



### W1 Drug Delivery Homicide: Prosecution, Defense, and Expert Testimony

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**Learning Overview:** The goals of this presentation are to: (1) discuss the theories of prosecution and defense under “drug-delivery-resulting-in-death” statutes and sentencing; (2) describe and explain the nuances of the Supreme Court of the United States (SCOTUS) decision in *Burrage v. United States*; (3) analyze the strengths and weaknesses of fact patterns drug-delivery-resulting-in-death cases; (4) identify and articulate the limitations of toxicological and medical testimony in these cases; and (5) prepare for testimony and direct and cross-examination in drug-delivery-resulting-in-death cases.

**Impact on the Forensic Science Community:** This presentation will impact the forensic science community by providing background on the legal challenges for charging, defending, or providing opinions and testimony in cases in which an individual's death is alleged to have resulted from another individual's actions in supplying the drugs that caused the death. Prosecutors, defense attorneys, and testifying experts will be better prepared to provide scientifically supported evidence in the appropriate context to triers of fact in these cases.

With the advent of the opioid crisis, in addition to traditional prosecutions for drug possession and trafficking, there has been an increasing move toward prosecuting specific individuals who obtained or procured the drugs used by a decedent proximate to the time of their death for drug delivery resulting in death, also known as drug delivery homicide, and “but-for” causation. In addition, under federal law, in large-scale drug trafficking cases, drug distributors, or purveyors, including prescribing physicians in “pill mill” cases, members of transnational organized crime groups and illegal drug distribution syndicates, are liable for significant enhanced penalties including 20-year mandatory minimum sentences if deaths resulted as a direct result of their involvement in the distribution of their product.

In 2014, the United States Supreme Court handed down *Burrage v. United States*, which constitutes prevailing authority on the standard of causation required for imposition of the federal sentencing enhancement.<sup>1</sup> The court focused on the specific text found in 21 U.S.C. § 841(b), the federal law requiring heightened sentences for drug sales causing death or serious bodily injury. In a unanimous decision, the Court ruled that a defendant cannot be held liable under the penalty enhancement provision of the Federal Controlled Substances Act unless a “but-for” cause of death or injury is established due to the distribution of a particular drug or drugs. The Court also held that the federal sentencing enhancement applies when it is proven beyond a reasonable doubt that the drug or drugs distributed by the defendant are “an independently sufficient cause of the victim's death or serious bodily injury.” The opinion states that the Government does not have to prove that the drug/drugs were the only cause of the decedent's death; but it must have been “the straw that broke the camel's back.”

The *Burrage* opinion has engendered differential interpretations in lower federal and state courts, which has resulted in corresponding ambiguities and incertitude among the scientific community called to testify in such cases. Among the challenges of presenting this evidence is the fact that many of these cases involve deaths of individuals who have been using multiple drugs that may or may not have come from the same supplier, and the timing of ingestion of the specific substances, the decedent's potential tolerance to the effects of the drug, and other factors are unknown.

This workshop will review the underlying Federal and corresponding state statutes that address these issues and how cases are being charged and prosecuted. The complex nature of certification of drug-related deaths, especially in the context of multiple mixed drugs being detected in the toxicological analysis, will be reviewed. Some exemplar case scenarios, and identifying key corroborating elements of physical evidence scene investigation, medical history, or eyewitness testimony that may weaken or strengthen the introduction of expert testimony will also be reviewed.

The expert panel will provide perspectives on the nuances of the terms “independently sufficient cause,” “resulting from,” “but-for causation,” and the interpretation of the “straw the broke the camel's back” analogy from both a legal and an applied science perspective. This presentation will lead the attendees to appreciate that the importance of the evidence that supports or undermines confidence in the expression of these scientific opinions in the context of charging, prosecuting, defending, testifying, and achieving just sentences in cases of this type.

#### Reference(s):

<sup>1</sup>. *Burrage v. United States e*, 571 U.S. \_\_\_\_, 134 S.Ct. 881 (2014)

#### Drug Delivery Homicide, But-For Drug Death Causation, Drug Delivery Resulting in Death