

# **UNDERSTANDING AND CHALLENGING THE LAW: PENNSYLVANIA AND FEDERAL DRUG DELIVERY RESULTING IN DEATH (DDRD) STATUTES DECODED**

## Presenters:

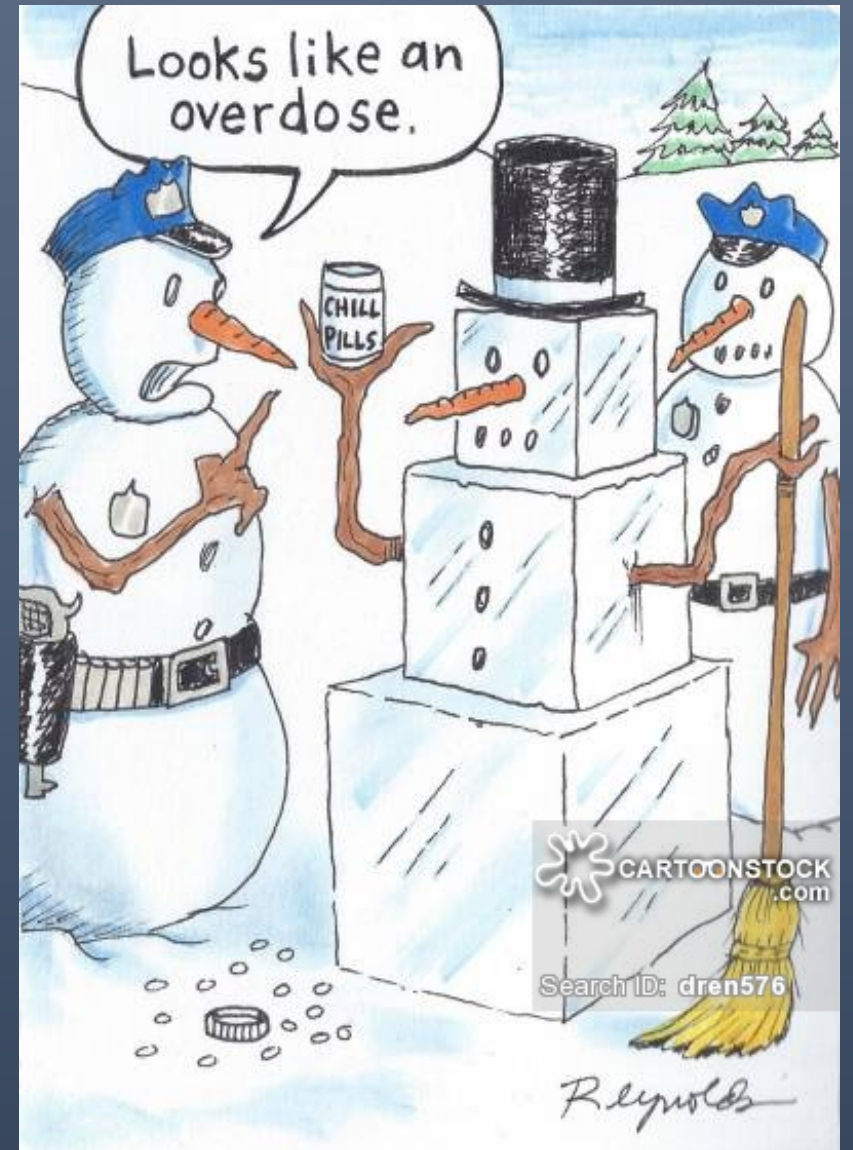
- Brian McNeil, Appellate Public Defender and Intern Coordinator, York County (PA) Public Defender's Office
- Andrea Harris, Assistant Federal Public Defender, Western District of Virginia

# Understanding & Challenging the Law: Pennsylvania and Federal DDRD Statutes Decoded

November 6, 2019

Brian McNeil, Public Defender, Appellate Unit, York Co. Public Defender  
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# Attempt at Overdose Humor?



# The Federal Part



# Most Commonly Used Federal Drug Statutes

Statutory Provisions	Penalty	Enhanced Penalty for Death/SBI
21 USC § 841(b)(1)(A)  21 USC § 960(b)(1)	<ul style="list-style-type: none"> <li>▪ 10 years to Life</li> <li>▪ With one 851, 15-Life</li> <li>▪ With two 851s, 25-Life</li> </ul>	<ul style="list-style-type: none"> <li>▪ 20 years to Life</li> <li>▪ With 851, Life</li> </ul>
21 USC § 841(b)(1)(B)  21 USC § 960(b)(2)	<ul style="list-style-type: none"> <li>▪ 5-40 years</li> <li>▪ With 851, 10-Life</li> </ul>	<ul style="list-style-type: none"> <li>▪ 20 years to Life</li> <li>▪ With 851, Life</li> </ul>
21 USC § 841(b)(1)(C)  21 USC § 960(b)(3)	<ul style="list-style-type: none"> <li>▪ 0-20 years</li> <li>▪ With 851, 0-30 years</li> </ul>	<ul style="list-style-type: none"> <li>▪ 20 years to Life</li> <li>▪ With 851, Life</li> </ul>
21 USC § 841(b)(1)(E)	<ul style="list-style-type: none"> <li>▪ 0-10 years</li> <li>▪ With 851, 0-20 years</li> </ul>	<ul style="list-style-type: none"> <li>▪ 0-15 years</li> <li>▪ With 851, 0-30 years</li> </ul>

# Elements – 21 USC § 841

- Knowingly and intentionally
- Manufacture, distribute, or dispense or possess with intent to do so
- Controlled substance
- Quantity
- Enhanced sentence if **death** or **serious bodily injury** results from the use of such substance

# SBI = Serious Bodily Injury

Statutory Definition 21 U.S.C. § 802(25)

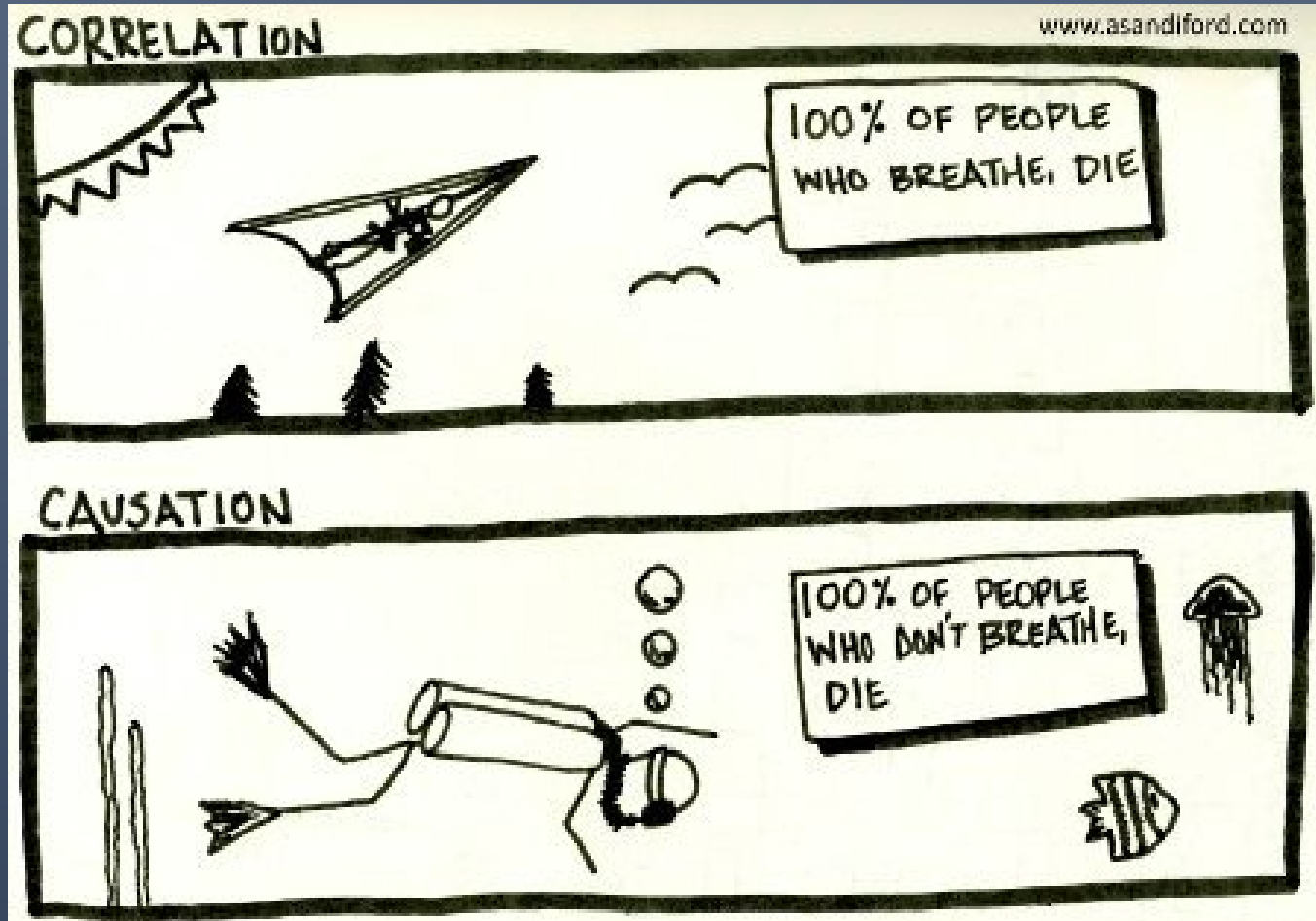
- Substantial risk of death
- Protracted or obvious disfigurement
- Protracted loss or impairment of the function of a bodily member, organ or mental faculty

# Burrage v. United States

134 S.Ct. 881 (2014)



# Burrage and Causation



“[A]t least where the 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 .. unless such use is a but-for cause of the death or injury.”

# Actual Cause

Amount Required to Kill



Amount Victim Took



Amount Defendant Distributed



# But-For Cause

Amount Required to Kill



Amount Victim Took



Amount Defendant Distributed



# Independently Sufficient Cause

Amount Required to Kill



Amount Victim Took



Amount Defendant Distributed



“The 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.”

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

FILED IN OPEN COURT  
DATE 5/15/13  
BY K. Dotson  
DEPUTY CLERK  
HARRISONBURG DIVISION, W.D. of VA

CASE NUMBER: 5:12cr00030-001

CASE NAME: USA v. Jean Paul Alvarado

We have a question regarding whether "death  
resulted from the use of heroin" means solely  
from the use of  
heroin or that heroin

contributed to his We have a question regarding whether "death  
Language from "resulted from the use of heroin" means solely  
from the use of heroin, or that heroin  
contributed to his death?"

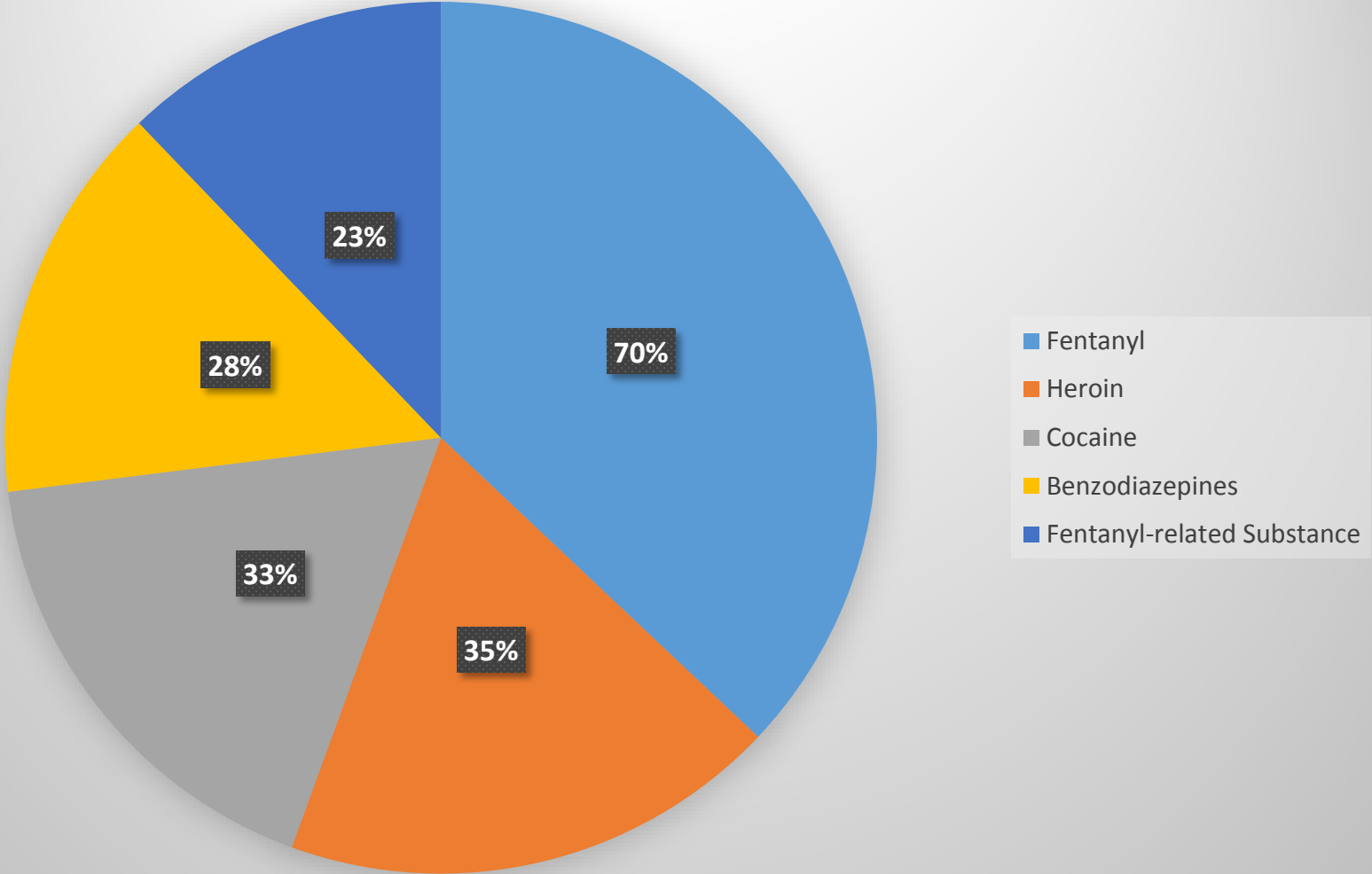
Juror Number: K. Mopolis Date: 5/15/2013 Time: 10:25

For Court Use Only:

Rev'd by: K. Dotson, Date: 5/15/2013 Time: 10:25 p.m.  
deputy clerk

Date Filed 5/15/2013

# 2018 Overdose Deaths in Pennsylvania – 4,491 Deaths





# Legal Cause = Undecided Question in *Burrage*

Second Question Presented:

Whether crime of distribution of drugs causing death under 21 USC § 841 is a strict liability crime, without a foreseeability or proximate cause requirement?

Not decided by the Supreme Court

*United States v. Robinson*, 167 F3d 824 (3<sup>rd</sup> Cir. 1999)

- Congress' language is "plain and unambiguous" and does not require proof that Defendant knew or should have known death would result
- "Congress recognized that risk of death or serious bodily injury is inherent in product and thus it provided that persons who distribute it do so at their peril"

# Joint Possessor Defense

- *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977)
- H: when two people “**simultaneously** and **jointly** acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse – simple joint possession, without any intent to distribute the drug further”
- Many courts only allow if both parties present when drug acquired

# Charge Bargaining






Office of the Attorney General  
Washington, D. C. 20530

March 20, 2018

MEMORANDUM TO UNITED STATES ATTORNEYS

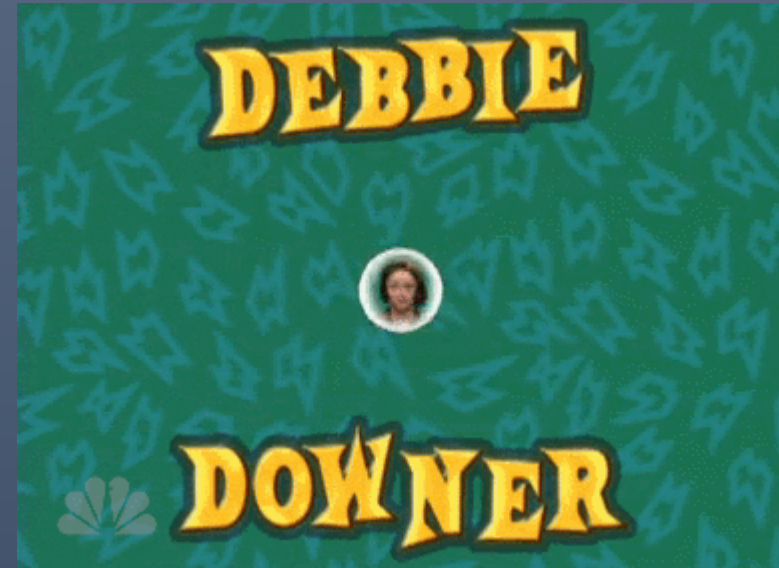
FROM: THE ATTORNEY GENERAL 

SUBJECT: Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions

The opioid epidemic has inflicted an unprecedented toll of addiction, suffering, and death on communities throughout our nation. Drug overdoses, including overdoses caused by the lethal substance fentanyl and its analogues, killed more than 64,000 Americans in 2016 and now rank as the leading cause of death for Americans under 50. In the face of all of this death, we cannot continue with business as usual.

Drug traffickers, transnational criminal organizations, and violent street gangs all contribute substantially to this scourge. To combat this deadly epidemic, federal prosecutors must consider every lawful tool at their disposal. This includes designating an opioid coordinator in every district, fully utilizing the data analysis of the Opioid Fraud and Abuse Detection Unit, as well as using criminal and civil remedies available under federal law to hold opioid manufacturers and distributors accountable for unlawful practices.

In addition, this should also include the pursuit of capital punishment in appropriate cases. Congress has passed several statutes that provide the Department with the ability to seek capital punishment for certain drug-related crimes. Among these are statutes that punish certain racketeering activities (18 U.S.C. § 1959); the use of a firearm resulting in death during a drug trafficking crime (18 U.S.C. § 924(j)); murder in furtherance of a continuing criminal enterprise (21 U.S.C. § 848(e)); and dealing in extremely large quantities of drugs (18 U.S.C. § 3591(b)(1)). I strongly encourage federal prosecutors to use these statutes, when appropriate, to aid in our continuing fight against drug trafficking and the destruction it causes in our nation.



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