Docket No:

UNITED STATES SUPREME COURT

United States,
Plaintiff-Respondent,

v.

Lucas Heindenstrom,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

1. Is applying the wrong causation standard when upwardly departing under the sentencing guidelines or upwardly varying under the statutory sentencing factors pursuant to 18 U.S.C. § 3553 for the death of a person who consumed fentanyl ever harmless error?

2. Must the Government prove strict but for causation when death resulted to justify a sentence of a term of imprisonment more than four times the high end of the calculated guideline range for the offense?

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United States v. Lucas Heindenstrom, 2:16-CR-156-NT, Docket Entry 103, Judgment, United States District Court for the District Maine November 28, 2018. *United States v. Lucas Heindenstrom*, 946 F.3d 57 (2019).

JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Petitioner makes this petition based on the jurisdiction conferred by Article III Section 1 of the United States Constitution and Rule 10 of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question and conflicts with other decisions of the Supreme Court of the United States. This petition has been timely filed prior to March 1, 2020 from an opinion of the United States Court of Appeals for the First Circuit dated December 30, 2019.

Appellate Jurisdiction. The Petitioner takes this appeal as of right in a criminal prosecution under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the district court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on November 28, 2018.

Original Jurisdiction. District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231. The indictment in this matter resulted in the conviction of Mr. Heindenstrom for violation of 21 U.S.C.§ 841(a)(1).

PROVISIONS OF LAW

18 U.S.C. 3553 (West 2020)

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments

have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of Guidelines in Imposing a Sentence.—

(1) In general.— Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

. . .

STATEMENT OF FACTS

On November 28, 2018, United States District Court Judge Nancy Torresen sentenced Lucas Heindenstrom to 60 months in prison for Distribution of Fentanyl in violation 21 U.S.C 841(a)(1). Appendix *hereinafter* A at 13. At the Sentencing, The District Court found that the offense had a base offense level of 12 and 2 points were taken off for acceptance of responsibility for a total offense level of 10. Addendum at 60. The Court found Mr. Heindenstrom's criminal history category to be category II. Addendum at 60. The Guideline range was 8 to 14 months. Addendum at 60. After an evidentiary hearing on the cause of the death of Kyle Gavin, the Court found that it had the authority to depart upward or impose an upward variant sentence in this case. Addendum at 59.

Mr. Heindenstrom entered a guilty plea on January 27, 2017 to a single count of Distribution of Fentanyl in violation 21 U.S.C 841(a)(1). A at 8. The prosecution version for the offense detailed the basis for the charge against Mr. Heindenstrom. A at 14. On March 31, 2016, the York Police Department responded to an unattended death that was suspected to be drug related. A at 14. A search of the room where the body of Mr. Gavin was discovered produced evidence of suspected drug use including a hypodermic apparatus, a needle, a metal spoon with residue, and a plastic baggie containing an off-white powdery substance. A at 14. Investigators also recovered a cell phone and observed numerous drug-related text communications between Mr. Gavin and Mr. Heindenstrom on March 30, 2016 that documented two meetings between them. A at 14.

The police reports detailed the events of March 30, 2016. Mr. Gavin had been out on a

date with a woman named Megan. A at 19. During the date, Mr. Gavin met with Mr. Heindenstrom and provided him $100 to purchase drugs for him. A at 14. Mr. Heindenstrom subsequently met with his source for drugs in Lebanon, Maine, and used the money to purchase approximately two grams of what he believed to be heroin. A at 14. Mr. Heindenstrom distributed approximately one gram of the substance to another acquaintance. A at 14. Then, later in the evening, Mr. Heindenstrom met Mr. Gavin, and distributed approximately one gram of the substance to him. A at 14. After delivering the drugs, Mr. Heindesntrom texted the following to Mr. Gavin: "U will like it for sure its a good rush." After that text, Mr. Gavin responded, "It taste like sit" and "sugar," defendant replied, "Its not I promise wait till u try it bro its good man I swear I got u and someone else a g and they loved it I know u will like it," adding "its gatta be the fet. U taste." A at 15.

In an interview, the defendant admitted that he had traveled to the meet location to meet with the decedent and intended to facilitate another drug transaction between Mr. Gavin and his source. A at 15. Mr. Heindenstrom further admitted that he had distributed one gram of what he believed to be heroin to the decedent on "Wednesday" as was consistent with text message communications recovered from Mr. Gavin's phone. A at 15.

A toxicology report indicated that there were 121 mg/dL of ethanol, 120 mg/dL of methanol, and 5.7 ng/mL of fentanyl in Mr. Gavin's system. These revelations were consistent with the report of the medical examiner, who determined that the cause of Mr. Gavin's death was "[a]cute intoxication" from the "combined effects of ethanol, methanol and fentanyl." *United States v. Heindenstrom*, 946 F.3d 57, 60 (1st Cir 2019).

At the sentencing hearing on this matter, the District Court admitted the expert testimony

of Dr. Jonathan Arden. Dr. Arden reviewed investigative reports that included the York Police Department documents including reports and statements and their probable cause memo; photographs taken of the death scene and some of the items of evidence; the documents from the office of the chief medical examiner for the State of Maine which consisted of an investigative report and examination report; the toxicology report which was performed by an outside laboratory called NMS Laboratories, particularly the postmortem toxicology from the samples taken from Mr. Gavin; and then finally the death certificate issued for Mr. Gavin. Dr. Arden was able to form an opinion based on these documents with respect to the cause of Mr. Gavin's death. A at 30.

Dr. Arden's opinion was that Mr. Gavin died as a result of the combined effects of ethanol, methanol, and fentanyl. Dr. Arden testified that "The precise wording for the cause of death that was entered into the death certificate for Mr. Gavin was acute intoxication due to the combined effects of ethanol, methanol, and fentanyl. Dr. Arden further testified that indeed this is an intoxication that was a combination of effects of three different substances. In Dr. Arden's view, it was not reasonable to separate any one of these three substances in this instance, in this death, to be the cause of death or the cause of death in fact. In Dr. Arden's opinion it was indeed the combination of all three which must be included to explain adequately his death. A at 31.

Dr. Arden explained how the three toxins worked together: "Ethanol being the type of alcohol that is found in drinking beverages. Methanol is a solvent that is commonly referred to as wood alcohol not intended for drinking. And then the third substance was fentanyl which is a particular type of an opioid drug or medication. All three of these substances, the two alcohols and the fentanyl opioid, primarily act by a mechanism of central nervous system depression so

they lessen or depress the functioning of the central nervous system, or in plain language the brain. And those effects may go on in many different parts of the brain having various effects; but primarily they act to lessen one's degree of consciousness, they act to lessen one's degree of responsiveness, and ultimately in the more severe instance, such as a fatality, they act to cause respiratory depression. In other words, the drive to breathe generated by the brain is lessened or diminished to the point where the person does not breathe adequately or rapidly enough, and the potential there being that sufficient respiratory depression and brain function depression can lead to death. A at 32-33.

Dr. Arden also explained how a secondary mechanism of methanol could cause death: The only other point, as I said a secondary mechanism, is that methanol, the wood alcohol, also has a metabolism such that it is broken down into a different chemical called formic acid which in and of itself is toxic and can cause acidification of the blood or the system of the person which in and of itself is a harmful mechanism in addition to the primary mechanism of central nervous system and respiratory depression. A at 33. When asked if methanol could be the cause in fact of Mr. Gavin's death, Dr. Arden testified "it could be -- it could be methanol in the context of already having ethanol and fentanyl onboard, yes, it could have been the straw that broke the camel's back, as we're saying, and it could have been the – the factor that pushed him over the edge. A at 61. In this case it was not possible to tell the cause in fact because no test for the metabolite of methanol, formic acid, was conducted. A at 62. Dr. Arden had explained that metabolism was a body process that acted on toxins in the body to break them down into metabolites and that it was possible to get a sense of timing based on the amount of time, the toxin involved, and the amount of the metabolites. A at 35.

Dr. Arden testified that he had two problems with the examination conducted on Mr. Gavin's body: there was no autopsy and no investigation into the methanol. Dr. Arden explained "that no autopsy was performed which really would have been the more appropriate approach to the investigation and certification of the cause and manner of this death which would have in part related to your question as to trying to determine source of methanol, when it was taken, at what stage we were at as far as[...]ingestion versus absorption I should say. Even more importantly, though, the investigation, per se, was not adequate because the presence of methanol in the system of a person is highly unusual. Methanol is not commonly ingested, certainly not intentionally, and so this is a very unusual really a striking finding in the toxicology results. And because it is so unusual, and because we rarely see it as a cause of death or a contributing factor to a cause of death, and because it is outside of the realm of what people commonly do take either for recreational purposes or abuse purposes, we have really no investigation that indicates the source of the methanol, when it was taken, why it was taken." When asked directly by the District Court, Dr. Arden was not willing to say that fentanyl played no role in Mr. Gavin's death. A at 37-38.

After weighing the evidence, the District Court made several factual findings. Importantly, the court found that the appellant had furnished the fentanyl discovered in Mr. Gavin's system; that the appellant knew that the substance he gave to Mr. Gavin contained fentanyl; and that Mr. Gavin's death was caused by the combined effects of the three toxins discovered in his system post-mortem (ethanol, methanol, and fentanyl). United State v. Heindenstrom, 946 F.3d 57, 60 (1st Cir. 2019).

The court recognized that the amount of fentanyl in Mr. Gavin's system was possibly an independent cause of death, but it found that the government had not proven this fact by a preponderance of the evidence. Similarly, the District Court recognized that the amount of methanol in Mr. Gavin's system might have been an independent cause of death. Once again, though, the District Court declined to make any more specific finding regarding the likelihood that methanol was the independent cause of death. Finally, the District Court determined that although fentanyl was a contributing factor in Mr. Gavin's death, it was not a strict but-for cause as it was "impossible to say" whether Mr. Gavin would have lived but for the ingestion of fentanyl. Id, At 61.

Against the backdrop of these factual findings, the District Court rejected Mr. Heindenstrom's argument that an upward departure under section 5K2.1 demands strict but-for causation. The District Court concluded instead that the offense conduct only needs to be a meaningful, contributing cause of death. The District Court proceeded to calculate the guideline sentencing range (GSR), which it found without objection to be eight to fourteen months. The government recommended a sentence of up to ninety-six months, and the appellant argued for a sentence of thirty months, which was about the amount of time Mr. Heindenstrom had been held in detention prior to sentencing. The District Court advised the parties that it had considered the nature and circumstances of the offense, as well as Mr. Heindenstrom's history and characteristics. Id

The District Court found the GSR "woefully insufficient," and determined that an upward departure was warranted under section 5K2.1. The court further found that forty-six months was the proper extent of the upward departure and proceeded to impose a sixty-month prison

sentence. The District Court stated explicitly, though, that if an upward departure were deemed inappropriate, it would nonetheless "have given [the same sentence] as an upward variance." In the court's view, the very same factors that supported an upward departure also supported an upward variance.

Mr. Heindenstrom appealed the sentence to the United States Court of Appeals for the First Circuit. The First Circuit declined to address the standard of causation necessary to account for the death of Mr. Gavin. Instead, the Court of Appeals affirmed on the basis that it was harmless error because the District Court had authority to sentence Mr. Heindenstrom with an upward variant sentence.

ARGUMENT

I. This is an important federal question involving the United States Sentencing Guideline and the application of sentencing law under 18 U.S.C § 3553 and an upward variant sentence for the death of a person who bought fentanyl from Lucas Heindenstrom who was convicted of distribution of fentanyl in violation 21 U.S.C. § 841(a)(1).

The fentanyl distributed by Mr. Heindenstrom was not the strict but-for cause of Kyle Gavin's death. This Court's interpretation of but-for causation rules out the "combined effects" theory offered by the Government in this case:

> In support of its argument, the Government can point to the undoubted reality that courts have not always required strict but-for causality, even where criminal liability is at issue. The most common (though still rare) instance of this occurs when multiple sufficient causes independently, but concurrently, produce a result. See Nassar, supra, at ——, 133 S.Ct., at 2525; see also LaFave 467 (describing these cases as "unusual" and "numerically in the minority"). To illustrate, if "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," A will generally be liable for homicide even though his conduct was not a but- for cause of B's death (since B would have died from X's actions in any event). Id., at 468 (italics omitted). We

> need not accept or reject the special rule developed for these cases, since there was no evidence here that Banka's heroin use was an independently sufficient cause of his death. No expert was prepared to say that Banka would have died from the heroin use alone.

Burrage v. United States, 571 U.S. 204, 214-15 (2014). In order to have but-for causation in this case, the Government must show that Fentanyl was a sufficient, independent cause of Mr. Gavin's death. The Government cannot make that argument under the facts of this case. The medical examiner listed the cause of death on the death certificate as acute intoxication from the combined effects of ethanol, methanol, and fentanyl. The toxicology report reported fentanyl at 5.7 nanograms per milliliter and methanol at 120 milligrams per deciliter. Both of these concentrations for either fentanyl or methanol could have resulted in death in an average individual. Dr. Arden's, the defense expert, opinion was that it was inappropriate to ignore or separate the ethanol, methanol, and fentanyl from the cause of death. The conclusion must be that no expert would be prepared to testify that Mr. Gavin died from the use of fentanyl alone.

The notion that the fentanyl played a contributing, or even substantial role in the death of Mr. Gavin is also insufficient for strict but-for causation. This Court rejected anything but strict but-for causation when "death resulting" was an element of the enhanced crime of distribution of drugs resulting in death under 21 U.S.C. § 841(b)(1)(C):

> Thus, the Government must appeal to a second, less demanding (but also less well established) line of authority, under which an act or omission is considered a cause-in-fact if it was a "substantial" or "contributing" factor in producing a given result. Several state courts have adopted such a rule, see *State v. Christman,* 160 Wash.App. 741, 745, 249 P.3d 680, 687 (2011); *People v. Jennings,* 50 Cal.4th 616, 643, 114 Cal.Rptr.3d 133, 237 P.3d 474, 496 (2010); *People v. Bailey,* 451 Mich. 657, 676– 678, 549 N.W.2d 325, 334–336 (1996); *Commonwealth v. Osachuk,* 43 Mass.App. 71, 72–73, 681 N.E.2d 292, 294 (1997), but the American Law Institute declined to do so in its Model Penal Code, see ALI, 39th Annual Meeting Proceedings 135–141 (1962); see also Model Penal Code § 2.03(1)(a). One prominent authority on tort law asserts that "a broader rule ... has

> found general acceptance: The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 267 (5th ed. 1984) (footnote omitted). But the authors of that treatise acknowledge that, even in the tort context, "[e]xcept in the classes of cases indicated" (an apparent reference to the situation where each of two causes is independently effective) "no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it." Id., at 268. The authors go on to offer an alternative rule—functionally identical to the one the Government argues here—that "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." Ibid. Yet, as of 1984, "no judicial opinion ha[d] approved th[at] formulation." Ibid., n. 40. The "death results" enhancement became law just two years later.

Id., at 215-216. At best, the combined effects cause of death allows the Government to argue that the fentanyl distributed by Mr. Heindenstrom played a contributing or significant role in Mr. Gavin's death. This argument is precluded by the very terms of *Burrage* and the Court's explicit rejection of such a theory justifying a mandatory minimum sentence for the enhanced crime of distribution of drugs resulting in death. See *United States v. Pena*, 742 F.3d 508, 511 n.3 (1st Cir. 2014). The Government's theory of Mr. Heidenstrom's liability simply is not the strict but-for causation required for "death resulting" cases. The Court's interpretation of "death resulting" has a broader effect than just defining an element of the enhanced distribution of drugs resulting in death criminal offense.

Although the facts of this case specifically preclude finding strict but-for causation, it also seems doubtful that strict but-for causation can ever be met by a "combined effects" theory of drug overdose. The Court has been quite specific about what would be required for the but-for causation needed for conviction on the enhanced crime of distribution resulting in death:

> We decline to adopt the Government's permissive interpretation of § 841(b)(1). 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. Congress could have written § 841(b)(1)(C) to impose a mandatory minimum when the underlying crime "contributes to" death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done, see Ala.Code § 13A–2–5(a) (2005); Ark.Code Ann. § 5–2–205 (2006); Me.Rev.Stat. Ann., Tit. 17–A, § 33 (2006); N.D. Cent. Code Ann. § 12.1–02–05 (Lexis 2012); Tex. Penal Code Ann. § 6.04 (West 2011). It chose instead to use language that imports but-for causality. Especially in the interpretation of a criminal statute subject to the rule of lenity, see Moskal v. United States, 498 U.S. 103, 107–108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990), we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.

Id, at 216. Mr. Heindenstrom could not be convicted of the enhanced distribution of drugs resulting in death offense. Without evidence that could meet the strict but-for causation requirement, Mr. Heindenstrom could not be held criminal responsible for the "death resulting" under any theory that could not separate out which toxin caused the death. Mr. Heindenstrom asserts that the language from the enhanced offense has a consequence for how any death may be accounted for during the sentencing process.

Historically, the First Circuit has not required strict but-for causation when applying the "death resulting" enhancement under the Guidelines. The First Circuit's approach to but-for causation has been the relaxed standard specifically rejected by the Supreme Court:

> We have construed section 5K2.1 to allow a departure when "a defendant puts into motion a chain of events" that runs a cognizable risk of death, even though "the defendant was not directly responsible for the death." *United States v. Diaz*, 285 F.3d 92, 101 (1st Cir. 2002). Thus, a departure under that guideline is permitted "even when the defendant is not the direct cause of the victim's death." *United States v. Sanchez*, 354 F.3d 70, 80-81 (1st Cir. 2004). We cite these cases as examples; they do not suggest limitations on the principle of but-for causation. Applying these tenets, we conclude that to warrant an upward departure in this case, the government was not required to show that ketamine was either the sole or the direct cause of MG's injuries; it had to show only that there was a but-for causal connection between ketamine and those injuries. The evidence before the district court easily met this benchmark. The hospital records are replete with references to MG's use of ketamine and his "ketamine overdose."

> Although other notations mention MG's ingestion of heroin, the records as a whole support an inference that ketamine was at least a concurrent cause of the injuries. Indeed, at the disposition hearing, defense counsel expostulated that the hospital records indicated an "overdose on July 27th of 200 milligrams of ketamine, plus heroin." The ultimate diagnosis — a "[h]eroin/ketamine overdose" — reflects this reality. The chronology of events supports the view that MG's injuries were causally connected to his use of ketamine. The evidence shows that MG ingested ketamine approximately one hour *after* he took heroin; thus, the heroin by itself had not rendered him unconscious. To cinch matters, the amount of ketamine that MG consumed (200 milligrams) constituted twice his usual dosage. To sum up, the totality of the evidence was sufficient to ground an inference that ketamine, either by itself or in combination with heroin, played a meaningful role in the overdose (and, thus, in the incidence of the injuries).

United States v. Pacheco, 489 F.3d 40, 46-47 (1st Cir. 2007). The standard of causation applied in *Pacheco* is certainly not the strict but-for causation standard established by the Supreme Court in *Burrage*. The First Circuit Panel in *Pacheco* was unconcerned by the evidence's inability to establish the sole or direct cause for the injury, but such an analysis is no longer viable under the Supreme Court's reasoning in *Burrage*.

The First Circuit has a history of applying a relaxed standard for but-for causation. First Circuit precedent requires some level of the but-for causation standard for an enhanced offense of distribution of drugs resulting in death:

> What is required under the death-enhancing statute is that the government prove cause-in-fact, that is, that the decedent's death was caused in fact by his or her use of drugs that were distributed either by the defendant himself or by others in a conspiracy of which the defendant was a part. Here, the district court properly instructed the jury about the required proof of cause-in-fact, and-following the court's instructions-the jury specifically found that Wallace died as a result of ingesting heroin that was distributed during the course of the charged offenses by Defendant to Wallace through Tracy and Flynn. Defendant's claims of error based on the issue of foreseeability are without merit.

United States v. De La Cruz, 514 F.3d 121, 138, (1st Cir. 2008). The Panel in *De La Cruz* used the words cause-in-fact and but-for causation interchangeably. *See Black's Law Dictionary* 234

(8th ed. 2004). *Burrage* now makes it clear that strict but-for causation is not the same as the cause-in-fact standard and they are not interchangeable. The First Circuit's interpretation of but-for causation is not nearly as demanding as the strict but-for causation mandated by *Burrage*. The First Circuit interpretation of but-for causation requires no direct connection between the death and the actual drugs distributed by the defendant.

The standard for causation applied in the First Circuit has its roots in *United States v Diaz*. The standard as applied by *Diaz* required only the faintest causal connection:

> Appellant argues that Officer Young's Death was an unpredictable occurrence insufficiently related to his criminal conduct to justify prolonging his term of imprisonment. He notes that none of the factors cited in the policy statement weigh toward departure -- not only was his offense conduct spontaneous, but it also was unforeseeable that officer Young would neither be recognized by fellow officers nor respond to their command to drop his gun. In sum, he argues, the circumstances do not warrant punishment based on the unfortunate, but completely chance, death of the officer. Although we can agree that appellant's culpability is at the low end of the spectrum contemplated by the policy statement, in that he was an indirect cause of the Officer Young's death, we are unable to conclude that he is outside its scope. By using a weapon, appellant invited weapon use by others. Unintended consequences are often the result of reckless behavior, and while he could not have anticipated the particular sequence of events, appellant should have foreseen the possibility of serious harm as a result of waving a cocked and loaded gun at a crowd of people.

United States v. Diaz, 285 F.3d 92, 101 (1st Cir. 2002). Reckless behavior that puts a sequence of actions into motion is just another way of saying it is conduct that contributes to an aggregate force that is itself a but-for cause of death. Under such a standard, overdose deaths caused by the combined effects of various drugs are sufficient but-for causation. Yet this proposition was specifically rejected by the Supreme Court.

The Government has made the argument that a "combined effects" theory could suffice for but-for causation. This Court also rejected that argument:

> In sum, it is one of the traditional background principles "against which Congress legislate[s]," Nassar, 570 U.S., at ——, 133 S.Ct., at 2525, that a phrase such as "results from" imposes a requirement of but- for causation. The Government argues, however, that distinctive problems associated with drug overdoses counsel in favor of dispensing with the usual but- for causation requirement. Addicts often take drugs in combination, as Banka did in this case, and according to the National Center for Injury Prevention and Control, at least 46 percent of overdose deaths in 2010 involved more than one drug. See Brief for United States 28– 29. This consideration leads the Government to urge an interpretation of "results from" under which use of a drug distributed by the defendant need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force (such as mixed- drug intoxication) that is itself a but-for cause of death.

Burrage, at 214. To the extent that but-for causation is required for the enhanced crime of distribution of drugs resulting in death in the First Circuit, the *Burrage* definition of that standard must be applied. The First Circuit should not be allowed to distinguish the but-for causation required for application of a "death resulting" enhancement under the guidelines from the causation required to prove the charged offense. The strict but-for causation standard should be the same throughout the criminal process.

The Fifth Circuit has held that Guidelines' application of the "death resulting" enhancement under United States Sentencing Guideline 2D1.1 is dependent on a conviction for the enhanced offense of distributing drugs resulting in death. The Fifth Circuit reasoned that the language from the 21 U.S.C. § 841(b)(1)(C) was the same in the Guidelines indicating that they were meant to mirror each other:

> The Ninth Circuit has recognized that § 2D1.1(a)(2) follows a similar pattern. See Deeks 303 Fed.Appx. at 509 (citing United States v. Houston, 406 F.3d 1121, 1122–24 (9th Cir.2005), as a model for interpreting § 2D1.1(a)(2) because it interprets 21 U.S.C. § 841(b)(1)(C) "which contains language nearly identical to U.S.S.G. § 2D1.1(a)(2)"). The Sentencing Guidelines instruct that the base offense level should be the greatest level specified in the Drug Quantity Table, § 2D1.1(a)(5), or a higher amount if "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance." U.S.S.G. §

> 2D1.1(a)(2). The similarities between the language indicate that the offense level was intended to mirror the criminal statute. We now hold that U.S.S.G. § 2D1.1(a)(2) applies only when the second prong of the statute, i.e. that death or serious bodily injury results, is also part of the crime of conviction.

United States v. Greenough, 669 F.3d 567 575 (5th Cir. 2012). Although *Greenough* preceded this Court's pronouncement defining the strict but-for causation element required in the enhanced distribution of drugs resulting in death offense, there was a clear preference for similarity between the statutory offense and the application of the Guidelines to the offense conduct. Just as Mr. Heindenstrom could not be subject to the mandatory minimum because there was no strict but-for causation, he cannot similar have his sentence enhanced under *U.S.S.G.* 2D1.1(a)(2) as a workaround to the degree of proof required to hold him criminally liable for that conduct. Mr. Heindenstrom asserts that strict but-for causation is now required in all applications of the Guidelines to 21 U.S.C § 841 offenses when "death results."

The policy statement in United States Sentencing Guideline 5K2.1 uses the same "resulted from" language as the statute for the enhanced crime of distribution of drugs resulting in death. The Guidelines language suggests that the First Circuit and the District Court are bound by this Court's interpretation of "resulting in death" when applying the Guidelines:

> 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 would normally 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 injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other 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.

U.S.S.G. § 5K2.1 (West 2018). *Burrage* is clear that "death resulting" requires strict but-for causation. While "resulted in death" is a variation of "death resulted," it is not so substantial that the Court does not need to conform to the definitive interpretation. Although a Judge of the United States Court of Appeals for the First Circuit has argued that similar language does not require similar interpretations between different statutes in dissent, the First Circuit has not adopted this principle of interpretation. *See United States v. Berroa*, 856 F.3d 141 (1st Cir. 2017). *Burrage* itself suggests that there are not different meanings for similar words used across various statutory schemes. *Burrage* at 889. "Death resulted," then, also requires the strict but-for causation required by the statutory scheme in 21 U.S.C § 841(b)(1)(C).

II. The First Circuit incorrectly concluded that it was not necessary to apply strict but-for causation and the District Court had the power to either impose a sentence that was an upward departure from the guidelines or that was an upward variant sentence on a standard of less than strict but-for causation by applying the harmless error doctrine.

The Court of Appeals took the opportunity to avoid addressing the conflict created by this Court's interpretation of the causation necessary for applying the death resulting sentencing enhancement and the First Circuit's interpretation of the causation necessary to apply the death resulting or serious bodily injury upward departures within the framework of the United States Sentencing Guidelines. The Court of Appeals rested on harmless error instead of addressing an obvious inconsistency:

> Whether there is an inherent tension (or even an irreconcilable conflict) between the holdings of Burrage and Pacheco is an interesting question. In the end, however, it presents a conundrum that we need not resolve today. See Privitera v. Curran (In re Curran), 855 F.3d 19, 22 (1st Cir. 2017) (explaining that "courts should not rush to decide unsettled issues when the exigencies of a particular case do not require such definitive measures"). Because the district court made

> pellucid that it would have imposed the same sixty month sentence as an upward variance and because (as we explain below) the sentence is fully supportable as an upward variance, we need not inquire into the bona fides of the upward departure. Even if the sentencing court's section 5K2.1 departure was improvident, any error in invoking a departure guideline is harmless where, as here, the district court would have imposed exactly the same sentence by means of a variance.

Heindenstrom, at 62. The reliance on harmless error is extraordinary in this instance. First, The First Circuit chose to leave its precedent in place despite its conflict with the policy required by this Court. Second, harmless error was inflated into a dramatic increase in sentencing discretion devoid of appellate review because the District Court could now say and if it cannot impose the sentence for that reason it would impose it for some other unarticulated reason. This Court's sentencing precedent since making the United States Sentencing Guidelines advisory does not support such a broad discretion.

The Court has specifically recognized the role of the Sentencing Guidelines in the current sentencing framework in the context of harmless error. Although Mr. Heindenstrom contested the upward departure and upward variant sentence applied to him, incorrect Sentencing Guideline calculations ordinarily justify review of errors that are not preserved:

> These sources confirm that the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar. The Guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence. This fact is essential to the application of Rule 52(b) to a Guidelines error. From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.

Molina-Martinez v. U.S., 136 S.Ct. 1338, 1346 (2016). The policy recognized in Molina-Martinez is just as applicable to Mr. Heindenstrom's case. The main distinction--the District

Court articulated its view that it would impose the same sentence with or without strict but for causation—does not create a class of sentencing decisions that are exempt from review. This especially apparent when even unpreserved Sentencing Guideline calculation errors require relief. Requiring strict but for causation to upward departures or upward variant sentences would in fact change the sentence that could have been imposed on Mr. Heindenstrom.

Molina-Martinez is really a bar to creating a class of unreviewable sentencing decisions due to conflicting precedent or policy. The dispute over strict but for causation is itself significant in the harmless error analysis:

> In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome. And, again in most cases, that will suffice for relief if the other requirements of Rule 52(b) are met. There may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist. The sentencing process is particular to each defendant, of course, and a reviewing court must consider the facts and circumstances of the case before it.

Id., at 1346. In this case it was enough for the District Court to simply say that it would have given the same sentence as an upward variant if strict but for causation was required for an upward departure. Because variant sentences were not tied to the standards required under the Sentencing Guidelines and only needed to be substantively reasonable or, as the First Circuit articulates that standard, a defensible result, no review was available. The First Circuit Panel agreed with the District Court that Mr. Gavin's death justified a significantly longer sentence.

Neither the District Court nor the Court of Appeals reasoning solves the underlying problem of which deaths may be accounted for and which deaths may not be accounted for in sentences. The Court has repeatedly recognized that the Sentencing Guidelines anchor the District Court's discretion and it should do so now:

> In the ordinary case the Guidelines accomplish their purpose. They serve as the starting point for the district court's decision and anchor the court's discretion in selecting an appropriate sentence. It follows, then, that in most cases the Guidelines range will affect the sentence. When that is so, a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range.

Id., at 1349. The District Court's pronouncement does indicate that the same sentence would be imposed if Mr. Gavin's death could not be factored into the sentences imposed on Mr. Heindenstrom. The tautology should not stand: The sentence cannot be effectively reviewed so long as the question over accounting for Mr. Gavin's death remains unresolved. The application of harmless error To Mr. Heindenstrom's case is too narrow.

The scope of plain error review for unpreserved Sentencing Guideline calculation errors suggests that the First Circuit's use of harmless error is too narrow. In 2018, the Court overturned the Fifth Circuit's heightened standard of plain error review for unpreserved calculation errors:

> In any event, the circumstances surrounding Rosales–Mireles' case are exceptional within the meaning of the Court's precedent on plain-error review, as they are reasonably likely to have resulted in a longer prison sentence than necessary and there are no countervailing factors that otherwise further the fairness, integrity, or public reputation of judicial proceedings. The fact that, as a result of the Court's holding, most defendants in Rosales–Mireles' situation will be eligible for relief under Rule 52(b) does not justify a decision that ignores the harmful effects of allowing the error to persist.

Rosales-Mireles v. U.S., 138 S.Ct. 1897 1910 (2018). *Rosales-Mireles* made it clear that barriers to reviewing unpreserved sentencing errors where not justified by the same concerns that otherwise limited review under plain error analysis. *Rosales-Mireles* also repeated the role the Sentencing Guidelines play in anchoring sentences and that incorrect calculations affected fairness, integrity, and public reputation of the proceeding. These same considerations apply in a

lengthy upward departure or upward variant sentence based on a death that was not sufficiently caused by Mr. Heindenstrom.

The Court has also rejected the idea that there should be strategic reason not to challenge Sentencing Guideline calculation errors. Although the Court rejected the strategic reasons argument in the opposite context, its rejection seems a clear indication against encouraging its necessity:

> That is because counsel normally has other good reasons for calling a trial court's attention to potential error—for example, it is normally to the advantage of counsel and his client to get the error speedily corrected. And, even where that is not so, counsel cannot rely upon the "plain error" rule to make up for a failure to object at trial. After all, that rule will help only if (1) the law changes in the defendant's favor, (2) the change comes after trial but before the appeal is decided, (3) the error affected the defendant's "substantial rights," and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, *supra*, at 732 (internal quotation marks omitted). If there is a lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for "plain error " *later,* we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.

Henderson v. United States, 268 U.S. 266, 276 (2013). This Court has placed a limit on when an enhanced statutory penalty that accounts for a death resulting from the distribution of drugs and that limitation has consequences throughout the sentencing scheme. Despite the number of deaths related to opioid distribution, few courts have addressed the limits of variant sentencing discretion. While the upward variance in Mr. Heindenstrom's case was just under four years, there is nothing preventing the imposition of the maximum sentence and no real way of maintaining consistency without actual review on the value in terms of years in prison on the life of the deceased. The Court should not sanction harmless error analysis as a means of avoiding that question.

The Court has expressed a preference for sentencing policy as articulated through the Sentencing Guidelines. Indeed, the critically important policy judgments behind the Sentencing Guidelines and the Sentencing Commission should continue to guide variant sentences:

> While the Government accurately describes several attributes of federal sentencing after *Booker*, the conclusion it draws by isolating these features of the system is ultimately not supportable. On the Government's account, the Guidelines are just one among many persuasive sources a sentencing court can consult, no different from a "policy paper." Brief for United States 28. The Government's argument fails to acknowledge, however, that district courts are not required to consult any policy paper in order to avoid reversible procedural error; nor must they "consider the extent of [their] deviation" from a given policy paper and "ensure that the justification is sufficiently compelling to support the degree of the variance," *Gall*, 552 U. S., at 50. Courts of appeals, in turn, are not permitted to presume that a sentence that comports with a particular policy paper is reasonable; nor do courts of appeals, in considering whether the district court's sentence was reasonable, weigh the extent of any departure from a given policy paper in determining whether the district court abused its discretion, see *id.*, at 51. It is simply not the case that the Sentencing Guidelines are merely a volume that the district court reads with academic interest in the course of sentencing.

Peugh v United States, 569 U.S. 530 548 (2013). The First Circuit's interpretation of harmless error is similar to the Firth Circuit's treatment of the fourth prong of the plain error standard. In effect, the First Circuit requires a sentence to be unreasonable before it will act to correct a guideline calculation. Harmless error was never meant to be construed so strictly and with such significant results on the sentence imposed.

III. This case is an excellent vehicle for the Court to establish the appropriate standard for imposing an enhancement because death resulted and the extent of variant sentencing discretion while providing guidance to the Circuits of the Court of Appeals on the use of harmless error.

The issue over the causation standard was squarely presented and considered by the District Court. The District Court specifically found that strict but for causation was not present

on the fact. The District Court also concluded that it was not necessary to apply strict but for to impose and upward departure or a variant sentence. The District Court even commented during the legal conclusions that counsel had his setup for the Burrage challenge. The findings clearly make the issue about accounting for the death of Mr. Gavin through either an upward departure or upward variant. Moreover, the strict but for causation would be dispositive should the court decide it was necessary in order to apply a sentence enhancement based on death resulting during either a Sentencing Guideline departure or 18 U.S.C. § 3553 variant sentence.

Resolving this issue also provides the district courts needed guidance in how it must resolve conflicting standards under the Sentencing Guidelines. In its current posture, this case is ideal for establishing a pathway identifying the role of Supreme Court sentencing policy and its consequence on other aspects of sentencing when confronted by an important and growing problem when death results from distribution of illegal drugs.

Finally, review of this case would correct the high burden that the First Circuit requires to allow review under the harmless error doctrine. The Court should not allow this high burden to create a class of sentences that a re unreviewable because the length of imprisonment may not by itself seem unreasonable given the magnitude of factoring death of a victim in the sentencing calculation.

CONCLUSION

The Supreme Court Should review the conclusion of the United States Court of Appeals for the First Circuit and Grant this petition for writ of certiorari.

Dated at Portland, Maine this 27th day of August 2019.

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