
24 but-for?

25 MS. CAMPBELL: Our position is -- I agree

1 with you, Justice Sotomayor, that the main issue is this  
2 but-for causation issue, that if we are correct that  
3 but-for causation should be read into a criminal  
4 statute, as we believe it should under these  
5 circumstances under this statute, that the appropriate  
6 question is whether, but for the heroin, they would have  
7 died.

8 JUSTICE SOTOMAYOR: All right. Let's assume  
9 that we are troubled by the examples that have been  
10 given. If two people or three people come together and  
11 each puts in a drop of blood, either knowing that only  
12 one drop is necessary or that all three drops are  
13 necessary, we don't want to let that person off because  
14 it doesn't seem logical, okay?

15 What would save your case in it? Is there a  
16 different proximate cause standard but not involving  
17 but-for that would still get you what you are looking  
18 for?

19 MS. CAMPBELL: Yes, and I don't think you  
20 need to look to causation to get to that answer.

21 JUSTICE SOTOMAYOR: And what do we look to  
22 if we are not looking to causation?

23 MS. CAMPBELL: Well, if each individual  
24 person in the poison hypothetical is working together  
25 and knows about the other people, then you have

1 conspiracy liability. And they would be liable for the  
2 actions of the other people -- of the other person that  
3 has put the poison in and you can still --

4 JUSTICE SOTOMAYOR: Why does it matter if  
5 you know that three people have -- three people hate  
6 someone and they are acting independently, each one  
7 intended to kill the guy and, you know, that the other  
8 two joined in was lovely, but we don't know which drop  
9 did it. We don't particularly care, do we?

10 MS. CAMPBELL: In that particular  
11 hypothetical then the --

12 JUSTICE SOTOMAYOR: There is no conspiracy.

13 MS. CAMPBELL: There's no conspiracy.

14 JUSTICE SOTOMAYOR: How can we save this  
15 case if there is no conspiracy?

16 MS. CAMPBELL: Then you have attempt  
17 liability, and those people would still all be  
18 criminally liable for attempted murder.

19 JUSTICE BREYER: The Model Penal Code, the  
20 Brown Commission, everybody says this is a famous law  
21 school hypothetical, I thought you would never find it  
22 in reality. They say certainly there is liability where  
23 two people strike, each strikes a mortal blow  
24 independently, and everyone seems to agree there is  
25 liability there. And even though no blow -- neither

1 blow is in fact a but-for condition, because in the  
2 absence of blow A he would be dead anyway from blow B.

3 All right. So we start with that, I  
4 thought. And now starting with that -- you can say I  
5 don't want to start with that. I think that all  
6 Professor Wechsler and Professor Hall and all these  
7 people famous in my day were wrong. Okay. That's up to  
8 you. But if you do take that as a basic assumption,  
9 then how do you win? I think that was the question, and  
10 there may be an answer to that.

11 MS. CAMPBELL: Yes, Justice Breyer, there is  
12 an answer to that. The hypotheticals that are posed by  
13 Professor LaFave, which is the one that you are citing,  
14 actually can be answered by the use of the substantial  
15 factor language. Now, when you have two independently  
16 sufficient causes which act upon an individual causing  
17 the death, you have a but-for problem because but for  
18 the actor A, B's blow would still kill the person.

19 In that limited circumstance, the common law  
20 already addresses that and you use the substantial  
21 factor language, which we did at the time of the trial,  
22 tried to incorporate into our jury instruction, which  
23 was rejected by the trial court. And so that is limited  
24 to those circumstances where you have two --

25 JUSTICE SCALIA: What is substantial factor?

1 I mean, I don't follow you. I don't see how it gets you  
2 to where you want to be unless "substantial factor"  
3 means that it would have been a but-for cause.

4 MS. CAMPBELL: That is our position, that  
5 substantial factor is appropriate when it would have  
6 been a but-for cause. You either need independently  
7 sufficient cause or but-for causes only failing by  
8 another independently sufficient cause.

9 JUSTICE KAGAN: So when you use that  
10 language of "substantial factor," what you really mean  
11 to point to is independent sufficiency? Two people  
12 shoot, either one would have killed the person, but you  
13 can't say --

14 JUSTICE SCALIA: Right.

15 JUSTICE KAGAN: -- that either is the but-  
16 for cause because of the fortuity of the second act?

17 MS. CAMPBELL: Correct. That is the  
18 traditional reason why you would use the substantial  
19 factor instruction.

20 JUSTICE KAGAN: So you don't mean that to go  
21 any further than independent sufficiency?

22 MS. CAMPBELL: We do not mean it to go any  
23 further, and I don't believe that the case law or the  
24 treatises take it any further. There is this other  
25 hypothetical --

1 JUSTICE SCALIA: It's a strange terminology  
2 for it. I mean, they really ought to get another  
3 terminology if that's what they mean.

4 MS. CAMPBELL: We agree.

5 JUSTICE SCALIA: You can be a substantial  
6 factor without being independently sufficient.

7 MS. CAMPBELL: You could under the common  
8 use of the word "substantial factor," but at least  
9 "substantial factor" would have been better language  
10 than "contributes to" or "plays a part in" that this  
11 jury heard.

12 JUSTICE SCALIA: Marginally.

13 MS. CAMPBELL: It would at least give us the  
14 opportunity to argue that the heroin was not the  
15 substantial factor to a jury in a factual question if  
16 "substantial factor" does not mean independently  
17 sufficient cause. But it's our position that at the  
18 time of the passing of this particular provision,  
19 "substantial factor" meant to address the circumstance  
20 where you have two independently sufficient causes.

21 So regardless of whether you use  
22 "substantial factor" as being independently sufficient  
23 cause or some other sort of formulation of the language  
24 of "substantial factor," you still have this problem  
25 that the jury was not instructed on even substantial

1 factor. They were instructed on contributing cause,  
2 that --

3 JUSTICE GINSBURG: You do agree that, that  
4 an overdose -- there is a foreseeable risk that someone  
5 who purchases heroin will overdose, there is a  
6 foreseeable risk of that?

7 MS. CAMPBELL: I concede that in a heroin  
8 case, that is a question for the jury, that you would  
9 charge foreseeability or proximate cause to the jury in  
10 those circumstances.

11 JUSTICE KAGAN: I guess here's what the  
12 government might say back to you. They might say, you  
13 know, in these drug cases, people often take drugs in  
14 combination and then they overdose, and it's really  
15 impossible for anybody to be able to say what you are  
16 requiring an expert to say. In other words, it's  
17 impossible to say it was the heroin, not the cocaine, it  
18 was the cocaine and not the heroin, it was both, it was  
19 neither.

20 It's just -- it's all we can talk about is  
21 likelihoods. You know, just as this expert did. They  
22 say the fact that he took the heroin made it much more  
23 likely that he would die. And that's all we are going  
24 to be able to show in a case like that, this, and  
25 because of that, we -- that's got to be enough.

1 MS. CAMPBELL: And I would agree that that's  
2 their argument and that's an argument that should be  
3 presented to Congress to amend the statute to  
4 incorporate language that addresses that. Congress  
5 knows how to address a contributing cause standard.  
6 They said it in numerous other statutes that a certain  
7 act contributes to a death, that the result is in whole  
8 or in part a result of the defendant's action. They've  
9 said it. They know how to say it and they could say it  
10 again in this statute if they wanted to.

11 JUSTICE ALITO: Well, let's compare what --  
12 the situation that Justice Kagan just described with  
13 this situation. The heroin dealer sells a user, I don't  
14 know, a three-day supply or four-day supply, whatever it  
15 is. And tells the -- the user, now, you should only use  
16 this much per day. But the user goes off and injects  
17 the whole amount and -- and dies as a result of an  
18 overdose.

19 Now, why would Congress want to punish that  
20 person where the overdose -- where the heroin sold is  
21 the but-for cause of death and not the situation where  
22 there's the -- the multidrug cocktail?

23 MS. CAMPBELL: Well, in the absence of  
24 language to the contrary, this statute actually says,  
25 the use of this substance, the substance sold by the

1 defendant results in a death.

2           And so when we start by looking at the words  
3 of the statute, they -- they don't say these common  
4 words that you could use to encompass those  
5 circumstances.

6           JUSTICE ALITO: Well, I understand that.  
7 That's a textual argument and maybe the text can be read  
8 both ways. Assuming it can be read both ways, why would  
9 Congress want to attach these severe consequences in the  
10 overdose case and not in the drug cocktail case?

11           MS. CAMPBELL: Because Congress would want  
12 to target a situation where there has been proof beyond  
13 a reasonable doubt that the defendant's actions were the  
14 cause of the death.

15           JUSTICE SCALIA: Well, for -- for any crime,  
16 there are two things. We punish the intent, the  
17 wickedness, and in both cases, the party is equally  
18 wicked, but we also punish the consequence. In one  
19 case, the party dies because of that person's act. And  
20 in the other case, nobody dies just because of that  
21 person's act. I don't know why you have to run away  
22 from that.

23           It's -- it's common in the criminal law  
24 that -- that two acts that are equally unlawful, equally  
25 nefarious, one happens to kill somebody, the other one

1 doesn't. We punish one person, we don't punish the  
2 other.

3 MS. CAMPBELL: That would be true. And what  
4 I was addressing in Justice -- the justice's  
5 hypothetical was that you can't read congressional  
6 intent into the selection of the words within this  
7 statute. And if Congress intended to punish multiple  
8 drug cocktails all equally, they would instead have  
9 written the statute to address the cocktail.

10 JUSTICE KENNEDY: Well, it said -- the  
11 statute says results, right?

12 MS. CAMPBELL: Correct.

13 JUSTICE KENNEDY: And so we're asking about  
14 results. Justice Alito's hypothetical, he gives a  
15 three-day supply. Suppose he gives a year's supply and  
16 he overdoses the next day, what result?

17 MS. CAMPBELL: I believe that would be a  
18 jury question.

19 JUSTICE KENNEDY: No, no, no. As a matter  
20 of law, is that a violation?

21 MS. CAMPBELL: It would be if he takes the  
22 heroin, and the heroin is the cause of the death, then,  
23 yes, it's a but-for cause. We would then add that you  
24 should have a proximate cause analysis, which is the  
25 juries are in -- in a unique position to determine

1 whether or not foreseeability is appropriate in that  
2 circumstance.

3 JUSTICE KENNEDY: All right. Suppose we go  
4 back to Justice Alito's example and it's just a two-day  
5 supply and there are statistics that 1 percent of heroin  
6 users overdose. Is that sufficient to establish  
7 liability under your foreseeability standard?

8 MS. CAMPBELL: Not as a matter of law and  
9 not to the degree that the Solicitor General urges that  
10 it's a per se foreseeability. Foreseeability is still  
11 always going to be instructed to the jury in that  
12 circumstance. And they can argue that certainly  
13 1 percent is sufficient, and the defense can argue  
14 1 percent chance is not sufficient and can attack the --  
15 the numbers.

16 JUSTICE KENNEDY: Well, the question is what  
17 the legal standard is. I'm the juror. I said -- I want  
18 to know does this suffice to impose liability? And you  
19 say well, if you say it is. Does it or doesn't it?  
20 That's a -- that's a fair question. Just -- you can't  
21 say, oh, well, it's up to the jury. We don't know. I  
22 want to know what the rule is. The juries have to  
23 follow a rule.

24 MS. CAMPBELL: The rule is the language of  
25 the proximate cause instruction that you give them. And

1 while there are different formulations of that proximate  
2 cause instruction, you would instruct the jury whether a  
3 reasonable person in the position of the defendant would  
4 be able to foresee that consequence.

5 JUSTICE SCALIA: And I would say, my  
6 goodness, if only 1 percent overdose, that -- that isn't  
7 very foreseeable. I -- you know, I don't think you have  
8 to submit that to the jury. I think that's one of the  
9 reasons we -- we banned these drugs, because they are  
10 risky, and anybody should know that if somebody dies  
11 from it, it's within the scope of the risk when you sold  
12 the cocaine.

13 Now, I guess it's different if you're  
14 selling, I don't know, sleeping pills, okay? Which are  
15 part of a cocktail that -- that causes somebody to die.  
16 That's the situation that worries me. It seems to me if  
17 the cocaine -- the person selling the cocaine can be  
18 liable for the cocktail death, I guess the person who  
19 sold the sleeping pills could, as well.

20 MS. CAMPBELL: Well, in that circumstance,  
21 in our specific factual circumstance, each individual  
22 person that supplied any of the drugs to the victim in  
23 this case would be equally liable.

24 JUSTICE GINSBURG: Well, one was -- the  
25 heroin was illegal -- was not -- the selling of a

1 sleeping pill is not illegal. It's perfectly lawful.  
2 Selling heroin is illegal. Doesn't that make a  
3 difference?

4 MS. CAMPBELL: Selling sleeping pills can be  
5 illegal if they're sold to someone that does not have a  
6 prescription, if they're sold on the street. The  
7 OxyContin that was used in this case was not procured  
8 legally. The marijuana in this case was not procured  
9 legally. The -- there was no evidence whether or not  
10 the other prescription drugs, the multitude of  
11 prescription drugs he had in his house were procured  
12 legally.

13 So assuming that the conduct of the person  
14 distributing the drugs were each individually violating  
15 the other provisions of the statute, it would be equally  
16 liable under the theory that they only had to contribute  
17 to the death of the individual.

18 JUSTICE ALITO: I don't see how this  
19 foreseeability test would work. Well, you'd have  
20 testimony what, this particular user looked -- looked  
21 like a healthy person, so there wasn't -- it wasn't  
22 foreseeable that that person was going to overdose.  
23 This other one looked kind of shaky and irresponsible  
24 and who knows what the person might do. That's what  
25 we -- that's what the jury would have to evaluate?

1 MS. CAMPBELL: There are certain facts that  
2 could be read to a jury. In each individual case, they  
3 would differ. And you can look at the case law,  
4 especially regarding this --

5 JUSTICE ALITO: Well, what sort of facts?  
6 Suppose you -- you have the heroin dealer, is a  
7 responsible heroin dealer.

8 (Laughter.)

9 JUSTICE ALITO: And he wants to sell heroin  
10 but doesn't want to cause anybody to die. What would be  
11 kind of the checklist that the person would go through?  
12 All right, I'm going to sell this. I take the risk of a  
13 drug conviction, but I don't want this death results  
14 business. So a person is well dressed. Person is --  
15 what would be the factors?

16 MS. CAMPBELL: Well, I think you could look  
17 directly to the Eighth Circuit's opinion in the  
18 Macintosh case and the factors in that case where that  
19 particular person manufactured methamphetamine and  
20 specifically said, I do not want my methamphetamine to  
21 go to this person. None of the meth should go to this  
22 person. But his meth ended up going to that person and  
23 that person overdosed and died.

24 In that circumstance, that would be a fact  
25 that we could argue to the jury on the defendant's

1    behalf using the appropriate proximate cause standard  
2    that that was not foreseeable and not intended --

3                   JUSTICE ALITO:  No.  But I want my -- I want  
4    the checklist for my responsible heroin dealer on the  
5    street corner.  What does this person go through?

6                   MS. CAMPBELL:  Well, I -- I don't think  
7    there can be a checklist.  That's why proximate cause  
8    and foreseeability is always charged to a jury.  Why  
9    it's -- it's uniquely a jury question.  Whether there's  
10   an experience with this particular user, whether the  
11   person that is selling the drugs knows the user has  
12   overdosed in the past, whether there's something within  
13   that particular drug that is stronger than normal  
14   heroin.

15                  CHIEF JUSTICE ROBERTS:  Do you have any --  
16   what type of heroin user is more likely to overdose and  
17   suffer death?  A first-time heroin user or an  
18   experienced heroin user?

19                  MS. CAMPBELL:  There are no facts in the  
20   record that reflect that.  The evidence within the  
21   record indicates that this particular user was an  
22   experienced heroin user and that people who use heroin  
23   on a -- on a regular basis actually develop tolerance to  
24   heroin, so it would take a higher amount of heroin for  
25   that person to overdose.  That's what's in the record.

1                   Now, the -- the studies that are cited by  
2 the Solicitor General indicate that there have been some  
3 sort of research -- we don't have access to all of those  
4 documents -- but some sort of research regarding heroin  
5 addicts. And -- and when you're dealing with heroin  
6 addicts, that number is less than 1 percent using  
7 their -- their research. Heroin addicts are less than  
8 1 percent likely to die.

9                   Those types of factors could be used in  
10 formulating a foreseeability analysis. But, of course,  
11 you can't just rely on the foreseeability analysis, you  
12 should always incorporate this but-for analysis. And in  
13 a but-for analysis, you would also be dealing with a  
14 situation where you have multiple drugs. And so it not  
15 only informs our discussion about whether or not the  
16 heroin was the but-for cause of the death, but also  
17 whether, in this particular circumstance, this  
18 particular defendant could foresee that this particular  
19 person --

20                   JUSTICE KENNEDY: I -- I just want to get  
21 your position as -- as a matter of law.

22                   Let's assume 1 percent of heroin users  
23 overdose. Dealer sells to an addict he's never seen  
24 before. Doesn't know anything about his age, background  
25 or anything. Just sells him the drug. The heroin

1 addict overdoses. Liability or not? Can there be  
2 liability under those facts?

3 MS. CAMPBELL: It would be our position that  
4 there could be liability if properly instructed to a  
5 jury.

6 JUSTICE SCALIA: But it's just up to the  
7 jury to decide whether it was foreseeable or not.

8 MS. CAMPBELL: Correct.

9 JUSTICE SCALIA: And you cannot say, as I --  
10 as I think I say, that if you sell cocaine and if it is  
11 without a doubt the but-for cause of somebody's death,  
12 you're liable under this statute. You don't think  
13 that's the case.

14 MS. CAMPBELL: We disagree. And,  
15 Justice Scalia, I would point actually to the -- this  
16 Court's precedent in the civil context where you -- you  
17 read proximate cause and foreseeability into almost  
18 exact same language.

19 CHIEF JUSTICE ROBERTS: Yes, but in the  
20 civil --

21 JUSTICE KENNEDY: No, but in a civil  
22 context -- excuse me, Mr. Chief Justice.

23 In the civil context, you have strict -- you  
24 have strict liability. This is in a way strict  
25 liability and seems to me quite proper.

1 MS. CAMPBELL: In a civil context, when it's  
2 explicit --

3 JUSTICE KENNEDY: A drug company if it -- if  
4 it doesn't take proper steps, it is liable even if  
5 1 percent of the users are adversely affected.

6 Excuse me, Chief.

7 MS. CAMPBELL: You -- in a strict liability  
8 circumstance would have a statute which writes in strict  
9 liability. This statute doesn't write in strict  
10 liability.

11 JUSTICE GINSBURG: May I just clarify before  
12 you're finished. You have used the words  
13 "foreseeability," "but for." Are you saying, to make it  
14 very simple, that unless the government proves that the  
15 heroin independently would cause death, then no  
16 conviction? The heroin must independently cause the  
17 death. Is that --

18 MS. CAMPBELL: Only in the circumstance  
19 where you have two independently sufficient causes do  
20 you -- do you reach that question. We don't think you  
21 need to reach that question here. That's why we didn't  
22 argue that at the motion for judgment of acquittal  
23 stage, because you don't have standard but-for  
24 causation. And that failure was not as a result of two  
25 independently sufficient causes.

1 If I may reserve my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 JUSTICE GINSBURG: Well, are you then saying  
4 except for the heroin ingestion, the death would not  
5 have occurred?

6 MS. CAMPBELL: The -- that's the primary  
7 argument, that except for the heroin that -- the factual  
8 basis of this case is that, if you remove the heroin,  
9 the doctors are saying he still might have died. And  
10 that is what defeats the but-for causation.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MS. CAMPBELL: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Horwich.

14 ORAL ARGUMENT OF BENJAMIN J. HORWICH

15 ON BEHALF OF THE RESPONDENT

16 MR. HORWICH: Mr. Chief Justice, and may it  
17 please the Court:

18 The situation here is very much what Congress had  
19 in mind when it sought to hold drug traffickers  
20 responsible for the results of the use of the dangerous  
21 substances in which they deal. It's perfectly ordinary  
22 to speak of a drug as contributing to an overdose. And  
23 in the context of the Controlled Substances Act, there  
24 is no room to argue that a heroin user's overdose death  
25 comes as a surprise.

1 JUSTICE KAGAN: So Mr. --

2 CHIEF JUSTICE ROBERTS: So one little -- one  
3 little grain of heroin that you discover is in the body,  
4 and that person's going away for whatever it is,  
5 20 years?

6 MR. HORWICH: No, I don't think so,  
7 Mr. Chief Justice. And let me explain, because I think  
8 the concern that arises with your hypothetical, which  
9 doesn't arise on these facts, presents a different issue  
10 than what's in dispute before the Court right now. The  
11 dispute between the parties is what kinds of -- on the  
12 causation in fact side of the case, the dispute is  
13 between what kinds of causes can qualify at all. Do  
14 they have to be but-for causes or can a contributing  
15 cause count?

16 Now, there is a separate principle which is  
17 reflected in jury instructions and reflected in the  
18 substantial factor concept and so forth that causes that  
19 are causes in fact but are too insignificant or not  
20 important enough or too insubstantial are not properly  
21 the basis for criminal responsibility.

22 Now, that's -- that's not the dispute before  
23 this Court.

24 JUSTICE KAGAN: Well, Mr. Horwich, I mean,  
25 it seems to me that the dispute before this Court is

1 this: You have somebody who's taken five drugs. One of  
2 them is heroin. And the -- the experts get on the  
3 stand, and they say: Did the heroin cause the death?  
4 And the experts say: Really can't say whether the  
5 heroin caused the death in the sense that if the -- if  
6 he hadn't taken the heroin, he wouldn't have died.

7 So they say: Well, what can you say? He  
8 said: Well, what I can say is that if he hadn't -- is  
9 that the heroin made it more likely that he died.

10 Well, how much more likely did the heroin  
11 make it? Well, the heroin made it 50 percent more  
12 likely that death resulted. Would that be sufficient?

13 MR. HORWICH: I -- I think probably yes,  
14 although let me -- let me explain that we -- why we see  
15 the nature of the expert testimony as actually different  
16 than what you're describing there. Because --

17 JUSTICE KAGAN: Well, take mine.

18 MR. HORWICH: Yes.

19 JUSTICE KAGAN: Because I think that that's  
20 actually --

21 MR. HORWICH: Oh, I'm sorry. I didn't mean  
22 the expert testimony in this case, but in general what  
23 experts are testifying to when they're testifying to  
24 that. They are not testifying to some uncertainty about  
25 whether the defendant's drugs played any role at all.

1 This isn't the question of say, yeah, he bought heroin  
2 from two different dealers. He took one of them, and he  
3 died, but we don't know which dealer it was.

4 In that case we totally agree that that sort  
5 of uncertainty means no liability. What the experts  
6 testified to in these cases is that the primary cause of  
7 death, which is essentially central nervous system  
8 depression that leads to asphyxiating on stomach  
9 contents or saliva or something like that, was a process  
10 to which a number of substances contributed.

11 JUSTICE KAGAN: Yes, and he might have died  
12 even without the heroin, because all the other  
13 substances might have been perfectly adequate to cause  
14 death. So I really can't tell you that the heroin  
15 played -- even -- you know, even to use your language, I  
16 can't tell you whether the heroin contributed. All I  
17 can tell you is a likelihood, a probability that the  
18 heroin led to death.

19 MR. HORWICH: Well, the experts here of  
20 course did testify specifically that the heroin did  
21 contribute to the death. So --

22 JUSTICE KAGAN: Well, again, that question  
23 of words, the experts were very careful to say: "I  
24 cannot tell you that in the absence of the heroin he  
25 wouldn't have died. He might have died even without the

1 heroin, the experts said. The only thing I can tell you  
2 is that the heroin made it more likely that he died.

3 MR. HORWICH: I guess -- maybe I can respond  
4 to that with a perhaps more conventional hypothetical.  
5 If you imagine that -- if you imagine that you have  
6 three assailants who independently simultaneously set  
7 upon the victim and beat him to death, and the victim  
8 could have survived any one of them. In that situation,  
9 you might well have testimony from a doctor that says,  
10 Well, I can't tell you -- he probably would have died --  
11 even I can be sure he would have died from the other two  
12 guys. But I think in that -- in that scenario we would  
13 certainly recognize that the -- that each of the  
14 assailants is responsible for the victim's death. We  
15 wouldn't say oh, well, he --

16 JUSTICE KAGAN: It's a bad sign that you're  
17 using the hypotheticals rather than the facts of your  
18 case, you know? The facts of your case are that the  
19 expert gets on the stand and says: I can't tell you  
20 that the heroin was responsible for the death. I cannot  
21 tell you that in the absence of the heroin he wouldn't  
22 have died. What I can tell you is that the heroin  
23 was -- what I can do is to give you essentially a  
24 probability that the heroin caused the death.

25 And you're saying that's enough, even if the

1 probability is as small as 50 percent.

2 MR. HORWICH: I don't think -- the experts  
3 here did not testify in probability figures in that way.  
4 What they testified to was that -- was that the heroin  
5 contributed to the set of drugs that were responsible  
6 for the actual primary cause of death.

7 JUSTICE KAGAN: They said it contributed to  
8 the set of drugs, but they didn't say that it  
9 contributed to the death. They had no idea whether it  
10 contributed to the death. All that they were able to  
11 say is: There are five drugs; here are some  
12 probabilities; here are some likelihoods. If you don't  
13 like the probability language: Here is the likelihood.  
14 Using heroin made it more likely that he would die, but  
15 we can't say that using heroin killed him.

16 MR. HORWICH: That -- and it is that aspect  
17 of the testimony which is why we concede that if you  
18 apply a but-for test, that testimony does not establish  
19 a but-for test.

20 JUSTICE KAGAN: Well, how much more likely  
21 does it have to make it that he would die? 50 percent?

22 MR. HORWICH: It's not a --

23 JUSTICE KAGAN: How about 30 percent?

24 MR. HORWICH: The relevant question is in a  
25 contributing cause analysis, at least in the first

1 instance, setting aside the substantiality question that  
2 the Chief Justice's hypothetical raised, the basic  
3 question of the contributing cause analysis is whether  
4 the drug in a case like this contributed to the physio  
5 -- the internal physiological effects that culminated in  
6 the death.

7           And I would make a distinction here, for  
8 example. If you -- consider the marijuana in this case.  
9 The testimony here does not even establish the marijuana  
10 as being a contributing cause, because the  
11 toxicologists -- the toxicologist testifies -- this is  
12 at Joint Appendix 193, that the -- "Every drug on this  
13 list, with the exception of the constituents of  
14 marijuana, have central nervous system depressant  
15 effects," and then goes on to explain why it's those  
16 effects that are -- that's what's going on in the body  
17 that's leading to the death.

18           So again -- so we would agree that if you  
19 apply -- that if you insist on a but-for test, then,  
20 correct, these sort of probabilities don't get the  
21 government even to the jury. That's a directed verdict.

22           But I want to -- but I would like to point  
23 out though -- so I guess what I would like to discuss is  
24 why the but-for test is not the right test to be  
25 applying here.

1 JUSTICE ALITO: Before -- Mr. Horwich,  
2 before we leave this hypothetical --

3 MR. HORWICH: Yes.

4 JUSTICE ALITO: -- may me ask you this. If  
5 I were a member of a legislative body considering what I  
6 would want to happen in this situation -- it's kind of a  
7 frightening thought. But if that were, I would want to  
8 know what kind of testimony medical experts can  
9 reasonable be expected to provide in cases like this,  
10 where there is the ingestion of multiple drugs. If it  
11 is possible in most cases, many cases, all cases, a high  
12 percentage of cases, for them to break this down  
13 probabilistically, there was a 50 -- this made it  
14 50 percent more likely, 90 percent more likely,  
15 10 percent more likely, I might want to go down that  
16 road. But if it's not reasonable in a lot of these  
17 cases to go further than what the experts did in this  
18 case, that would make a difference.

19 Now, can you tell us what, realistically,  
20 can they do in these cases where there is the ingestion  
21 of multiple drugs and the consequence is death?

22 MR. HORWICH: I -- I can't represent to be  
23 informed enough about sort of the range of cases, but I  
24 think the testimony in this case is actually informative  
25 on that point, because there are a number of

1     uncertainties to which the -- the -- the experts  
2     testified that show why it is, from -- why it is, from  
3     their point of view, essentially impossible to  
4     disentangle the effect of one drug and another drug when  
5     they're having the same effect on the body.  They're  
6     doing the same thing to the -- the victim's central  
7     nervous system.

8                     And so, it is -- it's the sort of thing that  
9     it's meaningless to speak of one drug versus the other  
10    as being "the cause," because they're all in the body,  
11    they're all doing the same thing in the same way that --

12                    JUSTICE SCALIA:  So Congress -- Congress  
13    supposedly knew that and -- and could have written a  
14    statute so that you're -- you're liable if you are a  
15    contributing cause of -- of the death.  It didn't do so.  
16    It said -- it says it has to result in the death.  
17    And -- and I take that to mean at least, at least  
18    but-for causality.

19                    MR. HORWICH:  Well, we -- we --

20                    JUSTICE SCALIA:  Why -- why should "result  
21    in" not -- not mean but-for causality?

22                    MR. HORWICH:  Well, we -- we would take  
23    Congress to have been incorporating the rules settled on  
24    generally in the criminal context --

25                    JUSTICE SCALIA:  Why?

1 MR. HORWICH: -- for this sort of problem.

2 JUSTICE SCALIA: Why -- why does "result in"  
3 refer -- refer to what -- what we do in the common law?  
4 I mean, I apply common law rules when -- when Congress  
5 adopts a common law crime, yes. It -- it brings along  
6 the -- the soil that goes with that crime, right? But  
7 this is not a common law crime, and -- and Congress used  
8 the English language "results in," and I would take that  
9 to mean causes.

10 MR. HORWICH: Well, we do take it to mean  
11 causes. But courts applying the concept of cause -- so  
12 that's why we think that Congress would be intending to  
13 borrow courts' approaches to causation in common law  
14 cases. And I think there's a key insight in those  
15 cases. Now, we cite a number of them going back 100,  
16 120 years in our -- in our brief at pages 19 and 20, 21,  
17 25 and 26.

18 And the key insight in those cases, which I  
19 think Justice Sotomayor touched on, which is that if  
20 your test for causation, say a but-for test, is  
21 producing a result in a case that nothing and nobody was  
22 the cause of the victim's death, you need to rethink  
23 your test for causation. It's not producing sound  
24 results.

25 JUSTICE BREYER: I accept that.

1           MR. HORWICH: And so, Justice Breyer, that's  
2 what's going on in -- in the treatises that then say,  
3 well, in these other cases, we're going to -- we're  
4 going to say, well, these independently sufficient  
5 tests, that applies as well.

6           JUSTICE BREYER: Well, here -- here I  
7 accept that -- first of all, there's no problem with  
8 intent for me for the reason Justice Scalia pointed out,  
9 that anyone who sells heroin to someone is reckless, at  
10 least, in respect to the possibility of a death  
11 resulting. So I think that's enough to bring them  
12 within the intent problem. Also, there was a death  
13 here; fine. But still you have to show cause.

14           And this is this unusual situation, which  
15 the Brown Commission expresses itself upon and which the  
16 model Penal Code didn't.

17           MR. HORWICH: Well, I think --

18           JUSTICE BREYER: And the model Penal Code  
19 did express itself on what they call, in the Brown  
20 Commission, concurrent causes, all right? It has to be  
21 a but-for or a concurrent cause. But a concurrent cause  
22 is the situation where there are two people striking a  
23 mortal blow. Therefore, either is sufficient. And if,  
24 in fact, the second wasn't sufficient, then the first is  
25 a necessary condition.

1 MR. HORWICH: Yes.

2 JUSTICE BREYER: All right? So here we have  
3 the separate problem which has been pointed out that not  
4 only -- we don't know if the others were sufficient, nor  
5 do we know if this was a necessary condition. And Brown  
6 and 5 States tell you what to do in such situation to  
7 fall within the definition of cause. And the model  
8 Penal Code where you have Professor Wechsler debating  
9 Professor Hall with Dean Griswald throwing in the odd  
10 comment decided not to tell us its view. Okay?

11 So that's where I stand. And you can  
12 correct that if you want, but I'm beginning to think  
13 that probably, at least it should be important in such a  
14 situation, and that the word "substantial" better  
15 connotes the idea of it being an important factor than  
16 the word "contributing," which means picks up all kinds  
17 of quite unimportant factors. That's where my thinking  
18 is, and anything -- I just say that in case you want to  
19 respond to that.

20 MR. HORWICH: I do. I have, I think, two  
21 very important things to say in response to that. One  
22 of them is, as -- as I was sort of suggesting with the  
23 Chief Justice, if the dispute is over whether it should  
24 be a substantial contributing cause, then I think we're  
25 happy to argue that the jury instruction gets in that

1 direction, and at a minimum, there's harmless error  
2 here. So --

3 JUSTICE SCALIA: It depends on what you mean  
4 by substantial.

5 MR. HORWICH: Well, I think --

6 JUSTICE SCALIA: Opposing counsel says  
7 substantial means that it would independently have  
8 sufficed.

9 MR. HORWICH: Well, I think -- I think  
10 that's right.

11 JUSTICE SCALIA: If that's what you mean by  
12 it, we'll all cheer. But -- but I suspect that's not  
13 what you mean.

14 MR. HORWICH: Well, it's not what -- it's  
15 not what we mean --

16 JUSTICE SCALIA: That's not what was found  
17 in this case, right?

18 MR. HORWICH: Well, I would point out -- I  
19 would point out that -- I mean, I'm reading from the  
20 Washington State Christman decision, which is the only  
21 decision that the parties have cited that's actually --  
22 factually deals with this scenario and it says, "Under  
23 the substantial factor test, all parties whose actions  
24 contributed to the outcome are held liable." So I think  
25 that's -- that's very much in line with what we're

1 saying.

2 I'd also say that the Brown Commission and  
3 those --

4 JUSTICE SCALIA: That -- that's what you  
5 call a substantial factor? That all contributed to the  
6 outcome? The one grain of heroin would -- would --

7 MR. HORWICH: No, because we think it  
8 does -- we think it does have to be substantial. I  
9 think that's -- that's why the word "substantial" --

10 JUSTICE SCALIA: Well, then -- then you  
11 don't agree with that -- that stuff that you just read  
12 point.

13 MR. HORWICH: Well, all parties whose  
14 actions substantially contributed to the outcome.

15 JUSTICE KENNEDY: So then you -- you're  
16 saying that the government's position is that  
17 contributing factor should be a substantial contributing  
18 factor; you're happy with that.

19 MR. HORWICH: I think -- I think we would  
20 not -- we wouldn't have an objection if the Court states  
21 that as the law. Now, if the Court does that, it would  
22 be appropriate, I suppose, to ask the court of appeals  
23 to examine the record here.

24 JUSTICE SCALIA: Well, what is substantial?  
25 What do you think is substantial? 10 percent,

1 20 percent --

2 MR. HORWICH: Well, I think substantial --

3 JUSTICE SCALIA: 5 percent, what?

4 MR. HORWICH: -- substantial -- I wouldn't

5 put it -- well, I would put it in relative terms, right?

6 The question would be: Is this cause substantial

7 relative to what? Well, relative to the other causes at

8 issue. And we have here overwhelming testimony that the

9 heroin --

10 JUSTICE KAGAN: So is that the question?

11 Is -- in other words, is the heroin more likely to have

12 caused the death than the cocaine, than the marijuana,

13 than the sleeping pills? So we can't really say that

14 the heroin caused the death, but it's more likely to

15 have caused the death than anything else he took? Is

16 that the -- is that the question?

17 MR. HORWICH: Well, we know that it can --

18 we know two things; one, it causally contributed in a

19 way that, say, the marijuana did not contribute to what

20 the experts are testifying was the physiological

21 process. And two --

22 JUSTICE KAGAN: But -- but maybe not to the

23 death.

24 MR. HORWICH: -- of the things that

25 contributed to that, we would agree that the

1 insubstantial, the one pill out of a thousand  
2 hypothetical, would certainly not be substantial. How  
3 substantial, I guess, is going to be very fact-specific.  
4 Here it's --

5 JUSTICE KAGAN: And is the one question  
6 is -- is how this all relates to the "beyond a  
7 reasonable doubt" instruction in criminal cases? I  
8 mean, the idea of a test which focuses in the way yours  
9 does on probabilities and likelihoods, and then we go  
10 tell the jury, find beyond a reasonable doubt that this  
11 was more likely to have caused the death than anything  
12 else, or find beyond a reasonable doubt that this  
13 increased the likelihood of death by 50 percent.

14 I mean, that seems a very odd kind of  
15 question for a jury to consider, but that's exactly what  
16 you would be asking a jury to consider.

17 MR. HORWICH: I disagree with that. Because  
18 what we're asking the jury to decide is beyond a  
19 reasonable doubt, did this drug have the physiological  
20 effects that the medical examiners described as being  
21 the integral process that resulted in death.

22 JUSTICE KAGAN: But the statute -- the  
23 statute says did it result in death. It did not -- the  
24 statute does not say -- does not criminalize a drug that  
25 has physiological effects. It criminalizes a drug when

1 it results in death. And you can't say anything about  
2 resulting in death except as -- except by reference to  
3 probabilities and likelihoods.

4 MR. HORWICH: I -- I think that there is  
5 going to be testimony about probabilities and  
6 likelihoods that will inform the substantiality  
7 question, but it's not a question of likelihood that  
8 it -- that it contributed to the central nervous system  
9 depression that killed the victim here. That -- that is  
10 unequivocal in the testimony.

11 CHIEF JUSTICE ROBERTS: If you wanted to  
12 incorporate in the statute your friend's understanding  
13 of but-for cause, what word would you use that would be  
14 better than "results"?

15 MR. HORWICH: Well, I would -- you could use  
16 but for or accept.

17 CHIEF JUSTICE ROBERTS: Well, I know. But  
18 you want -- you want a word that's going to be readily  
19 understandable.

20 MR. HORWICH: Or solely. I guess I would  
21 refer the Court to the -- the jury instructions that  
22 Petitioner proposed here, which are on 238, which say  
23 that, that the -- the proximate cause must be one that  
24 except for the cause the death would not have occurred.  
25 That's the instructions that are proposed there.

1                   And our point is that the insight in -- in  
2 these sources, it's an insight that's in the Brown  
3 Commission report, it's an insight that's in the  
4 numerous cases we have cited going back, is that that is  
5 not the only test that is used.

6                   CHIEF JUSTICE ROBERTS: Mr. Horwich, just if  
7 I could get back, that is the instruction on proximate  
8 cause.

9                   MR. HORWICH: Well --

10                  CHIEF JUSTICE ROBERTS: What about the  
11 but-for cause?

12                  MR. HORWICH: Well, the way they are  
13 structured for -- in Petitioner's submission, it's --  
14 it's sort of built into the proximate cause instruction.  
15 They weren't separated in the way Petitioner did it. So  
16 there's -- the first part of the second sentence on 238,  
17 the "direct result or reasonably probable consequence"  
18 gets at what we would more conventionally describe as  
19 proximate cause. But the second part is classic  
20 causation in fact: "Except for the cause the death  
21 would not have occurred." So what Petitioner here is  
22 trying to defend is a test that produces --

23                  JUSTICE BREYER: No, but it doesn't say --  
24 the one they quote in their brief, all they wanted the  
25 judge to say was it could be -- they say, you are right,

1 proximate cause, but they're interested here in is it a  
2 cause at all. And they say: "As long as the subject  
3 cause contributes substantially to producing the death."  
4 That's what they wanted him to say. And he didn't say  
5 it.

6 And actually when I read that, I thought,  
7 well, what they want is to say that it's an important  
8 factor, rather than just saying it's some unimportant  
9 factor. And they seem, I don't know what these words  
10 really mean, but it seems they are closer to what you're  
11 saying should be the law than you are.

12 MR. HORWICH: That is a convenient excerpt  
13 from the instruction on 238, but the other part of the  
14 instruction insists that except for the cause the death  
15 would not have occurred. So --

16 JUSTICE SCALIA: I agree with you the  
17 language -- their position now is not that it's enough  
18 that it's an important factor. Rather, and I would like  
19 to know your view on this, your opposing counsel  
20 contends that the courts and commentators who use the  
21 "substantial factor" terminology mean by "a substantial  
22 factor" a factor that would by itself have been  
23 sufficient.

24 MR. HORWICH: Well, certainly, certainly  
25 they can pull up cases that say that. But what I would

1 emphasize for this Court is that in four briefs to this  
2 Court Petitioner has not cited a single case that does  
3 what he's asking this Court to do, which is reject a  
4 contributing cause approach and exonerate him under a  
5 but-for test that applied to this case would lead to the  
6 conclusion that nothing and nobody caused the victim to  
7 die here.

8 CHIEF JUSTICE ROBERTS: Just to get back to  
9 it, you were reading from the proximate cause  
10 instruction. They've got -- the very next instruction  
11 says: You have to find that he died as a result of  
12 using the heroin distributed by the defendant. So I  
13 think it's a little unfair to suggest that they were  
14 willing to go with the same concept of cause that you  
15 were proposing.

16 MR. HORWICH: Well, we wouldn't -- we don't  
17 disagree that a court could just use the unadorned  
18 statutory language. That -- that -- that would not be  
19 error to do so. Our point is only -- our point is only  
20 that a contributing cause, as these courts have  
21 recognized for a long time, can be a cause in fact,  
22 particularly in these scenarios where otherwise they are  
23 going to conclude there was no cause at all.

24 JUSTICE BREYER: What do you want us to say?  
25 You know what's actually worrying me about this case?

1 It took quite a long time, and there are like three  
2 levels of complexity, and we are from but for into  
3 concurrent and then the sufficient condition and the  
4 necessary condition. And we are trying to argue whether  
5 this thing that the Model Penal Code wouldn't even pick  
6 up in Brown ought to be the Federal law of the United  
7 States.

8           And Professor Wechsler's reaction was:  
9 Look, this is -- this going to arise so infrequently,  
10 it's so complicated to talk about, that you are going to  
11 mix everybody up once we start to write on this.

12           And that is worrying me as a real problem.  
13 Once I start to write in this area, we are going to get  
14 people so mixed up no matter what we say --

15           MR. HORWICH: Well, I think the Court --

16           JUSTICE BREYER: -- that I hesitate to go  
17 backwards from the very vague and open language,  
18 substantive, substantial versus contributing, and just  
19 sort of why not just say substantial and leave it there  
20 and let the lower courts figure it out, so we don't  
21 confuse the entire bar and the entire Congress and  
22 everything.

23           MR. HORWICH: Yes. If Your Honor is  
24 concerned about that --

25           JUSTICE BREYER: I am.

1 MR. HORWICH: -- I think you could write a  
2 decision that says the right instruction here is  
3 substantial factor. The test -- the cause does not have  
4 to be a but-for test, but we are not going to go on to  
5 define "substantial factor."

6 JUSTICE SCALIA: Because of that  
7 imprecision, some poor devils will have to go to jail  
8 for a longer period than otherwise, you know. Tough  
9 luck.

10 MR. HORWICH: Well, I this isn't -- I think  
11 this isn't something that would catch Congress by  
12 surprise. The problem of multiple drug use is a well  
13 recognized situation.

14 If I might turn to foreseeability.

15 JUSTICE KAGAN: Mr. Horwich, I just don't  
16 understand what "substantial factor" means in the way  
17 you are using it. I understand what Ms. Campbell said,  
18 because she said "substantial factor" just means  
19 independently sufficient. But you are saying  
20 "substantial factor" can mean more than that, but it  
21 doesn't have to mean a but-for cause. How is something  
22 that is a substantial factor in a death without their  
23 being able to say that it was a but-for cause of the  
24 death?

25 MR. HORWICH: The situations that we're

1 talking about here are ones in which nothing would be a  
2 for cause of the death and nothing would be  
3 independently sufficient to cause the death. So in some  
4 sense --

5 JUSTICE KAGAN: So it's not a substantial  
6 factor in causing the death, because that assumes that  
7 it actually played a role in causing the death and you  
8 can't say whether it played a role in causing the death.  
9 That's what creates this problem.

10 MR. HORWICH: I disagree with that. It  
11 absolutely played a role in causing it. That's exactly  
12 what the toxicologist --

13 JUSTICE KAGAN: In the sense of if it hadn't  
14 been there, the death would not have occurred.

15 MR. HORWICH: That's true.

16 JUSTICE KAGAN: You can't say that, that's  
17 the point.

18 MR. HORWICH: Well, that's true, but I don't  
19 think, to take my example of the assailants, the three  
20 assailants beating the victim to death, I think it would  
21 be very strange to say that none of those assailants  
22 played a role in the victim dying, none of them  
23 contributed to the victim dying. That seems -- that  
24 seems to be contrary to ordinary usage and ordinary  
25 intuitions about cause and effect.

1                   Now, I agree in this situation because we  
2 are talking about something that happens at a molecular  
3 level, it's perhaps less -- it's less part of common  
4 experience and we have to rely on the doctors. But what  
5 they are saying is no different than saying that he had  
6 three drugs in there and they were each knocking him  
7 down to a state of unable to -- to repress his gag  
8 reflex, essentially.

9                   CHIEF JUSTICE ROBERTS: The problem with  
10 your hypothetical, it's the sort of thing where there's  
11 no way that a doctor could say three people beat the guy  
12 up, which one threw the fatal punch. But here we have a  
13 situation where the experts could tell you: Yes, the  
14 heroin alone would have killed him. Or, as in this  
15 case, I can't tell you the heroin alone would have  
16 killed him.

17                   MR. HORWICH: Yes, I think that's right, but  
18 I can imagine a doctor similarly testifying in the three  
19 assailants situation to exactly that point. I can't  
20 tell you which is the fatal punch, precisely. I agree  
21 with that.

22                   CHIEF JUSTICE ROBERTS: But if you can't put  
23 -- but my point is that they would not be able to tell  
24 you in any case, where here they can tell you in every  
25 case whether it's clear that the heroin caused the death

1 or not.

2 MR. HORWICH: That may be true, but there  
3 will be cases in which no single drug caused the death  
4 and yet the victim died. That's what produces the  
5 problem here.

6 CHIEF JUSTICE ROBERTS: Right. But this  
7 statute does not say if you die from taking drugs, then  
8 the person who gave you drugs, who gave you any kind of  
9 drug is responsible. It says the heroin has to result,  
10 death has to result from the heroin.

11 MR. HORWICH: It does. And I think it's  
12 ordinarily -- I think it's an ordinary usage of language  
13 to describe this as resulting from the heroin and some  
14 other things, too. But the testimony is certainly to  
15 the effect that it resulted from the heroin.

16 JUSTICE KENNEDY: What result if a heroin  
17 dealer persuades a first time user to please try heroin,  
18 it's wonderful. He does. Three days later the addict,  
19 the new addict, the new user buys heroin from a  
20 different dealer and overdoses and dies? Does the first  
21 dealer contribute, is a substantial contributing cause?

22 MR. HORWICH: Contributing cause there? I  
23 guess -- I guess I would need to know more medically. I  
24 suspect that yes.

25 JUSTICE KENNEDY: No, no. The heroin has

1 disappeared, but he has become addicted.

2 MR. HORWICH: Okay. So he's become  
3 addicted. I think possibly yes. I am skeptical that  
4 that would be a substantial contributing cause. And  
5 then there would be -- there would be in our view  
6 questions about proximate cause that would be raised in  
7 that situation as well.

8 CHIEF JUSTICE ROBERTS: What about you give  
9 the guy a heroin and he drives away, but as a result of  
10 using it he's driving under the influence, has an  
11 accident and is killed? Is that -- does his death  
12 result from the heroin in that case?

13 MR. HORWICH: We think in that situation,  
14 certainly factually, causation in fact, it does. In  
15 that situation we are lying farther away from the  
16 central harms that the Controlled Substances Act is  
17 addressing, and so we think you would get into some sort  
18 of proximate cause inquiry there as well, that you  
19 wouldn't here.

20 JUSTICE SOTOMAYOR: I'm sorry. Now I'm  
21 really confused. I thought you were pointing the  
22 causation, the factual causation, into proximate cause.  
23 You are saying there's a difference. So what do you  
24 think gets folded into proximate cause?

25 MR. HORWICH: So in proximate cause, our

1 basic point on proximate cause in an overdose situation  
2 is that you already have the indicia you need to know  
3 that this is the harm for which Congress wants to hold  
4 the defendant responsible. In the Chief Justice's --

5 JUSTICE SOTOMAYOR: In one other case --  
6 there has been one other case, but you are suggesting  
7 that there are cases in which there might be a proximate  
8 cause problem, you just --

9 MR. HORWICH: Absolutely.

10 JUSTICE SOTOMAYOR: -- as you just said to  
11 Justice Kennedy. In what other case have we said that  
12 you don't have to charge a jury on an element of the  
13 crime on proximate causation? Is there any in which we  
14 have ever said that?

15 MR. HORWICH: Well, I -- I have to  
16 disagree with --

17 JUSTICE SOTOMAYOR: Because in -- in the  
18 vast majority of cases, it won't be a problem.

19 MR. HORWICH: I guess I have to -- I guess  
20 my answer to your hypothetical has to be to disagree  
21 with the idea that this is an element. We're not  
22 dispensing with an element. The element is that a death  
23 resulted. The question is how, in a particular case,  
24 should a district judge explicate the scope of harms for  
25 which defendants should be held responsible?

1           And sometimes you can do that with a  
2   foreseeability instruction. Sometimes you might do it  
3   with an intervening or superseding cause instruction or  
4   other proximate cause concepts.

5           But in a case where you know there's an  
6   overdose at issue, and we're talking about heroin here,  
7   which is controlled, in large part, precisely because it  
8   kills people --

9           JUSTICE SOTOMAYOR: So foreseeability --

10          MR. HORWICH: -- you don't need --

11          JUSTICE SOTOMAYOR: -- is an element in only  
12   some ways of killing people, in which some people die.

13          MR. HORWICH: It is necessary to instruct on  
14   it if we're in a situation where we're worried about  
15   consequences running out to infinity. That's the usual  
16   concern, the Palsgraf-type concern about foreseeability,  
17   but this is not running out to infinity. This is  
18   just --

19          JUSTICE SOTOMAYOR: You know, I'm having a  
20   really hard time because of Paroline, where you  
21   basically admit that proximate cause, i.e.,  
22   foreseeability, because I see them --

23          MR. HORWICH: Yes.

24          JUSTICE SOTOMAYOR: -- as almost  
25   interchangeable, is almost always to be charged, is

1 almost always an element that is required when you have  
2 a -- results from --

3 MR. HORWICH: Yes. To be clear, we're not  
4 saying there's no proximate cause requirement. We're  
5 saying that there is a sufficient assurance that the  
6 function of proximate cause, of limiting defendant's  
7 responsibility to the matters about which Congress is  
8 concerned, is served in an overdose case when you know  
9 that you have a substance that is controlled in large  
10 part because of precisely this risk, that then it causes  
11 exactly that harm.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Ms. Campbell, you have three minutes  
14 remaining.

15 REBUTTAL ARGUMENT OF ANGELA L. CAMPBELL,

16 APPOINTED BY THIS COURT,

17 ON BEHALF OF THE PETITIONER

18 MS. CAMPBELL: It's our position that  
19 but-for cause is the first question, and only when you  
20 reach a point where there is no but-for cause do you  
21 then go on to say, is this one of these circumstances  
22 where there is a -- two independently sufficient harms.  
23 If no, end of question, which was the motion for  
24 judgment of acquittal at the time of trial. There was  
25 no but-for cause. We made the motion for judgment of

1 acquittal on but-for cause. You don't need to make that  
2 inquiry in this particular case. There may be cases  
3 where you make that inquiry.

4 Of course, we didn't win, so we had to keep  
5 going along, and we asked for a substantial factor test  
6 because we thought maybe we could influence the judge to  
7 give us a better instruction, like the substantial  
8 factor test that the Eighth Circuit had already  
9 approved, and he rejected it and gave them a  
10 contributing cause instruction, which is clearly not  
11 encompassed within the common law standards of  
12 causation. But-for cause is substantial factor.

13 Now, to address the concerns about letting  
14 defendants go free, that just simply doesn't play a part  
15 in this analysis. Every criminal defendant in any of  
16 these hypotheticals would have some sort of criminal  
17 liability, either a lesser included offense. This  
18 particular defendant, Mr. Burrage, could go to prison  
19 for 20 years for the lesser included offense. You have  
20 accomplice liability. You have conspiracy. You have  
21 attempt.

22 All of these individuals are going to be  
23 punished. You have sentencing discretion. The judge  
24 can look at the fact that there was a death -- well,  
25 maybe not a primary cause in the death -- there was a

1 death, and enhance the sentence under the -- beyond the  
2 guideline range.

3 All of those concerns are already addressed  
4 in the criminal law, and we do not need to change the  
5 criminal law of causation and relax it to encompass more  
6 harms. Because if we aren't willing to do that in a  
7 civil context where you have contributing negligence and  
8 shifting of burdens of -- shifting of the costs in  
9 having -- your hypothetical, you have different  
10 percentages' likelihood of causing the harm. So maybe  
11 you give 5 percent to the marijuana dealer and  
12 10 percent to the oxycodone dealer and 20 percent to the  
13 heroin dealer. We don't have that in criminal law.  
14 That's a -- that's a policy consideration that is  
15 different between civil law and criminal law.

16 In criminal law, the person's going to go to  
17 prison under a mandatory minimum sentence, and in some  
18 cases for life with no parole based on this relaxed  
19 causation standard that the government is asking this  
20 Court to incorporate into a statute where it doesn't say  
21 it.

22 And so we would respectfully ask for the  
23 Court not to engage in that process, not to relax  
24 causation for the criminal -- criminal statute at play  
25 here and in all of the criminal statutes that use

1 "result in," and instead rely upon the general notions  
2 of causation that are already established in the law.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 11:58 a.m. the case in the  
7 above-entitled matter was submitted.)

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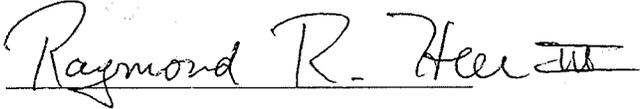
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: MARCUS ANDREW BURRAGE, Petitioner, v. UNITED STATES; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, written over a horizontal line.

REPORTER