

Would an Enhancement for Accidental Death or Serious Bodily Injury Resulting from the Use of a Drug No Longer Apply Under the Supreme Court’s Decision in *Burrage v. United States*, 134 S. Ct. 881 (2014), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013)?

I. Death or Serious Bodily Injury Results

The drug statute makes it a crime to knowingly or intentionally manufacture, distribute, or dispense, or to possess with intent to do so, a controlled substance or a counterfeit substance, and increases the minimum and maximum penalties “if death or serious bodily injury results from the use of such substance” to 20 years to life, or mandatory life if the prosecutor also filed notice of a prior conviction for a “felony drug offense” under § 851. *See* 21 U.S.C. § 841(a)-(b); *see also* 21 U.S.C. § 960(a)-(b).

Quantity Level	Unenhanced Range	Death or SBI Results	Death or SBI Results + Prior “Felony Drug Offense”
21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)	10 years to Life	20 years to life	Life
21 U.S.C. §§ 841(b)(1)(B), 960(b)(2)	5 to 40 years	20 years to life	Life
21 U.S.C. §§ 841(b)(1)(C), 960(b)(3)	0 to 20 years	20 years to life	Life

The drug guidelines meet and exceed the statute, requiring a base offense level 38 (with guideline ranges from 235-293 months up to 360 months to life depending on criminal history category) where “the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance,” and a base offense level 43 (with a guideline sentence of life) if, in addition, “the defendant committed the offense after one or more prior convictions for a similar offense.”¹ USSG § 2D1.1(a)(1)-(2).

The enhancement rarely applies, but when it does, the increase is severe. Note that it does not apply to violent crimes resulting in death or injury, but to accidental, unintended, and unforeseeable death or serious bodily injury “result[ing] from the use of [the] substance.”² For

¹The term “prior conviction[] for a similar offense” is not defined in the guidelines, but apparently means any prior conviction used to enhance a sentence under 21 U.S.C. § 851 even though such offenses are often not similar to federal drug trafficking offenses (*e.g.*, can be simple possession), and if the prior offense did not result in death or serious bodily injury.

² *See, e.g., United States v. Houston*, 406 F.3d 1121, 1124 (9th Cir.2005) (“Congress specified that the heightened sentence would apply ‘if death . . . results’ from the distribution of a controlled substance. This passive language unambiguously eliminates any statutory requirement that the death have been foreseeable. According to its language, as long as death ‘results’ from the use of a described controlled substance, the person convicted of distributing the substance ‘shall be sentenced to a term of imprisonment of not less than twenty years or more than life.’”); *see also United States v. Carbajal*, 290 F.3d 277, 284 (5th Cir.2002); *United States v. Soler*, 275 F.3d 146, 153 (1st Cir.2002); *United States v.*

example, a drug buyer's alleged attempted suicide through overdose has been determined to be sufficient to trigger this enhancement.³ Where the defendant played a direct role in distributing the drug, the enhancement applies on a "strict liability" basis.⁴ Even when the defendant played no direct role in the distribution of the drug, some courts broadly ruled that "[w]here a conspirator is involved in distributing drugs to addicts, some of which are administered intravenously, it is a reasonably foreseeable consequence that one or more of those addicts may overdose and die."⁵

II. Change in Law

Until recently, "death or serious bodily injury results," (1) was not necessarily required to be found by a jury beyond a reasonable doubt or admitted by the defendant as part of a guilty plea,⁶ and (2) applied in most circuits when the drug distributed by the defendant was not proved to be the but-for cause.⁷

McIntosh, 236 F.3d 968, 973 (8th Cir.2001), *abrogated on other grounds by Burrage v. United States*, 134 S. Ct. 881 (2014); *United States v. Robinson*, 167 F.3d 824, 831 (3d Cir.1999); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir.1994).

³ *Zanuccoli v. United States*, 459 F. Supp.2d 109 (D. Mass. 2006).

⁴ *See, e.g., United States v. Rebmann*, 226 F.3d 521, 525 (6th Cir.2000), *overruled on other grounds by United States v. Leachman*, 309 F.3d 377, 385 (6th Cir.2002); *see also McIntosh*, 236 F.3d at 973 ("when a conspiracy defendant plays a direct role in manufacturing or distributing a drug that results in death, Congress's intent under § 846 is clear that the defendant is strictly liable under § 841(b)(1)(A)'s enhancement scheme").

⁵ *United States v. Westry*, 524 F.3d 1198, 1219 (11th Cir. 2008).

⁶ Before the Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that any fact that increases the statutory maximum is an element that must be charged in the indictment and proved to a jury beyond a reasonable doubt, death or serious bodily injury was not considered an element. After *Apprendi*, some courts held that there was still no violation of *Apprendi* as long as the mandatory minimum required by the fact of "death or serious bodily injury results" did not exceed the statutory maximum that applied without that fact. *See, e.g., Spero v. United States*, 375 F.3d 1285, 1287 (11th Cir. 2004); *United States v. Cathey*, 259 F.3d 365, 368 (5th Cir.2001); *McIntosh*, 236 F.3d at 975.

⁷ *See United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010) (adopting "but for" cause standard); *United States v. Atkins*, 289 Fed. Appx. 872, 875-77 (6th Cir. 2008) (not deciding if proximate cause is required, but not plain error for district court to decline to so instruct because all circuits to address the issue had held proximate causation not required); *United States v. Webb*, 655 F.3d 1238 (11th Cir. 2011) (proximate cause not required); *United States v. Sweger*, 413 Fed. Appx. 451 (3d Cir. 2011) (government must show only a causal connection, not proximate cause); *United States v. Westry*, 524 F.3d 1198 (11th Cir. 2008) (contributing cause); *United States v. Houston*, 406 F.3d 1121 (9th Cir. 2005); (no proximate cause requirement); *United States v. Carbajal*, 290 F.3d 277 (5th Cir. 2002) (same); *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001) (same); *United States v. Robinson*, 167 F.3d 824 (3d Cir. 1999) (same).

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In *Burrage v. United States*, 134 S. Ct. 881 (2014), the Supreme Court held that the “death or serious bodily injury” enhancement “is an element that must be submitted to the jury and found beyond a reasonable doubt,” *id.* at 887, relying on *Alleyne v. United States*, 133 S. Ct. 2151 (2013), which held that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury” and “found beyond a reasonable doubt.” *Id.* at 2155, 2163.

In *Burrage* itself, the government charged the “death results” enhancement in the indictment and submitted the fact to the jury (though at the time it didn’t have to). The indictment alleged that Burrage distributed heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), and that death resulted from the use of that heroin, subjecting Burrage to the 20-year mandatory minimum. Banka, a long-time drug user, died after an extended binge, as part of which he purchased heroin from Burrage and injected it. Multiple drugs were present in his system at the time of death, including heroin, codeine, alprazolam, clonazepam, and oxycodone. *Id.* Two medical experts testified at trial that the heroin was a “contributing” factor in Banka’s death, but neither could say whether he would have lived had he not taken the heroin. *Id.* at 885-86. In other words, there was no evidence that Banka’s heroin use was a but-for cause of his death. *Id.* at 892.

Burrage moved for judgment of acquittal, arguing that Banka’s death did not “result from” the heroin use because there was no evidence that the heroin was a but-for cause of death. *Id.* at 886. The trial judge denied the motion, and instructed the jury that the government was required to prove “that the heroin distributed by the Defendant was a contributing cause of [the] death.” *Id.* Burrage was convicted and sentenced to the 20-year statutory minimum. The court of appeals affirmed, holding that the contributing-cause instruction was proper.

Certiorari was granted to answer the question whether a defendant may be convicted when the use of the controlled substance was a “contributing cause” of the death. *Id.*⁸ The Court construed the phrase “results from” to decide “whether the mandatory-minimum provision applies when use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim’s death or injury.” *Id.* at 885. Giving the phrase its ordinary meaning, “results from” imposes “a requirement of actual causality,” that is, a “but-for requirement.” *Id.* at 887-88. As an example of but-for cause, “if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.” *Id.* at 888. “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.” *Id.* at 891. “[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

⁸ Certiorari was also granted on the question whether a conviction under the “death results” provision could be had “without separately instructing the jury that it must decide whether the victim’s death by drug overdose was a foreseeable result of the defendant’s drug-trafficking offense.” *Id.* The Court found it unnecessary to answer this second question. *Id.* at 887.

provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.” *Id.*⁹

III. Sentence Commutation

Under *Burrage* and *Alleyne*, a client who was originally subject to the “death or serious bodily injury results” provision of the statute and guidelines would likely receive a substantially lower sentence today unless (1) “death or serious bodily injury results” was charged in an indictment and proved to a jury beyond a reasonable doubt, or the client admitted it as part of a guilty plea, and (2) the conviction was based on but-for causation.

First, examine the indictment to determine whether it charged “death or seriously bodily injury resulted from the use of” the drug. If the enhancement was charged, and the client pled guilty, examine the plea agreement and plea colloquy to determine whether the client pled guilty to that element. If the client went to trial, examine the trial transcript to determine whether that element was proved to a properly-instructed jury beyond a reasonable doubt. If the enhancement was not charged, or the client was not convicted through guilty plea or jury verdict of that element, the transcript of the sentencing hearing should confirm that it was found by the judge by a preponderance of the evidence at sentencing. If that is the case, there was an *Alleyne* violation and the statutory range and guidelines’ base offense level would be those in effect today absent the “death or serious bodily injury” enhancement. For further guidance, *see* Would the Supreme Court’s Decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), Lead to a Lower Sentence Today?

Second, examine any pretrial motions, the plea agreement and plea colloquy (if there was a guilty plea), the trial transcript (if there was a trial), the presentence report and any objections and addenda, the sentencing memoranda, and the transcript of the sentencing hearing to determine whether there was any contributing cause of death other than the drug distributed by the client. This will most often be multiple other drugs ingested by the person. If there was no evidence of any other contributing cause, and there was evidence that the person took a lethal dose of the drug distributed by the client, there was no *Burrage* violation.

If there was another contributing cause or causes, and the client went to trial, examine the trial transcript to see what the proof and jury instructions were. If there was no proof of but-for causation and the jury was instructed that the government need only prove that the drug distributed by the client was a contributing cause (or some other lesser standard than but-for

⁹ An example of an independently sufficient cause would be where “A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head . . . also inflicting a [fatal] wound; and B dies from the combined effects of the two wounds.” *Id.* at 890 (internal citation and punctuation omitted). The Supreme Court declined to decide whether a special rule was needed for those rare instances since there was no evidence that the heroin *Burrage* had distributed was an independently sufficient cause of the death. *Id.*

causation, or no instruction on causation), there was a *Burrage* violation. If the defendant pled guilty, examine any pretrial motions and rulings to determine how causation was defined in the case, and the plea agreement and plea colloquy, particularly the elements and factual basis asserted for the plea, to determine whether the defendant admitted that the drug distributed by him was the but-for cause. If not, there was a *Burrage* violation, and the statutory range and guidelines' base offense level would be those in effect today absent the "death or serious bodily injury" enhancement.

Any appellate decision in the case should also be examined.

An example of the effect *Burrage* may have on previously-imposed sentences is found in *United States v. MacKay*, 2014 WL 1813147 (D. Utah May 7, 2014). Among the charges against Mackay was one count of distributing a controlled substance in violation of § 841(a), with death resulting from the use of that substance, punishable by a minimum of 20 years' imprisonment under 21 U.S.C. § 841(b)(1)(C). The jury was instructed to "determine whether or not death resulted from the use of the controlled substances dispensed and distributed by Dr. Mackay." *Id.* at *2. There was no instruction on what "resulted from" meant. The jury convicted Mackay, and he was sentenced to the 20-year minimum on that count. *Id.* at *1-*2.

Mackay appealed, and the Tenth Circuit remanded to the district court "to clarify the sentence for the record." *United States v. MacKay*, 715 F.3d 807, 846-47 (10th Cir. 2013). The district court then continued the case pending the outcome of *Burrage*. Following the Supreme Court's decision, the district court found that the trial evidence did not support a verdict that the drug was a but-for cause of death because no expert testified that that the drugs distributed by MacKay were the but-for cause and there were several other causes including other drugs and untreated pneumonia. 2014 WL 1813147, at **3-6.

In vacating the enhanced penalty conviction, the district court rejected the government's argument that "*Burrage* has no effect because this Court did not give a 'contributing factor' instruction like the district court in *Burrage*" and that "the Supreme Court's declaration that but-for causation is the plain meaning of 'results from,' means it is safe to assume that the jury in this case must have arrived at the same definition." *Id.* at *7. According to the district court:

In effect the Government asks the Court to find the statutory interpretation skills of the common layperson juror equal to those of Justice Scalia. The Court is unable to make such a finding when this Court, the district court in *Burrage*, and the Eighth Circuit, all failed to correctly deduce the plain meaning of "resulting from." Whether MacKay must face a 240-month mandatory minimum sentence of incarceration and be held criminally liable for the death of another person depends on the interpretation of "resulting from." In such a situation, the Court has a duty to make sure the jurors got it right. Simply providing the jurors with the "resulting from" language, without more, is not acceptable in light of *Burrage*.

Id. at * 7.

Without the enhancement, Mackay's statutory punishment range was 0-20 years. After considering the section 3553(a) sentencing factors, the court resentenced Mackay to 36 months' imprisonment. *Id.* at *7, *10.

Unlike *MacKay*, which was a remand on direct appeal, the cases to be reviewed for clemency will not have received the benefit of *Burrage* at sentencing or on direct appeal because they will have concluded years before *Burrage* was decided.

However, a habeas petition (28 U.S.C. § 2241 or 28 U.S.C. § 2255) that raises a *Burrage* violation may be pending, will be pending soon, or should be filed by January 26, 2015.¹⁰ To determine how to proceed, you must carefully review Pending And Possible Court Challenges: Appeals, Habeas Petitions, § 3582(c)(2) Motions.

¹⁰ If the client has not previously filed any § 2255 motion, s/he would have one year from the date *Burrage* was decided, January 27, 2014, to file a first § 2255 motion raising a *Burrage* violation. The one-year limitation period runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3) *Burrage* is arguably retroactive because it is a substantive change in the law in that it makes conduct that was once an offense not an offense. When the Supreme Court interprets a substantive criminal statute, it establishes what the law has always meant. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311–13 & n. 12 (1994); *Bousley v. United States*, 523 U.S. 614, 625-26 (1998) (Stevens, J., concurring). *Burrage*, therefore, should apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), just like *Bailey v. United States*, 516 U.S. 137 (1995) did in *Bousley*.

If the client previously filed a § 2255 motion that was denied, the standard for filing a second or successive motion is different. The petitioner would have to establish that *Burrage* established "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). Because the Supreme Court has not expressly made *Burrage* retroactive (and, in addition, it is questionable that it established a constitutional rule), a second or successive § 2255 may be unavailable. But relief may be available through the savings clause of 28 U.S.C. § 2255(e), which is the gateway to 28 U.S.C. § 2241, if the client establishes that he is actually innocent of the enhanced offense, and relief was foreclosed by circuit precedent at the time of sentencing, direct review, and the initial § 2255.