

Litigation Strategies In Opioid Overdose Cases

Federal Criminal Practice Seminar – Spring 2018

April 13, 2018

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I. Distribution Resulting in Death or Serious Bodily Injury

A. Drug Statutes

The most commonly used drug statutes include the following:

- 21 USC § 841 Prohibits the manufacture and distribution of, and possession with intent to distribute, controlled substances.
- 21 USC § 846 Prohibits attempts and conspiracies to manufacture, distribute or possess with intent to distribute 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 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	Penalty	Enhanced Penalty for Death/SBI
21 USC § 841(b)(1)(A) 21 USC § 960(b)(1)	▪ 10 years to Life ▪ With 851, 20-Life	▪ 20 years to Life ▪ With 851, Life
21 USC § 841(b)(1)(B) 21 USC § 960(b)(2)	▪ 5-40 years ▪ With 851, 10-Life	▪ 20 years to Life ▪ With 851, Life
21 USC § 841(b)(1)(C) 21 USC § 960(b)(3)	▪ 0-20 years ▪ With 851, 0-30 years	▪ 20 years to Life ▪ With 851, Life
21 USC § 841(b)(1)(E)	▪ 0-10 years ▪ With 851, 0-20 years	▪ 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 substantial risk of death;
 - Protracted and obvious disfigurement; OR
 - 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. Burkholder***, 816 F.3d 607 (10th Cir. 2016)
 - o Question: whether jury must find that the victim's death was a foreseeable result of the defendant's drug-trafficking offense?
 - o 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).
 - o **Dissent:** not convinced that "results from" language unambiguously reveals Congress' intent to "forgo a proximate-cause requirement" and impose strict liability on criminal defendants
- The Fourth Circuit and many other circuits have interpreted identical "death results" language in other statutes to require not just actual causation but proximate causation
 - o A few examples:
 - o *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")
 - o *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979)(18 USC § 242)
 - o *United States v. Marler*, 756 F.2d 206, 215-216 (1st Cir. 1985)
 - o *United States v. Martinez*, 588 F.3d 301, 317-18 (6th Cir. 2009)(18 USC § 1347)
 - o *United States v. Spinney*, 795 F.2d 1410, 1415-16 (9th Cir. 1986)
 - o *United States v. Woodley*, 136 F.3d 1399, 1405-06 (10th Cir. 1998)

LITIGATION TIP: **Ask for a jury instruction on whether the death was a foreseeable result. Not likely to get one in the 4CCA but preserve the issue for appeal.**

II. Toxicology

Toxicology = Study of adverse effects of chemicals on living organisms.

Forensic Toxicology = involves related disciplines to assist in detection and interpretation of drugs and poisons in medicolegal death investigations and/or human performance issues

A. Evidence Collection

- Specimens collected by either medical examiner, coroner, or forensic pathologist
- For drug-related case: blood, urine, vitreous humor, gastric contents, bile, liver, hair can be tested
 - Blood – Specimen of choice for detecting, quantifying and interpreting drugs and other toxicant concentrations
 - If hospital treatment before death, blood samples taken soon after admission and immediately before death should be investigated – treatment in hospital can change results
 - Post-mortem redistribution (PMRD) is a recognized toxicological phenomenon of an increase in drug concentration after death
 - Degree of decomposition can interfere with testing
 - Urine – Not always available for post-mortem testing
 - Does not directly correlate to drug effects at time of sample collection because of time it takes to break down and eliminate drugs or metabolites in the urine
 - Presence in urine is a sign substance was in blood at earlier time (within a few days) and somewhat processed (detecting metabolites gives proof drug ingested)
 - Liver – Primary solid tissue for use in post-mortem toxicology because it is where body metabolizes most drugs and toxicants
 - Drugs can be concentrated in liver and found even where no levels in the blood
 - Vitreous Humor – Clear gel-like substance that fills the eye
 - Commonly analyzed for BAC
 - Concentrations are higher than blood by about 20% on average because lags behind blood by 1-2 hours
 - If level is higher than blood level, this suggests person was in excreting phase vs. absorptive phase
 - Used to determine ethanol levels and whether 6-acetylmorphine present (metabolite of heroin)
- Where was analysis done? – hospital or Department of Forensic Science

LITIGATION TIP:	Find out whether sample was taken pre- or post-mortem because post-mortem redistribution (PMRD) can affect the reliability of the drug concentration results for some drugs.
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Table 2. Drugs included in routine post-mortem toxicology

<i>Substance(s)</i>	<i>Examples</i>
Alcohol	Chemically known as ethanol. Test also includes methanol and acetone ¹ .
Analgesics	Paracetamol (acetaminophen), tramadol 9(ConZip™, Ryzolt™, Ultracet, Ultram in the U.S.), Salicylates (aspirin)
Antidepressants	Tricyclics (e.g., imipramine, amitriptyline) ; SSRIs (fluoxetine [Prozac®], sertraline [Zoloft®])
Antihistamines (sedating)	doxylamine, chlorpheniramine, diphenhydramine
Antipsychotics	old and newer generation including depot injections (subcutaneous or intramuscular injections of long---lasting medication); Haloperidol; Risperidone
Benzodiazepines and “Z” drugs	all available (diazepam [Valium®], alprazolam [Xanax®]; zolpidem (Ambien®, Ambien CR, Intermezzo®, Stilnox®, and Sublinox®), zopiclone (Imovane®, Zimovane), zaleplon (Sonata® and Starnoc)
Cannabis	tetrahydrocannabinol (THC) (Marijuana, pot) and its metabolites
Cardiovascular drugs	Diltiazem (calcium channel blockers), Disopyramide (names Norpace® and Rythmodan®), propranolol (beta blocker)
Cocaine	cocaine and its metabolites
Narcotic analgesics	codeine, methadone, pethidine, morphine, hydrocodone, oxycodone, fentanyl
Stimulants	Amphetamine, methamphetamine, MDMA (ecstasy), pseudoephedrine, fenfluramine, phentermine, caffeine

[1] Acetone can derive from abnormal body metabolism in diabetic ketoacidotic states.

Table 3. Drugs not routinely included in death investigation toxicology screens

Anti---convulsants	<i>(some only) lamotrigine (Lamictal®), valproate, phenytoin</i>
Barbiturates	Phenobarbital, butalbital, many other prescribed (or otherwise obtained) Barbs

Designer drugs	synthetic cathinones and synthetic cannabinoids ('bath salts', 'plant food', 'spice', etc.)
Digoxin	used to treat arrhythmias and heart failure
GHB	gamma---hydroxybutyrate("Juice", "Liquid Ecstasy", Fantasy)
LSD	hallucinogen rarely seen in coroners cases
Environmental Toxicants	carbon monoxide; cyanide; pesticides; herbicides ; metals

LITIGATION TIP: Find out what drugs were tested for by the lab.

B. Testing

1. Initial Screening

- Screening refers to a preliminary test that yields a qualitative "Positive or negative" result.
- Immunoassay (IA) techniques: Most commonly used drug screening test, antibodies detect reaction with specific substance; Four interpretations possible:
 - o True-positive: test correctly detects presence of drug
 - o False-positive: test incorrectly detects presence of drug that is absent
 - o True-negative: test correctly confirms absence of drug
 - o False-negative: test fails to detect presence of drug that is present
- IA screening is generally non-specific in that it does not differentiate among the drug class. For example, a positive OPIATE result only indicates that there is some opiate present and does not indicate whether it is hydrocodone (Vicodin), codeine (Tylenol 3), heroin, or a combination of these.
- If the initial screen is positive, then the sample will be submitted for confirmation testing.

2. Confirmation Testing

- Confirmation testing uses high complexity instrumentation that yields a definite and specific result.
- Best practice for confirmation testing involves using either Gas Chromatography/Mass Spectrometry (GC/MS) or Liquid Chromatography-Mass Spectrometry/Mass Spectrometry (LC-MS/MS)
- For both screening and confirmation testing, the laboratory has drug reporting cut-off levels. Drugs are only included on the lab report if the amount of drug in the sample reaches the reporting cut-off level.

LITIGATION TIP: Make sure you know what the lab reporting cut-off levels are. Many labs have this information on their website. If not, ask the toxicologist.

LITIGATION TIP:	Request or subpoena the lab notes to see if the decedent had other drugs in his or her system that may not have reached the reporting cut-off levels but that could have affected the result.
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3. Opioids

- Term “opioid” generally includes both natural opiates and synthetic opioids
- **Opiates** = natural substances derived from opium poppy

Examples include:

- Schedule I: Heroin
- Schedule II: codeine, morphine, opium

- **Opioids** = synthetic or partly-synthetic drugs made to work in a similar way to opiates

Examples include:

- Schedule I: fentanyl analogues (See 21 CFR 1308.11(h),(i))
- Schedule II: fentanyl, methadone, hydromorphone (Dilaudid), oxycodone (OxyContin); hydrocodone (Vicodin)
- Opioids are Central Nervous System depressants
- Physical symptoms of opioid poisoning = shallow/slow respirations, pinpoint pupils, slow heart rate, decreased temperature
 - Naloxone (Narcan) is a direct opioid antagonist which reverses its effects
- Death typically caused from respiratory depression leading to asphyxia
 - Prior to death pupils dilate and skin become cyanotic (blue)

LITIGATION TIP:	If overdose occurred after application of Naloxone/Narcan, investigate argument that death not caused by opioids because an appropriate dose of Naloxone should reverse opioid poisoning
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4. Metabolites and Analogs

- **Metabolite** is the product of a drug metabolizing in the living body
 - Presence of a metabolite in a tested sample can be proof that a particular drug was ingested
- **Analog** is a designer drug that is structurally or functionally the same as a controlled substance, designed to mimic the pharmacological effects of the original drug while avoiding detection in standard drug tests
- No quantitative measurements for new synthetic analogues until measures can be developed
- Different analogues have different potency levels

5. Fentanyl

- Acts as CNS depressant like morphine or other opiates
- Respiration slows to the point where brain does not receive enough oxygen and body shuts down

- Typical therapeutic level for fentanyl = 1-5 ng/L but 3 ng/L can be considered toxic
- No way to tell the difference between prescription fentanyl and illicit fentanyl through tox screen
- Fentanyl metabolites: Norfentanyl; Despropionylfentanyl
- Fentanyl analogues:
 - By some estimates there are more than 1400 fentanyl analogues
 - Scientists and illicit manufacturers are constantly creating new analogues
 - Examples: Acetylfentanyl; butyrfentanyl; methylbutyrfentanyl
 - Carfentanyl
 - Most famous fentanyl analogue
 - First synthesized in 1974 and has remained the most potent commercially available opioid in the world
 - Known as an “elephant tranquilizer,” it is estimated to be 10,000 times more potent than morphine
- Toxicologist cannot tell if fentanyl mixed with acetylfentanyl

6. Heroin

- Produced from morphine (which is a naturally occurring opiate extracted from the seedpod of the poppy plant)
- Heroin is metabolized by the body into morphine and 6-Monoacetylmorphine (6-MAM)
- Heroin is processed into 6-Monoacetylmorphine quickly – often as soon as 15-20 minutes after use
- 6-Monoacetylmorphine has a very short half-life and results in a very short detection time in urine (2-8 hours at the most sensitive cutoff limits)
- In contrast, morphine is usually detectable in the urine up to approximately 24 hours after heroin use
- Because of 6-Monoacetylmorphine is rapidly eliminated in the body, its absence in blood or urine does not exclude heroin use, but its presence confirms it

C. Interpretation of Toxicology Results

- Toxicologist is necessary
- Drug levels in sample are often referred to by a toxicologist as within Therapeutic, Toxic, or Lethal levels
- “Therapeutic” level is the drug concentration level usually expected to achieve desired therapeutic effects
- “Toxic” level refers to the drug concentration level where a person has accumulated too much of a drug in his bloodstream, leading to adverse effects on the body
- “Lethal” level refers to the drug concentration level that is expected to cause death
- These levels cannot be relied on by themselves because interpretation of the drug concentration levels is complicated by many factors including:
 - Individual variations in response to drugs
 - Tolerance
 - Physical stature

- o Disease states
 - o Presence of other drugs
 - o Potential for post-mortem changes in blood-drug concentrations
- Other factors affecting toxicity
 - o Elemental form of the substance (gas, liquid, etc)
 - o Particular chemical form of the substance
 - o Whether contact was by inhalation, ingestion or both
- North Carolina Office of the Chief Medical Examiner has a helpful chart that generally outlines the therapeutic, toxic, and lethal levels of a large number of drugs
- Available at www.ocme.dhhs.nc.gov/toxicology/index.shtml

LITIGATION TIP: **Always consult with and interview government toxicologists and medical examiners because they are usually very willing to explain their findings in detail and often do not speak with the same degree of certainty that may be included in an agent's report.**

D. Effect of multiple drugs in system

- One drug can affect tolerance level for another drug
- Different drugs have different physiological effects
- More than one CNS depressing drug can have a synergistic effect on each other
 - o Synergistic = an effect arising when two or more drugs are used that produce an effect greater than the sum of their individual effects
- In August 2016, the Food and Drug Administration issued a new “boxed” warnings (the FDA’s strongest warning) with information about the serious risks associated with using opioids and benzodiazepines (i.e., Xanax) at the same time because both classes of drugs are central nervous system depressants

LITIGATION TIP: **Investigate carefully to see if other drugs, particularly benzodiazepines or designer drugs that are also CNS depressants, may have also been used, and, if so, whether the lab tested for them.**

E. Resources

- Disposition of Toxic Drugs and Chemicals in Man, 11th Ed., Randall C. Baselt
 - o Contains monographs of about 1800 drugs
 - o Each monograph contains 5 sections: Occurrence and Usage, Blood Concentrations, Metabolism and Excretion, Toxicity, and Analysis
 - o There is also a chapter on Guidelines for the Interpretation of Analytical Toxicology Results
 - o \$337.95 on Amazon
- Post-Mortem Clinical Pharmacology, R.E. Ferner, *British Journal of Clinical Pharmacology* (included with materials)

F. Experts

- Sources for locating experts
 - American Board of Forensic Toxicology – www.abft.org
 - Listing of board certified forensic toxicologists by state
 - Society of Forensic Toxicologists – www.soft-tox.org
 - “ToxTalk” Newsletter on website has case study articles
 - Consortium of Forensic Science Organizations – www.thecfso.org
 - Includes SOFT and other groups, such as American Academy of Forensic Science, American Society of Crime Laboratory Directors

III. Plea Negotiations/Sentencing Issues

A. Plea Agreements

1. Stipulation – 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. Base Offense Level

Guideline	Base Offense Level	Applies If:
2D1.1(a)(1)	43	• 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	• 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	• 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	• 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

- o The 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
- o Before *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the circuit courts applied *Apprendi* to solve the issue if 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.
- o 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

- o Defined in **Comment 1(L) of USSG § 1B1.1**.
- o Means injury involving:
 - o Extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty;
 - o Requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.
 - o 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.
- o This **definition differs from the statutory definition** under 21 U.S.C. § 802(25).
 - o **Similar:** both apply to protracted impairment of the function of a bodily member, organ, or mental faculty
 - o **Different:** substantial risk of death vs. extreme physical pain or requiring medical intervention

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.

- 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: **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 below 20 years.**

B. 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.

- o *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)
- o *United States v. Ihigworo*, 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)
- o *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

- o 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
- o 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.
- o 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"**
- o **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)
- o **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)

C. Crime Victims' Rights Act

- o Is the person (or estate of person) who overdosed a victim entitled to make Victim Impact Statement?
- o 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)
- o 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).
- o Does not explicitly contain the same exception found in 18 USC 3663 for participants in the offense

D. Good Samaritan Laws

- o No federal Good Samaritan Law
- o **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)
- o **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
- o **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
 - o **North Carolina, N.C.G.S.A. § 90-96.2**
 - Effective August 1, 2015
 - Provides limited immunity for both Samaritan who reports overdose and Overdose Victim
 - Only applies to misdemeanor or felony possession (less than a gram of cocaine or heroin), or paraphernalia offenses

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.
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