

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

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Defending Drug Overdose Homicides in Pennsylvania
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I. Pennsylvania Drug Delivery Resulting In Death Statute

18 Pa. C.S.A. § 2506 (2014)

It is a felony of the first degree if a person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance ... and another person dies as a result of using the substance.

II. Federal Drug Statutes

A. Most commonly used federal drug statutes include the following:

- 21 USC § 841 Prohibits the manufacture, distribution or dispensing of, and possession with intent to do so, controlled substances.
- 21 USC § 846 Prohibits attempts and conspiracies to manufacture, distribute, dispense, or possess with intent to do so, controlled substances
- 21 USC § 952 Prohibits the importation of controlled substances
- 21 USC § 953 Prohibits the exportation of controlled substances
- 21 USC § 963 Prohibits attempts and conspiracies to import/export controlled substances.

The penalty structures for these and other drug crimes are set out in 21 USC § 841(b) and 21 U.S.C. § 960(b).

B. Sentencing Enhancements

The minimum and maximum statutory penalties are driven by the type and quantity of the drug involved, but may be increased if the defendant has a prior “serious drug felony” or “serious violent felony” pursuant to 21 USC § 851.

The minimum and maximum statutory penalties may also be increased if the offense involved “**death or serious bodily injury.**”

If “death or serious bodily injury results from the use of the substance,” the following enhanced penalties apply:

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

LITIGATION TIP: The sentence enhancement is an element of the offense that must be alleged in the Indictment.

C. Death or Serious Bodily Injury

“...if death or serious bodily injury results from the use of such substance...”

1. **Serious bodily injury**

- Defined in 21 U.S.C. 802(25)
- Means bodily injury which involves:
 - (A) A substantial risk of death;
 - (B) Protracted and obvious disfigurement; OR
 - (C) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

2. **Results from** is not defined

- Relates to Causation
- Means but/for causation; *See Burrage v. United States*

D. *Burrage v. United States*, 134 S.Ct. 881 (2014)

Supreme Court granted *certiorari* to address two questions related to the enhanced penalty provisions of 21 U.S.C. § 841(b)(1)(C) for distribution of drugs when “death results” from such distribution.

Questions Presented:

1. Whether a person can be convicted for distribution of heroin causing death when the heroin that was distributed “contributed to” death by “mixed drug intoxication” but was not the sole cause of death?
2. Whether the crime of distribution of drugs causing death under 21 USC § 841 is a strict liability crime, without a foreseeability or proximate cause requirement?

First question addresses **Actual Cause**.

Second question addresses **Legal/Proximate Cause**.

- “The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause.” *Burrage*, 134 S.Ct. at 887.
- “When a crime requires ‘not merely conduct but also a specified result of conduct,’ a defendant generally may not be convicted unless his conduct is ‘both (1) the actual cause, and (2) the ‘legal’ cause (often called ‘proximate cause’) of the result.” *Id.*
- These two categories roughly coincide with the two questions on which *certiorari* was granted.

1. Actual Cause = But/For Cause

Holding: “[A]t least 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 USC § 841[] unless such use is a but-for cause of the death or injury.” *Burrage v. United States*, 134 S.Ct. 881, 892 (2014)

- There must be proof “that the harm would not have occurred” in the absence of – that is, but for – the defendant’s conduct
- This is the *minimum* requirement for a finding of causation.
- **Contributing to the death** is not enough.
- 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

- Court did not address the rare scenario where multiple sufficient causes independently, but concurrently, produce a result. (i.e., A fatally stabs B at the same time X independently shoots B in the head)

LITIGATION TIP: **If multiple drugs involved, try to build argument that the drug distributed by client only contributed to the death or serious bodily injury.**

2. Legal Cause = Proximate Cause

- Supreme Court declined to answer the proximate cause issue presented in *Burrage* because it ruled in Mr. Burrage’s favor on the actual cause issue
- Supreme Court did discuss proximate cause in *Paroline v. United States*, 134 S.Ct. 1710 (2014)
- Only some actual causes – those with a “sufficient connection to the result” – are proximate causes
- Proximate cause is often explained in terms of **foreseeability** or the scope of the risk created by the predicate conduct
- See *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010) for extended discussion of causation.
- ***United States v. Patterson***, 38 F.3d 139 (4th Cir. 1994)
 - Held that plain language of § 841(b)(1)(C) does not require a finding that the death resulting from the distribution was a reasonably foreseeable event
 - Statute puts drugs dealers and users on notice that their sentence will be enhanced if people die from using the drugs they distribute
 - Affirmed most recently in ***United States v. Alvarado***, 816 F.3d 242 (4th Cir. 2016)
- ***United States v. Robinson***, 167 F.3d 824 (3rd Cir. 1999)
 - Third Circuit adopted the reasoning of *Patterson*, holding that Congress’ language is “plain and unambiguous” and does not require proof that the defendant knew or should have known that death would result
 - “Congress recognized that the risk [of death or serious bodily injury] is inherent in the product and thus it provided that persons who distribute it do so at their peril”
 - Recently considered favorably by Third Circuit in unpublished opinion of *United States v. O’Brien*, 738 Fed. Appx. 38 (3rd Cir. 2018).
- ***United States v. Harden***, 893 F.3d 434 (7th Cir. 2018)
 - Seventh Circuit adopts reasoning of *Patterson*, *Robinson*, and *Burkholder* that no proximate causation requirement because:

- Statutory language does not require proof of proximate cause and use of term “results from” rather than “cause” does not imply common law requirement of proximate cause
 - Policy of strict liability when death occurs fits the statutory language and its evident purpose due to the extremely hazardous nature of drug distribution
 - In fn 1, 7CCA notes that *Hatfield’s* discussion of proximate cause was dicta.
- ***United States v. Burkholder***, 816 F.3d 607 (10th Cir. 2016)
 - Question: whether jury must find that the victim’s death was a foreseeable result of the defendant’s drug-trafficking offense?
 - 2:1 decision holding that Section 841 required only proof of but-for causation and did not require showing of proximate causation (or foreseeability of the result).
 - **Dissent:** not convinced that “results from” language unambiguously reveals Congress’ intent to “forgo a proximate-cause requirement” and impose strict liability on criminal defendants
 - Cert. denied January 9, 2017
- Many circuits have interpreted identical “death results” language in other statutes to require not just actual causation but proximate causation
 - A few examples:
 - *United States v. Harris*, 701 F.2d 1095 (4th Cir. 1983)
 - 18 USC § 241 (conspiracy to violate civil rights) (“if death results” provision requires actual causation and proximate causation – that is, “death foreseeably and naturally results from the rights-violating conduct”)
 - *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979)(18 USC § 242)
 - *United States v. Marler*, 756 F.2d 206, 215-216 (1st Cir. 1985)(18 USC § 242)
 - *United States v. Martinez*, 588 F.3d 301, 317-18 (6th Cir. 2009)(18 USC § 1347)
 - *United States v. Spinney*, 795 F.2d 1410, 1415-16 (9th Cir. 1986)
 - *United States v. Woodley*, 136 F.3d 1399, 1405-06 (10th Cir. 1998) (18 USC § 245 violent interference with enjoyment of public facility based on race)
 - Also from the Third Circuit:
 - *United States v. Matusiewicz*, 165 F. Supp.3d 166 (D. Del. 2015)
 - Federal interstate stalking and cyberstalking case required proof that victim’s death was reasonably foreseeable result of the particular offense and that her death could be expected to follow as a natural consequence of the particular offense

LITIGATION TIP: Ask for a jury instruction on whether the death was a foreseeable result. Not likely to get one in the 3CCA but preserve the issue for appeal.

II. Federal Plea Negotiations/Sentencing Issues

A. Plea Agreements

1. Stipulation – United States Sentencing Guideline (USSG) § 1B1.2(c)

- A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- Better than conviction of greater offense because the defendant can at least argue for a sentence below the guideline range (and below 20 years) based on the § 3553(a) factors.

2. Standards for Acceptance of Plea Agreements – USSG § 6B1.2

- Court may accept agreement under Rule 11(c)(1)(B) or (C) if the court is satisfied either that:
 - The recommended/agreed sentence is within the applicable guideline range OR
 - (A) the recommended/agreed sentence is outside the applicable guideline range for justifiable reasons AND
 - (B) those reasons are set forth with specificity in the statement of reasons form

3. Sessions Memo – March 20, 2018

- Encourages prosecutors consider “every lawful tool at their disposal” and to pursue capital punishment “in appropriate cases” to combat the opioid epidemic.

B. Federal Sentencing Guideline Base Offense Levels:

Guideline	Base Offense Level	Applies If:
2D1.1(a)(1)	43	<ul style="list-style-type: none"> • Conviction under 21 USC § 841(b)(1)(A)-(C) or 21 USC § 960(b)(1)-(3) • Death or Serious Bodily Injury Resulted From Use • One or More Prior Convictions For Similar Offense
2D1.1(a)(2)	38	<ul style="list-style-type: none"> • Conviction under 21 USC § 841(b)(1)(A)-(C) or 21 USC § 960(b)(1)-(3) • Death or Serious Bodily Injury Resulted From Use

2D1.1(a)(3)	30	<ul style="list-style-type: none"> • Convicted under 21 USC § 841(b)(1)(E) or 21 USC 960(b)(5) • Death or Serious Bodily Injury Resulted From Use • One or More Prior Convictions For Similar Offense
2D1.1(a)(4)	26	<ul style="list-style-type: none"> • Convicted under 21 USC § 841(b)(1)(E) or 21 USC 960(b)(5) • Death or Serious Bodily Injury Resulted From Use

NOTE: USSG § 1B1.2(a): Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the **offense of conviction**.

1. Offense of conviction

- The U.S. Sentencing Commission’s view is that the “offense of conviction” language limits the application of these offense levels to cases where death or serious bodily injury is proved beyond a reasonable doubt by plea or to the factfinder. *See* USSG App. C, amend. 123 (effective Nov. 1, 1989) (“[t]he purpose of this amendment [limiting the application of §§ 2D1.1(a)(1), (a)(2)] is to provide that subsections (a)(1) and (a)(2) apply only in the case of a conviction under circumstances specified in the statutes cited”)¹
- Before *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the circuit courts applied *Apprendi* to solve the issue of whether the “offense of conviction” language limited the application of these enhancements to such cases or whether they may be applied after mere judicial fact finding. This resulted in a circuit split.
- After *Alleyne*, the Seventh Circuit held that “§2D1.1(a)(2) applies only when a resulting death (or serious bodily injury) was an element of the crime of conviction, proven beyond a reasonable doubt or admitted by the defendant. *United States v. Lawler*, 818 F.3d 281 (7th Cir. 2006).

2. Serious bodily injury

- Defined in **Comment 1(L) of USSG § 1B1.1**.
- Means injury involving:
 - Extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty;
 - Requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.

¹ Amendment 727 added § 2D1.1(a)(3)-(4) as a response to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub.L. 110-425. “[T]he amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance.” The Amendment effective date was November 1, 2009.

- Also deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.
- This **definition differs from the statutory definition** under 21 U.S.C. § 802(25).
 - **Similar:** both apply to protracted impairment of the function of a bodily member, organ, or mental faculty
 - **Different:** substantial risk of death vs. extreme physical pain or requiring medical intervention
- Courts have not addressed whether the “serious bodily injury” enhancement under USSG § 2D1.1(a)(1)-(4) is triggered by the guidelines definition or the statutory definition.
- However, one court noted in an unpublished opinion that the Supreme Court has held a statutory definition should be given preference over a general guideline definition. *See United States v. Alvarez*, 165 F.App’x 707, 708-09 (11th Cir. 2006) (citing *United States v. LaBonte*, 520 U.S. 751, 757 (1997), and *Stinson v. United States*, 508 U.S. 36, 38 (1993), for the propositions that the guidelines “must bow to the specific directives of Congress,” and “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute,” respectively).

LITIGATION TIP: **In federal court, it is often in the client’s best interest to negotiate a plea agreement that allows him to plead to the lesser included offense of simple distribution even if he has to stipulate to the higher base offense level since it at least allows for an argument for a sentence below 20 years.**

C. Federal Sentencing

1. Grounds for Departure (Policy Statement) – USSG § 5K2.1 Death

- If death resulted, the court may increase the sentence above the authorized guideline range.
- Loss of life does not automatically suggest a sentence at or near the statutory maximum.
- The sentencing judge must give consideration to matters that normally would distinguish among levels of homicide, such as the defendant’s state of mind and the degree of planning or preparation.
- Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken.

- The extent of the increase should depend on the dangerousness of the defendant’s conduct, the extent to which death or serious bodily injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the Chapter Two guidelines, already reflects the risk of personal injury.
- For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.
- *United States v. Nossan*, 647 F.3d 822, 824 (8th Cir. 2011) (5K2.1 departure to 60-month sentence where guideline range was 10-16 months was appropriate because Nossan set into motion a chain of events that risked serious injury or death, even when an intent to harm is entirely absent and the defendant was not directly responsible for the death)
- *United States v. Ihegworu*, 959 F.2d 26 (5th Cir. 1992) (District court departed upward based on 5K2.1 because a preponderance of the evidence clearly related Love’s overdose death to the heroin the defendant was distributing)
- *United States v. Russow*, 2015 WL 1057513 (D.Conn. 2015) (Having found that the heroin that defendant sold to RP knowing of his addiction and his intended use by injection using defendant’s “pens,” resulted in RP’s death, Court concluded an above-guideline sentence warranted under 5K2.1).

2. Restitution

- 18 USC § 3663, the Victim and Witness Protection Act (VWPA), is the restitution statute applicable to offenders convicted of offenses under the Controlled Substances Act
- 18 USC 3663(a)(2) defines “victim” to mean a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.
- However, after a listing of eligible drug offenses covered by this discretionary restitution statute, Subsection (a)(1)(A) specifically provides that **“in no case shall a participant in an offense under such sections [of the Controlled Substances Act] be considered a victim of such offense under this section”**
- **But See Cases Below With Very Narrow Reading of “Participant”:**
 - *United States v. Mousseau*, 517 F.3d 1044, 1048 (8th Cir. 2008) (For the prohibition in Section 3661(a)(1) to apply, the defendant must be convicted of one of the offenses enumerated in the statute, and the person to whom restitution is due must have committed the *same* offense.

Mousseau was convicted of providing a controlled substance to a minor – an offense the minor did not commit, and, thus, was not a participant of).

- *United States v. Nossan*, 647 F.3d 822 (8th Cir. 2011) (Recipient of drug distributed by Nossan did not commit the offense of distributing a controlled substance – though he may have been guilty of other crimes, e.g., drug possession – and his estate was eligible for restitution)
- **Note:** There is no corresponding proscription in the mandatory restitution statute (18 USC § 3663A)
 - Seems likely to be an inadvertent omission
 - *United States v. Reifler*, 446 F.3d 65, 127 (7th Cir. 2006) (An order entered under the MVRA that had the effect of treating coconspirators as victims and thereby requiring restitution was a fundamental error adversely reflecting on the public reputation of the judicial proceedings)

D. Crime Victims' Rights Act

- Is the person (or estate of person) who overdosed a victim entitled to make Victim Impact Statement?
- 18 USC 3771 is the Crime Victims' Rights Act
 - Right to be reasonably heard at bond, plea, sentencing, or parole hearing (a)(4)
 - Right to full and timely restitution (a)(6)
 - Right to be informed of any plea bargain or deterred prosecution agreement (a)(9)
- CVRA defines “crime victim” to mean a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. 18 USC § 3771(e)(2).
- Does not explicitly contain the same exception found in 18 USC 3663 for participants in the offense

E. Good Samaritan Laws

- No federal Good Samaritan Law
- **35 P.S. 780-113.7 – Drug Overdose Response Immunity**
 - Effective December 1, 2014
 - Provides immunity from prosecution if:
 - Law enforcement only becomes aware of offense because person transported one experiencing a drug overdose event to law enforcement or a health care facility

- The person provided his or her own name and location and cooperated with law enforcement
 - The person remained with the person needing immediate assistance until law enforcement or emergency services personnel arrived
 - Does **not** apply to delivery or distribution of a controlled substance or to drug-induced homicide
- **Virginia Code 18.2-251.03** (Safe Reporting of Overdoses)
- Became effective July 1, 2015
 - Provides an affirmative defense to prosecution of an individual for unlawful possession of a controlled substance if *such* individual *seeks or obtains emergency medical attention for himself* or another person if either is experiencing an overdose by contemporaneously reporting such overdose to fire, EMS, police, or 911.
 - Does **not** apply to distributor of drug
 - Does **not** apply to the person overdosing if he or she is not the one who sought or obtained the medical services for him or herself. *Broadus v. Commonwealth*, -- S.E.2d --, 67 Va. App. 265 (Va. App. 2017)
- **DC Code § 7-403** (Seeking Health Care for an Overdose Victim)
- Effective: March 19, 2013
 - Provides that unlawful possession of a controlled substance will not be considered a crime or serve as the basis for revoking or modifying a person’s supervision for a person who seeks health care for him or herself or for another person if reasonable belief that the person is experiencing an overdose
 - Does **not** apply to distributors of the drugs
 - Does contain a **mitigation provision** that states that seeking health care for someone having an overdose may be considered by the court as a mitigating factor in any criminal prosecution or sentencing for a drug offense other than the possession offenses to which the statute primarily applies
- **Maryland Code, Criminal Procedure, § 1-210**
- Effective: March 14, 2016
 - Provides immunity from prosecution to person reporting medical emergency and the person experiencing medical emergency for certain possession offenses
 - Does **not** apply to distributors

LITIGATION TIP: **Good Samaritan laws do not generally apply to distributors of drugs but may be a useful mitigation argument if client either called 911 or rendered or attempted to render aid to an individual suffering an overdose.**