Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions — The Burrage Decision

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ABSTRACT

As the opiate/opioid crisis has worsened in the United States, one of the law enforcement responses has involved increased efforts to prosecute the individuals responsible for the distribution of illicit drugs that result in overdoses. When mixed intoxications occur, the controlling decision for prosecution is *Burrage v. United States* (2014), which provides guidance on the types of evidence required for establishment of causation. In many types of legal proceedings, forensic pathologists are called to provide expert testimony, although they may be unaware of the burden of proof that is required in a given case. This paper seeks to elaborate upon the burden of proof in drug overdose prosecutions with the guidance of *Burrage* and offer insight into the expectations and limitations involved in these cases. *Acad Forensic Pathol.* 2017 7(1): 87-90

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INTRODUCTION

The United States is in the midst of a significant heroin and opioid epidemic. Given the mortality rates, this epidemic has quickly become the most significant law enforcement and public health crisis we have seen in decades. Prescription opioid pain relievers initially accounted for much of the mortality and continue to remain a major factor in some parts of the country. As law enforcement and the medical community have started to address the issues surrounding the use and misuse of prescription opioids, many jurisdictions, including the Northern District of Ohio, have seen a significant rise in the abuse of illicit narcotics like heroin and clandestinely manufactured fentanyl. As part of the law enforcement response to this crisis, efforts have increased to hold the drug dealers accountable with a special sentence enhancement when their criminal conduct directly results in a fatal or nonfatal overdose by one their customers.

For the past several decades, forensic evidence has become an increasingly important part of the investigation and prosecution of criminal cases, especially in federal court (1). Reliable scientific data has become a cornerstone of the criminal justice system. Yet, often lawyers and scientists do not fully appreciate the requirements and limitations of one another's work (2). Prosecutors must meet an exacting "beyond a reasonable doubt" burden of proof on every element of a charged offense. Those elements, however, vary significantly based on the nature of the crime that has been alleged. As discussed below, the elements the prosecution must prove to seek to impose an enhanced sentence for an overdose include that "but for" the illegal substance the drug dealer sold, the victim would not have died or suffered serious bodily injury. If a substance contributes to death, this does not necessarily imply "but for" causation. The concept of "but for" causation (which has its origins in tort law) would require the substance to be able to stand alone in causation.

DISCUSSION

Burrage v. United States

In the prosecution of drug distribution cases that carry a sentence enhancement for death or serious bodily injury, the controlling decision is *Burrage v. United States* (3). In *Burrage*, the Supreme Court discussed the elements the government must establish beyond a reasonable doubt to hold a defendant liable for causing a drug user's death or serious bodily injury, particularly where an overdose occurs in the context of mixed drug intoxications. This paper summarizes the Supreme Court's decision and offers insights into the types of evidence that must be available to pursue this sentence enhancement.

Burrage involved a drug user named Joshua Banka who died after using a number of illegal drugs over the course of a single day, including marijuana, oxycodone (which he crushed, cooked, and then injected), and heroin (which he also cooked and injected). Marcus Burrage was the drug dealer who sold Banka the heroin. Burrage was tried and convicted for selling only the heroin to the decedent and was held accountable on the theory that Banka's death resulted from using the heroin he purchased from Burrage. Specifically, Burrage's indictment included a charge under Title 21, United States Code, Section 841(b)(1)(C), which provides for a 20-year mandatory minimum sentence where death or serious bodily injury results from the distribution and use of an illegal drug. At trial, the government presented testimony from two medical experts, each of whom was called to testify about the cause of Banka's death. Each testified that the heroin "was a contributing factor" in Banka's death (3). Neither expert testified that Banka would have lived if he had not taken the heroin. The jury, however, was instructed that it could convict Burrage of the death specification charge if it found beyond a reasonable doubt that "the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death" (3).

The critical question presented to the Supreme Court was whether that jury instruction accurately described what the government was required to prove to estab-

lish, as the statute requires, that Banka's death "*resulted from*" the heroin that Burrage sold to him. The Supreme Court held that the jury instruction that was given was insufficient and that instead, the government must prove that "*but for*" the heroin he ingested, Banka would not have died. The Court clarified, however, that the government did not have to prove that the heroin was the only cause of Banka's death; but it must have been the straw that "*broke the camel's back*" (3). Although it does not have to be the only cause, the evidence must establish that the drug that was sold was "*an independently sufficient cause of the victim's death or serious bodily injury*" (3).

To illustrate the fact that the "*but for*" causation is not an insurmountable hurdle, and that there can be more than one "*but for*" cause for an event, Justice Scalia described a hypothetical baseball game in which the visiting team wins by a score of one to zero, with their leadoff batter hitting a home run in the first inning of play. Here, although the home run was a "*but for*" cause of the victory, it would not be the only necessary cause of the victory because the team would not have won without great defense, great pitching, the coach's decision to give the batter the leadoff spot, and many other factors. In contrast, if the visiting team won the game by a score of five to two, no one would say the leadoff home run was a "*but for*" cause of the victory – because the team would have won even without that home run. Thus, there can be more than one "*but for*" cause, but a nonessential factor cannot satisfy the "*but for*" causation requirement.

Challenges of Mixed Drug Intoxication Cases

As certifiers of causes of death, most medical examiners and coroners are familiar with the concept of "*but for*" causation. Where a single drug is involved in the lethal intoxication, the issue of causation is more obvious. Challenges arise, however, when more than one intoxicant is present. The Supreme Court in Burrage requires that the supplier be shown to have provided an intoxicant that, in and of itself, would have been fatal or would have caused serious bodily injury (i.e., "*but for*" that intoxicant, the death or serious bodily injury by overdose would not have occurred).

In mixed drug intoxication scenarios, this standard may be difficult to apply. Several mixed drug intoxications involve combinations of substances, any one of which may have been lethal (e.g., heroin, fentanyl, cocaine, amphetamines). In these instances, it is often not possible for the forensic pathologist to opine with a degree of medical certainty that any one of the substances represents a "*but for*" cause of death or serious bodily injury. In those cases, consideration should be given to the entire case investigation (e.g., terminal collapse circumstance information, presence of only inactive metabolites of one of the substances) to arrive at a medically appropriate opinion. It is also worth bearing in mind that certain depressant drugs like ethanol or benzodiazepines will potentiate the depressant effects of the opiates/opioids but are not often likely to produce death in and of themselves (4, 5). In a mixed drug intoxication of this type, it may be reasonable to acknowledge the contributory and potentiating effect of the ethanol or benzodiazepine in the cause of death and still regard the opiate/opioid as a "*but for*" factor in the death even though it does not appear in isolation on the death certificate. Provided the expert can testify that, without the incremental effect of the illegal drug at issue, the decedent would have lived or not suffered serious bodily injury, the prosecution can properly seek the sentence enhancement under the Supreme Court decision on the federal guideline.

CONCLUSION

Forensic evidence, particularly toxicology, is essential to the proper adjudication of drug-related fatalities. It is worthwhile for certifiers of death to understand the Burrage decision and how it impacts the administration of justice in these cases. Enhanced sentencing options of drug dealers in fatal overdose cases present a potentially powerful deterrent to traffickers and the Burrage decision offers a "*reasonable and attainable*" standard for such prosecutions (6). Competent certification, along with unbiased testimony, are the touchstones of justice in these cases.

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