No. 12-7515

IN THE

Supreme Court of the United States

MARCUS ANDREW BURRAGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S OPENING BRIEF

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QUESTIONS PRESENTED

1. Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.

2. Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to," death by "mixed drug intoxication," but was not the independent cause of death of a person.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the caption above.

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The decision of the U.S. Court of Appeals for the Eighth Circuit is reported at 687 F.3d 1015 and reprinted in the Joint Appendix (J.A.) at 52-70. The district court's judgment is unreported but reprinted at J.A. 40-51.

JURISDICTION

The Eighth Circuit issued its decision and judgment on August 6, 2012. J.A. 52. Petitioner filed a timely petition for a writ of certiorari, which this Court granted on April 29, 2013. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involved the interpretation of 21 U.S.C. § 841(a)-(b), which is reproduced in full in the appendix to this brief.

INTRODUCTION

Under the Controlled Substances Act, Congress outlawed the knowing or intentional sale of heroin, among other drugs, and imposed a twenty-year maximum sentence. 21 U.S.C. § 841(a), (b)(1)(C). However, "if death or serious bodily injury results from the use" of that heroin, § 841(b)(1)(C) imposes a mandatory minimum sentence of twenty years and up to life in prison. *Id.* § 841(b)(1)(C). In the decision below, the Eighth Circuit concluded that this twenty-year mandatory minimum is triggered if the use of heroin was a mere "contributing cause" of death. Accordingly, even though the heroin sold by Marcus Burrage could not be said to be a substantial factor in or a foreseeable cause of Joshua Banka's death, the court affirmed

the twenty-year minimum sentence imposed on Mr. Burrage. This was error.

Congress's use of the phrase "results from" in § 841(b)(1)(C) requires causation. And in the criminal context, this traditional causation requirement includes both a "but for" and proximate cause element. The criminal common law has long required a showing that the defendant's acts were a substantial factor in causing an injury and that the resulting injury was a foreseeable result of those acts. Here, however, the unrebutted evidence shows that the heroin sold by Mr. Burrage, only a part of which was consumed by Mr. Banka, was not a substantial factor in Mr. Banka's death, nor was that death a foreseeable result of Mr. Burrage's sale of the drug.

The jury instruction in this case allowed the prosecution to show only that the use of heroin was a "contributing cause" of Mr. Banka's death. J.A. 56. But a contributing cause standard has no place in criminal law, because it allows criminal liability to extend far beyond common law principles of criminal causation. The lower court erroneously imported a civil causation standard into the statute, divorcing the high degree of proof required to impose the harsh punishments mandated by § 841(b)(1)(C).

STATEMENT OF THE CASE

A. Statutory Background

Section 841(a) of the Controlled Substances Act, among other things, makes it "unlawful for any person knowingly or intentionally … to … distribute … a controlled substance." 21 U.S.C. § 841(a). The Act then sets forth specific penalties for particular unlawful acts involving different types of controlled substances in different quantities. See *id.* § 841(b).

For cases like this one where the drug quantities fall under the lowest threshold (100 grams for heroin), § 841(b)(1)(C) provides that a person who violates subsection (a) "shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life." *Id.* § 841(b)(1)(C). This provision also includes other enhancements. For instance, if the person violates subsection (a) "after a prior conviction for a felony drug offense has become final," then the sentence shall be "a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment." *Id.* Finally, the provision states that regardless of any other law, a court "shall not place on probation or suspend the sentence of any person sentenced under the provision of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results," and that the person shall not be "eligible for parole during the term of such a sentence." *Id.*

B. Factual Background

After a multi-day crime spree, Joshua Banka, a long-time drug addict, decided to engage in one more day of heavy drug use before entering a court ordered substance abuse program. Trial Tr. vol. 2, 188, June 28, 2011; J.A. 100. He spent Wednesday, April 14, 2010, purchasing drugs, stealing drugs, and using drugs—including OxyContin, heroin, marijuana, and other prescription drugs. J.A. 115-29. Mr. Banka and his wife[1] started their day on April 14 by smoking

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[1] Mr. Banka's wife, Tammy Noragon, also an extensive drug user, knew that Mr. Banka had struggled with drug abuse since

marijuana at a former roommate's house. J.A. 127-28. While at the house, Mr. Banka stole his former roommate's prescription drugs, including OxyContin. J.A. 128. Mr. Banka later crushed the OxyContin, cooked it, and injected it into his system. J.A. 119-21. He also abused other prescription drugs that day, although his wife lost track of what drugs he used and when. J.A. 132. Later in the afternoon of April 14, Mr. Banka resolved to purchase heroin and texted Mr. Burrage to arrange the transaction. J.A. 101, 121.

Mr. Banka, who had recently returned to central Iowa after living out of state, had met Mr. Burrage one week earlier. J.A. 95, 98-99. In response to Mr. Banka's text message, Mr. Burrage agreed to meet Mr. Banka and his wife in a parking lot and sold Mr. Banka one gram of heroin for $200. J.A. 102-04. Mr. Banka immediately used some of the heroin that afternoon, and his wife drove him home. J.A. 105-06. Mr. Banka continued using various drugs throughout the evening and night of the 14th, and into the morning of April 15. J.A. 108-10. At 10:30 a.m. on April 15, Mr. Banka's wife found Mr. Banka dead in the bathroom and called the police. J.A. 111-12.

Upon arrival, law enforcement officers searched the house and Mr. Banka's vehicle. The officers located a small bag containing .59 grams of heroin, Oxycodone

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he was 17 years old. Trial Tr. vol. 2, 220-21, June 28, 2011; J.A. 96. Ms. Noragon knew that Mr. Banka frequently abused a panoply of drugs. J.A. 96-97. Ms. Noragon also knew that Mr. Banka's substance abuse evaluation noted that he needed extensive outpatient treatment with daily meetings to address his substance abuse and mental health issues. Trial Tr. vol. 2, 188-89, June 28, 2011. Despite this knowledge, Ms. Noragon agreed to assist Mr. Banka on his drug spree on April 14. J.A. 100-01, 104, 116, 124.

tablets, a bottle of Baclofen, a bottle of clonazepam, alprazolam, a bottle of hydrocodone, marijuana residue, and a small bag of unidentified narcotics. J.A. 91-92; Trial Tr. vol. 1, 154-55, June 27, 2011. They also found full and used syringes, as well as unused empty syringes, a Mountain Dew can cut down to facilitate intravenous drug use, and a marijuana bong. J.A. 91-92; Trial Tr. vol. 2, 339-40, June 28, 2011. An autopsy and toxicology screen on Mr. Banka's body revealed his cause of death to be "mixed drug intoxication." J.A. 157.

The officers showed Mr. Banka's wife a photo line-up, and she identified Mr. Burrage as the heroin distributor. Trial Tr. vol. 2, 208-10, June 28, 2011. The police decided to include Mr. Burrage in the line-up because of a "controlled buy" they had conducted five months earlier, on November 17, 2009, where Mr. Burrage sold heroin to a police informant during an audio-recorded transaction. J.A. 53-54. The officers declined to arrest or charge Mr. Burrage with distribution at the time of the controlled buy. J.A. 77-78.

C. Trial Court Proceedings

On April 27, 2011, a grand jury returned a superseding indictment charging Mr. Burrage with distribution of heroin causing death under § 841(b)(1)(C), for the sale of heroin to Mr. Banka on April 14, 2010 (Count II), as well as simple distribution of heroin, for the previously uncharged controlled buy on November 17, 2009 (Count I). J.A. 40-41.

1. At trial, the prosecution called two experts to testify about the causes of Mr. Banka's death: Dr. Jerri McLemore, the medical examiner who conducted the autopsy, and Dr. Eugene Schwilke, the toxicologist who ran the screen of Mr. Banka's blood and urine. J.A. 137-39, 188-90. Both experts agreed that

the cause of Mr. Banka's death was *not* heroin overdose, but instead was "mixed-drug intoxication." J.A. 157, 191-92.

Dr. McLemore's April 16, 2010 autopsy of Mr. Banka yielded the following uncontested findings:

- Mr. Banka's blood panel showed recent use of benzodiazepines, such as clonazepam and alprazolam, marijuana, opiates, such as Oxycodone, morphine, and 6-Monoacetylmorphine ("6-MAM"), a derivative of heroin. J.A. 150-51.
- Mr. Banka had aspirated on his own vomit. J.A. 144-45.
- Mr. Banka had scarred vessels in his arms, indicating a long history of intravenous drug use. J.A. 145.
- There was evidence Mr. Banka was injecting drugs into other areas of his body, indicating extensive intravenous drug use. J.A. 145-47.
- Mr. Banka had developed a condition in his lungs, which indicated long-term intravenous drug use. J.A. 156-57.
- Mr. Banka had heart disease and his heart was twice the size and weight of a normal man's heart. J.A. 147.

In Dr. McLemore's opinion, the morphine in Mr. Banka's system was derived "at least in part" by heroin use. J.A. 153.[2] And she opined that Mr. Banka's morphine level was two and a half times higher than

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[2] When the human body breaks down heroin, it metabolizes heroin into 6-Monoacetylmorphine and then into morphine. J.A. 192-205.

the published reference range for a therapeutic dose of morphine in a patient. *Id.*[3]

Dr. McLemore testified that the use of opiates, which Mr. Banka had abused for many years, creates a tolerance and that the amount of heroin that causes a given individual to overdose varies depending on that person's tolerance to the opiates. J.A. 167-69. As a result, Dr. McLemore could not say whether the approximately .41 grams of heroin that was missing from the one gram bag purchased from Mr. Burrage would have caused an overdose. J.A. 169. Dr. McLemore ultimately concluded that the cause of Mr. Banka's death was a "mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." J.A. 157.[4] In her opinion, the circumstances of the case were "consistent with those drugs, including the heroin, as contributing to death." J.A. 158.

Significantly, Dr. McLemore could not say that Mr. Banka would have lived if he had not taken the heroin. J.A. 159-60. She explained that if she could have made such a finding, her report would have read "heroin overdose" rather than "mixed drug intoxication." *Id.* Dr. McLemore also could not determine which drug caused Mr. Banka to vomit and then aspirate (inhale). J.A. 160, 166-67. Finally, she could

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[3] Dr. McLemore explained that therapeutic range was "the range of the medication … that you normally get if you are prescribed it and you take it as prescribed." J.A. 153.

[4] In the medical profession, according to Dr. McLemore, a "cause of death" is a disease or disease process or injury that brought about the death of a person. A "contributory" cause is a disease, disease process, or injury that aided in bringing about the death of a person. J.A. 159. The difference between the two is causation – a "contributory" cause means that it is not necessarily true that a person would not have died but for that cause.

not say that Mr. Banka would have died even if he had not used oxycodone. J.A. 170.

The prosecution also called the toxicologist, Dr. Schwilke, who testified that "every drug on this list" in Mr. Banka's system, with the exception of marijuana, had a depressant effect on the central nervous system. J.A. 193. A slowed breathing process, also called respiratory depression, is a common toxic effect when multiple central nervous system depressant medications are combined together. J.A. 194. Thus, while a certain amount of one particular drug may not be toxic, it may become toxic when mixed with other drugs because "there's a synergistic or overenhanced effect of the medication when multiple CNS depressant or central nervous system depressant drugs are taken at the same time." J.A. 195.

Dr. Schwilke reaffirmed Dr. McLemore's opinion that that cross-tolerance from a regular oxycodone user like Mr. Banka, who used oxycodone daily, would develop and raise the tolerance level for all the opiates. J.A. 203. Dr. Schwilke believed that the "201 nanograms per milliliter" of morphine in Mr. Banka's system—the level that the prosecution claimed was lethal—may not be toxic to a regular drug user like Mr. Banka. J.A. 202-03. Dr. Schwilke opined that the prosecution's reliance on the therapeutic level of morphine as the cause of death could be misplaced because it was like "compar[ing] apples and oranges." J.A. 202. Like Dr. McLemore, Dr. Schwilke could not say that Mr. Banka would have lived if he had not taken the heroin, and similarly could not state that if Mr. Banka had not taken the oxycodone, he still would have died. J.A. 208.

2. At the close of the prosecution's evidence, Mr. Burrage moved for judgment of acquittal, in part, because the prosecution had not proven that Mr. Ban-

ka's heroin use was the "but for" cause of Mr. Banka's death. The motion was denied. J.A. 213-18.

At the conclusion of the case, Mr. Burrage proposed several jury instructions on the standard for causation under § 841(b)(1)(C). Proposed Instruction 13 provided that "the use of the heroin [must have been] the proximate cause of a death." J.A. 236. Proposed Instruction 14 stated in its entirety, "The element 'resulting in death' listed in Count 2 of the indictment, requires the government to prove beyond a reasonable doubt that the distribution of the heroin was the proximate cause of death." J.A. 237. Proposed Instruction 15 defined "proximate cause":

> As used in these instructions, the term "proximate cause" means a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.
>
> A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

J.A. 238.

The district court declined to give Mr. Burrage's proposed instructions to the jury, stating that they did not reflect the causation standard in the Eighth Circuit. J.A. 221-23. Instead, the court adopted the prosecution's proposed instruction on causation, which incorporated the concept of "contributing cause." J.A. 234. Over Mr. Burrage's objection, the district court ultimately instructed the jury:

> For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death.

J.A. 241-42.

The jury convicted Mr. Burrage of both counts. J.A. 40. The district court sentenced him to 240 months, imposing the twenty-year maximum for the distribution count, and the twenty-year minimum for the "death results" count, to be served concurrently. J.A. 42. Mr. Burrage appealed. J.A. 52.

D. The Eighth Circuit's Decision

On appeal, Mr. Burrage argued, among other things, that the district court's jury instruction was erroneous because the court failed to give a proximate cause instruction for the "death results" count. J.A. 57.

The Eighth Circuit held that there is no proximate cause requirement under § 841(b)(1)(C) to establish that death "results from" use of a controlled substance. J.A. 59-60. The court relied entirely on its prior decision in *United States* v. *McIntosh*, 236 F.3d 968, 972-73 (8th Cir. 2001), which held that a showing of proximate cause is not required under § 841(b)(1). J.A. 58. Moreover, the court explained that in *United States* v. *Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), it had previously opined that "contributing cause" was the law of the Eighth Circuit after *McIntosh*. J.A. 59. Although the court recognized that the Seventh Circuit in *United States* v. *Hatfield*, 591 F.3d 945 (7th Cir. 2010), had expressly rejected a "contributing cause" instruction, J.A. 60, it explained

that it was bound by its precedent and declined to follow *Hatfield*. J.A. 60, 70.

SUMMARY OF ARGUMENT

The plain meaning of the text of the criminal statute punishing the distribution of drugs resulting in death under 21 U.S.C. § 841 requires a finding of "but for" and proximate cause. Under the criminal common law, this causal standard translates into a substantial factor that causes a foreseeable result. A foreseeability requirement avoids creating a new category of strict liability crimes. Foreseeability, which is the basis for a finding of recklessness or negligence, provides the necessary *mens rea* requirement under the precedents of this Court. Moreover, policy considerations support the conclusion that proximate cause applies. Because a large number of criminal statutes incorporate "death results" or very similar language, the definition of this phrase will have wide ranging effect. The facts of this case satisfy neither the substantial factor nor the foreseeability requirements, and this Court should reverse Mr. Burrage's conviction.

Under the long-established common law of criminal causation, the contributing cause instruction given by the district court is insufficient to establish criminal liability when "but for" cause is required. While the Solicitor General attempts to import a less stringent causation standard from civil law into common law "but for" causation, the traditional criminal law standard should apply because of the differing policies behind criminal and civil law. Moreover, the drastic difference in potential punishment if "death results" reinforces the need to apply the stricter causal standards of criminal law. Finally, the contributing cause instruction is insufficient when proximate cause is required. Even under the civil proxi-

mate cause precedents of this Court the instruction that was given fails.

ARGUMENT

Section 841(b)(1)(C) requires that, before the mandatory minimum sentence of twenty years is imposed[5] on a defendant who distributes a controlled substance, the prosecution must prove that use of that controlled substance was a substantial factor in causing death, and that the death was foreseeable. These basic causation principals follow directly from Congress's use of the phrase "results from" in § 841(b)(1)(C), because this phrase incorporates stringent "but for" and proximate causation standards of criminal law.

The lower court's standard of "contributing cause" has no place in § 841(b)(1)(C). This is a civil causation standard that satisfies neither the foreseeability nor the substantial factor test.

I. SECTION 841(B)(1)(C)'S TWENTY-YEAR MANDATORY MINIMUM REQUIRES PROOF THAT USE OF THE DRUG DISTRIBUTED WAS A SUBSTANTIAL CAUSE OF DEATH AND THAT DEATH WAS FORESEEABLE.

The text and structure of § 841(b)(1)(C), background common law principles, and policy considerations establish that the twenty-year mandatory minimum requires a showing of "but for" and proximate cause, which means that use of the drug distributed was a substantial factor in causing the death and

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[5] The penalty is even greater in cases where defendants have a prior conviction: the statutory penalty is zero to thirty years, but if "death results" then the penalty jumps to a mandatory life sentence.

that the death must have been foreseeable. The foreseeability requirement further avoids creating a vast new category of strict liability crimes. Indeed, numerous criminal statutes have language similar to the "results from" language in § 841(b)(1)(C), and a foreseeability requirement avoids upsetting the stringent causality standards typically required to establish criminal liability. Because the evidence in this case cannot satisfy either the substantial factor or foreseeability causation requirements, Mr. Burrage's conviction should be overturned.

A. The Text And Structure Of § 841 Establish That The "Death Results" Language Requires "But For" And Proximate Causation.

The text and structure of § 841(b)(1)(C) plainly require a showing of both "but for" and proximate causation before the mandatory minimum twenty years can be imposed. This follows from Congress's use of the phrase "results from." First, this phrase signifies a causal connection. *Webster's New World College Dictionary* 1145 (Victoria Neufeldt & David B. Guralnik eds., 3d ed. 1996) (defining result as "to happen or issue as a consequence or effect"). And this Court has accordingly explained that the meaning of "results of" "is naturally read simply to impose the requirement of a causal connection." *Brown* v. *Gardner*, 513 U.S. 115, 119 (1994) (assuming that proximate causation applies to veterans' compensation statute). Numerous courts have likewise held that similar language requires causation. [6]

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[6] *See also CNG Transmission Mgmt. VEBA* v. *United States*, 588 F.3d 1376, 1379 (Fed. Cir. 2009) ("The plain meaning of the term 'results in' is 'causes.'"); *Murakami* v. *United States*, 398 F.3d 1342, 1351-1352 (Fed. Cir. 2005) (holding that the provi-

In criminal statutes, the phrase "results from" requires both "but for" and proximate causation. As Professor LaFave explains, when crimes are defined "to require not merely conduct but also a specified *result* of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003) (emphasis added). In other words, "it must be determined that the defendant's conduct was the cause in fact of the result, which usually … means that but for the conduct the result would not have occurred." *Id.* And, "[i]n addition, even when cause in fact is established, it must be determined that any variation between result intended … or hazarded … and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." *Id.*[7]

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sion of the Civil Liberties Act allowing redress for harms occurring "as a result of" certain government actions means "as a consequence or effect of the governmental actions"); *Black Hills Aviation, Inc.* v. *United States*, 34 F.3d 968, 975 (10th Cir. 1994) (holding that "use of the plain language—'as a result of'—is logically interpreted to mean 'caused by' … [not] 'connected with'"); *Am. Ins. Co. of City of Newark, N.J.* v. *Keane*, 233 F.2d 354, 360 (D.C. Cir. 1956) (defining the verb "result" as "'[t]o proceed, spring, or arise as a consequence, effect, or conclusion'") (quoting *Merriam-Webster New International Dictionary* (2d ed. 1953)).

[7] *See also State* v. *Marty*, 801 P.2d 468, 471 (Ariz. Ct. App. 1990) ("In Arizona, both 'but for' causation and proximate cause must be established in a criminal case."); *People* v. *Hudson*, 856 N.E.2d 1078, 1083 (Ill. 2006) (holding that Illinois requires proximate cause in felony murder cases, which is composed of "two distinct requirements: cause in fact and legal cause"); *Robertson* v. *Commonwealth*, 82 S.W.3d 832, 836 (Ky. 2002) (requiring cause in fact as a part of proving proximate cause); *State* v. *Phillips*, 514 So. 2d 743, 745 (La. Ct. App. 1987) ("Cause-in-fact as well as proximate or legal cause of a homicide must be proved beyond a reasonable doubt."); *People* v. *Feezel*, 783 N.W.2d 67,

This reading of "results from" is confirmed by the interpretation of similarly worded statutes. For example, in *Babbitt* v. *Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995), Justice O'Connor, in interpreting the Endangered Species Act, explained that "parties should be held liable … only if their … actions proximately cause death or injury …." *Id.* at 712 (O'Connor, J., concurring); see also *United States* v. *Pineda-Doval*, 614 F.3d 1019, 1026 (9th Cir. 2010) (interpreting an act criminalizing the transportation of illegal aliens resulting in death, and stating that "when a criminal statute requires that the defendant's conduct has *resulted* in an injury, 'the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury.'" (emphasis added) (quoting *United States* v. *Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986)); *United States* v. *Martinez*, 588 F.3d 301, 318-19 (6th Cir. 2009) (holding that "proximate cause is the appropriate standard to apply in determining whether a health care fraud violation 'results in death'"); *United States* v. *Harris*, 701 F.2d 1095, 1101 (4th Cir. 1983) (interpreting the phrase "death results" in 18 U.S.C. § 242 to mean that the "death [must] foreseeably and naturally result[] from the rights-violating conduct" (internal quotation marks omitted)).

The design of 21 U.S.C. § 841(b)(1)(C) reinforces that "death results" requires a strict causal standard.

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74 (Mich. 2010) (holding that the term "cause" has a "'unique, technical meaning'" in the criminal law context, requiring both factual or "but for" cause and proximate cause) (quoting *People* v. *Schaefer*, 703 N.W.2d 774, 784 (Mich. 2005)); *State* v. *William*, 435 N.W.2d 174, 177 (Neb. 1989) (requiring "but for" and proximate cause for felony murder); *State* v. *Marshall*, 34 A.3d 540, 544 (N.H. 2011) (adopting "but for" and proximate cause as the standard for drug-related crimes resulting in death).

U.S. Nat'l Bank of Or. v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction is a holistic endeavor, … and, at a minimum, must account for a statute's full text, language … [and] structure…") (internal quotation marks omitted) (internal citation omitted). In the statute, Congress attached severe penalties to circumstances when "death results." In the present case, the death results language raised the sentencing range from a maximum of twenty years to a twenty-year minimum up to life. And, if a defendant has a prior controlled substance conviction, then the repercussions are even more severe: a mandatory life sentence. Moreover, the statute provides that "the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results …" 21 U.S.C. § 841(b)(1)(C). The harsh penalties that apply when "death results" suggest that Congress intended correspondingly stringent causal standards to also apply.

B. The Common Law Of Criminal Causation Requires "But For" Causation, Which Means Applying A Substantial Factor Test When There Is More Than One Cause.

A "but for" causation requirement is also required by the traditional rule that courts should "construe the statute in light of the background rules of the common law …." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (citing *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978)). The common law has long required "but for" causation as a minimum

standard in criminal cases.[8] Indeed, the Model Penal Code states that "[c]onduct is the cause of a result when … it is an antecedent but for which the result in question would not have occurred." Model Penal Code § 2.03(1). The Solicitor General does not dispute that at a minimum "but for" causation is required. Br. Opp'n 16. And the basic meaning of "but for" is "[t]he cause without which the event could not have occurred." *Black's Law Dictionary* 250 (9th ed. 2009).

However, when more than one cause contributed to a result, the proper test to establish "but for" causation is whether "the defendant's conduct [was] a substantial factor in bringing about the forbidden result[.]" LaFave, *supra* § 6.4(b), at 468-69.[9] Professor

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[8] *Witherspoon* v. *State*, 33 So. 3d 625, 627-28 (Ala. Crim. App. 2009) (citing "but for" language for criminal liability from § 13A-2-5, Ala. Code 1975); *State* v. *Crocker*, 431 A.2d 1323, 1325 (Me. 1981) (upholding a "but for" standard of causation in criminal cases); *State* v. *Montoya*, 61 P.3d 793 (N.M. 2002) (requiring "but for" causation); *State* v. *Bingaman*, 655 N.W.2d 51, 56 (N.D. 2002) (adopting a "but for" standard); *Robbins* v. *State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986) (en banc) (requiring "but for" causal connection); *see also supra* note 7.

[9] *See, e.g.*, *State* v. *Malone*, 819 P.2d 34, 36 (Alaska Ct. App. 1991) (holding that "the defendant's conduct need not be the sole factor … the test is whether the defendant's conduct was a 'substantial factor' in bringing about the result" while reviewing criminal assault charges); *State* v. *Wassil*, 658 A.2d 548, 551 (Conn. 1995) (holding that the defendant's conduct must contribute "substantially and materially, in a direct manner, to the victim's injuries" and affirming a conviction for first degree manslaughter and sale of narcotics); *Abney* v. *State*, 766 N.E.2d 1175 (Ind. 2002) (holding that intoxication offenses required proof that defendant's operation of a motor vehicle while intoxicated was a "substantial cause" of the resulting death, not a mere "contributing cause"); *Robertson*, 82 S.W.3d at 836 (requiring that the criminal act be a "substantial factor" in bringing about the result and affirming conviction for second-degree

LaFave states that this test is applicable when "two causes, each alone sufficient to bring about the harmful result, operate together to cause it." *Id.* at 468. Thus, criminal liability can attach only if the defendant's actions would have *independently* caused the death.

C. The Common Law Requires A Finding Of Proximate Cause, Which In Criminal Law Means Foreseeability.

In addition to proof of "but for" or substantial causation, the common law also requires the prosecution to prove that the defendant's actions were not only a cause of the result, but also that the result was a foreseeable one. This requirement is most often labeled "proximate cause." LaFave, *supra* § 6.4, at 464 (internal quotation marks omitted). The common law reinforces that "proximate cause" is an indispensible element to hold a defendant criminally liable.[10] Prox-

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manslaughter); *William*, 435 N.W.2d at 177 (requiring that the defendant's act be the "predominating cause" or the "substantial factor" which results in the victim's death and affirming conviction for felony motor vehicle homicide); *State* v. *Lillie*, 193 P.3d 1050, 1053 (Or. Ct. App. 2008) (viewing "tests of factual causation—'directly contributed,' 'substantial factor in bringing about,' and resulting 'foreseeable consequences'—as synonymous" and affirming conviction of murder); *Commonwealth* v. *Uhrinek*, 544 A.2d 947, 951 (Pa. 1988) (holding that "[t]he defendant's conduct must be a direct and substantial cause of the injury" and reversing conviction of homicide by vehicle); *State* v. *Oimen*, 516 N.W.2d 399, 404 (Wis. 1994) (holding that "an actor causes death if his or her conduct is a 'substantial factor' in bringing about that result" and affirming conviction of felony-murder).

[10] *See, e.g.*, *Whitesides* v. *State*, 88 P.3d 147, 150 (Alaska Ct. App. 2004) (explaining that "the normal meaning of the words 'direct' and 'result' imply that the defendant's conduct must, at a minimum, be a 'proximate cause' of the victim's physical injury"

imate cause "is a bedrock rule of both tort and criminal law." *United States* v. *Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011) (citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 cmt. a (2010) (calling proximate cause a "requirement[ ] for liability in tort"); W. Page Keeton et al., *Prosser*

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while reviewing conviction for sale of heroin and possession of methamphetamine); *Wassil*, 658 A.2d at 551 (stating that "to prove causation, the state is required to demonstrate that the defendant's conduct was a 'proximate cause' of the victim's death" and affirming a conviction for first degree manslaughter and sale of narcotics); *Webster* v. *State*, 213 A.2d 298, 302-03 (Del. 1965) (explaining that a statute requiring that "death results" should be understood to require direct or proximate causation and affirming conviction for involuntary manslaughter); *Martin* v. *State*, 377 So. 2d 706, 707 (Fla. 1979) (holding that the proximate cause standard for a conviction of death resulting from distribution of heroin is constitutional); *Commmonwealth* v. *Berggren*, 496 N.E.2d 660, 662 (Mass. 1986) ("[T]he proper standard of causation for [motor vehicle homicide] is the standard of proximate cause…"); *State* v. *Jaworsky*, 505 N.W.2d 638, 643 (Minn. Ct. App. 1993) (holding that proximate cause is the standard of causation in involuntary manslaughter cases); *State* v. *Vaughn*, 707 S.W.2d 422, 426 (Mo. Ct. App. 1986) (using a proximate cause standard for criminal liability in homicide cases); *State* v. *Cummings*, 265 S.E.2d 923, 925-26 (N.C. Ct. App.) (holding that death must proximately result from defendant's unlawful acts in conviction for involuntary manslaughter), *aff'd*, 271 S.E.2d 277 (N.C. 1980); *A.L.G.* v. *State*, 736 P.2d 521, 522 (Okla. Crim. App. 1987) (requiring proximate cause for misdemeanor-manslaughter cases); *State* v. *Farner*, 66 S.W.3d 188, 191-92 (Tenn. 2001) (reversing conviction for criminally negligent homicide after trial court failed to instruct jury on proximate causation); *Brown* v. *Commonwealth*, 685 S.E.2d 43, 46 (Va. 2009) (applying proximate causation to criminal cases and affirming conviction of involuntary manslaughter); *State* v. *Engstrom*, 487 P.2d 205, 209 (Wash. 1971) (en banc) (applying proximate causation to negligent homicide cases); *Glazier* v. *State*, 843 P.2d 1200, 1204 (Wyo. 1992) (applying proximate cause and affirming conviction of aggravated vehicular homicide).

and Keeton on Torts § 41 at 263 (5th ed. 1984) (stating that "an essential element of the plaintiff's cause of action for negligence, or … any other tort, is … 'proximate cause'")), *cert. denied*, 132 S. Ct. 756 (2011). "The purpose of this rule is clear: 'legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.'" *Monzel*, 641 F.3d at 535-36 (quoting Keeton et al., *supra*, at 264).

Proximate cause in the criminal context means, after "but for" cause is established, that criminal defendants should only be held liable for the foreseeable results of their actions.[11] Foreseeability is generally defined as "'whether any ordinarily prudent man would have foreseen that damage would probably result from his act.'" *Consol. Aluminum Corp.* v. *C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987) (quoting F. James & R. Perry, *Legal Cause*, 60 Yale L.J. 761, 786 (1951)) (detailing definitions of foreseeability and their geneses). Even the Solicitor General concedes

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[11] *See, e.g.*, *Hudson*, 856 N.E.2d at 1083 ("[F]oreseeability is a necessary component of a proximate cause analysis"); *William*, 435 N.W.2d at 177 ("[W]here the death or injury caused by the defendant's conduct is a foreseeable and natural result of that conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible.") (quoting *State* v. *Spates*, 405 A.2d 656, 660 (Conn. 1978)); *A.L.G.*, 736 P.2d at 522 (imposing criminal liability "'[w]here events are foreseeable and naturally result from one's criminal conduct'") (quoting *United States* v. *Hayes*, 589 F.2d 811, 821 (5th Cir. 1979)); *see also Lillie*, 193 P.3d at 1053 (viewing "tests of factual causation—'directly contributed,' 'substantial factor in bringing about,' and resulting 'foreseeable consequences'—as synonymous").

that foreseeability is a common element of proximate cause. Br. Opp'n 11 n.*.

Policy considerations confirm that proximate cause is required to impose a mandatory-minimum sentence of twenty years on a defendant under § 841(b)(1)(C). Without this limitation, the severe penalties in § 841(b)(1)(C) would extend far beyond what Congress intended. See *Hatfield*, 591 F.3d at 948; *United States* v. *Robinson*, 167 F.3d 824, 831-32 (3d Cir. 1999). Suppose, for example, that heroin use impaired a driver, who could not then avoid being hit by another driver in a speeding car who ran a red stop light. The heroin use may have "contributed" to the driver's death, but the distributor would not have foreseen the negligence of the second driver (or perhaps even that the drug user would get in a car). Section 841(b)(1)(C) requires something more exacting before the person who distributed the drug faces a mandatory minimum sentence of twenty years to life from a death that was really caused by the second speeding driver. It requires that death or serious bodily injury actually "results from" the drug use. The Eighth Circuit erroneously imported a civil causation standard into the statute, divorcing the high degree of proof required to impose the harsh punishments mandated by § 841(b)(1)(C).

Moreover, if causation is not proximately limited, then Mr. Banka's wife's aiding and abetting Mr. Banka in stealing and purchasing drugs is a contributing cause. Mr. Banka's former roommate was a contributing cause as well for failing to properly secure his stash of OxyContin and other prescriptions drugs from Mr. Banka and his wife. The doctors that prescribed pain medication to Mr. Banka for his back problems were contributing causes. Indeed, there are hundreds of causes that "contributed" to Mr. Banka's

death under the prosecution's theory. Because such a result cannot be what Congress intended, proximate cause should limit the criminal liability under the statute.

D. The Presumption In Favor Of *Mens Rea* Also Confirms That Foreseeability Is Required.

Foreseeability is not only required by common law standards of criminal proximate causation, but it is also required by the necessary element of *mens rea* that presumptively applies to all criminal statutes. The four general types of *mens rea* are purpose, knowledge, recklessness, and negligence; the last two are based on principles of foreseeability (subjective foreseeability for recklessness and objective foreseeability for negligence). LaFave, *supra* § 5.1(c), at 337.

1. The Text Of § 841 Indicates That *Mens Rea* Is A Necessary Element.

The text of § 841 proves that not only does the underlying violation have a *mens rea* element, but so does the "death results" element.[12]

Section 841 provides:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person *knowingly or intentionally*--

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[12] This Court's decision in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), removes any doubt that "death results" is an element of the offense. In *Alleyne*, the Court held that an aggravating fact that led to a higher mandatory minimum sentence was an element of the crime that must be proved to the jury. 133 S. Ct. at 2162-63. Under § 841(b)(1)(C), the mandatory minimum sentence increases from zero years to twenty years if death results.

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> ….
>
> (b) Penalties
>
> ….
>
> [(1)](C) In the case of a controlled substance in schedule I or II, … such person shall be sentenced to a term of imprisonment of not more than 20 years and *if death or serious bodily injury results* from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life …"

21 U.S.C. § 841(a)-(b)(1)(C) (emphases added).

While the phrase "knowingly or intentionally" only appears in subsection (a), that mental state must extend to all subsequent elements of the offense, including the "death results" element. See *Flores-Figueroa* v. *United States*, 556 U.S. 646, 646-47 (2009) (finding that "knowingly" applied to subsequent elements of an offense). "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime." *United States* v. *Bailey*, 444 U.S. 394, 406 (1980) (quoting Model Penal Code Comments 123). Thus in § 841, the *mens rea* requirement must continue to apply to every element.

Even if "knowingly" does not apply to the "death result" element in § 841(b)(1)(C), at a minimum recklessness is required. "[T]he Model Penal Code … provides that proof of guilt of a statute that does not specify a state of mind or other standard of culpability requires proof of at least recklessness." *Hatfield*,

591 F.3d at 950-51 (citing Model Penal Code § 2.02(3) (1962)).

The Solicitor General, in opposition to the Petition, relied on *Dean* v. *United States*, 556 U.S. 568 (2009), to argue that "death results" contains no *mens rea* requirement. Br. Opp'n 10-11. The Court in *Dean* found that the "discharge provision" of 18 U.S.C. § 924(c)(1)(A) did not have a *mens rea* component because, in part, the "brandishing provision" in the same subsection was specifically defined later in the statute to contain a *mens rea* component. 556 U.S. at 573-74. In other words, the Court followed the principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 573 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Dean is inapplicable here for multiple reasons. First, *Dean*, by its own terms, applies only to a sentencing factor. 556 U.S. at 574. Sentencing factors do not enjoy the same protections in the common law that elements do: "Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts." *Harris* v. *United States*, 536 U.S. 545, 549 (2002), *overruled on other grounds by Alleyne*, 133 S. Ct. 2151. Thus, *Dean's* rationale cannot apply to "death results" which is a central element in the aggravated crime in § 841(b)(1)(C). See *supra* note 12.

Second, *Dean*'s rationale cannot extend to the distinct provision at issue. In *Dean*, the Court concluded that a criminal prohibition lacked a *mens rea* compo-

nent because Congress had included a *mens rea* element in a separate prohibition (discharge of a weapon versus brandishing a weapon). 556 U.S. at 570, 577. Here, on the other hand, there is only one unified prohibition and the knowledge requirement specified in (a) must apply to the entire prohibition. Indeed, the district court even read the "knowingly or intentionally" requirement of (a) into subsection (b) by requiring the jury to find that Mr. Burrage knew it was heroin, even though the heroin element is found in subsection (b)(1)(C) under "Penalties" ("In the case of a controlled substance in schedule I"). *Dean* is inapplicable.

2. The Common Law Presumption Of *Mens Rea* Applies To The "Death Results" Element.

Holding that the "death results" element requires a finding of *mens rea* comports with "the background rules of common law." *Staples*, 511 U.S. at 605 (citing *U.S. Gypsum Co.*, 438 U.S. at 436-37).

The *mens rea* requirement is "universal and persistent in mature systems of law," one "almost as instinctive as the child's familiar exculpatory 'But I didn't mean to ….'" *Morissette* v. *United States*, 342 U.S. 246, 250-51 (1952). The Solicitor General's opposition to a more stringent causality standard, Br. Opp'n 10, threatens "by a feat of construction radically to change the weights and balances in the scales of justice … [T]o strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Morissette*, 342 U.S. at 263; see also *Staples*, 511 U.S. at 605 (The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.") (quoting *U.S. Gypsum Co.*, 438 U.S. at 436); 1 Joel

Prentiss Bishop, *Commentaries on the Criminal Law* 260 § 227 (2d ed. 1858) ("the essence of an offence is the wrongful intent, without which it cannot exist"); 4 William Blackstone, *Commentaries on the Laws of England* 21 (1769) ("[T]o constitute a crime against human laws, there must be, first, a vicious will"); 3 Edward Coke, *Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown. And Criminal Causes.* 107 (1797) ("*Actus non facit reum, nisi mens sit rea*"—an act is not guilty if the mind is not guilty); Francis Bacon, *The Elements of the Common Lawes of England* 65 (1630) ("All crimes have their conception in a corrupt intent").

Also, the difference in the potential severity of punishment between when "death results" (twenty years to life) and when it does not (up to twenty years) confirms that the death results element requires proof of *mens rea*. See, e.g., *Staples*, 511 U.S. at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*"); *U.S. Gypsum Co.*, 438 U.S. at 442 n.18 (noting that "[t]he severity of [the] sanctions provides further support for our conclusion that the … Act should not be construed as creating strict-liability crimes"); see also *United States* v. *O'Brien*, 130 S. Ct. 2169, 2177 (2010) (stating that a "drastic, sixfold increase [in sentence] that strongly suggests a separate substantive crime"). Moreover, the additional and grave penalties specified for defendants with prior convictions (see *supra* Part I.A.) also support the application of the common law presumption to this statute in particular.

The Solicitor General in his opposition cited *Carter* v. *United States*, 530 U.S. 255, 269-70 (2000), in support of his erroneous argument that the presumption

in favor of *mens rea* is only applicable to avoid criminalizing otherwise lawful conduct. Br. Opp'n 10 (citing *United States* v. *X-Citement Video*, Inc., 513 U.S. 64, 72-73 (1994)). In so arguing, the Solicitor General resurrects an argument that garnered zero votes from this Court in *Flores-Figueroa*, a case decided nine years after *Carter*. In *Flores-Figueroa*, the statute at issue punished someone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" while committing an enumerated predicate crime. 556 U.S. at 646-47 (emphasis removed). The Solicitor General argued that it did not have to prove that the defendant knew the identification card contained the identity of another person (as opposed to a fictitious identity). *Id.* at 648. That case could not have turned on protecting the otherwise innocent because the defendant would have already committed a predicate crime *and* used a false ID card. Tellingly, the Court rejected the Solicitor General's argument that "the defendant's necessary knowledge that he has acted 'without lawful authority,' make[s] it reasonable" to "read the statute's language as dispensing with the knowledge requirement." *Id.* at 656. Instead, the Court read the word "knowingly" to apply to each element. *Id.* at 651-52.

While the Solicitor General relies heavily on language from *Dean* to support his argument about otherwise innocent conduct, Br. Opp'n 10, *Dean* is inapplicable to the case at bar for the reasons stated *supra* pp. 24 to 25. In addition, in *Dean* the Court's concern was about the inherent risk in the conduct of using a loaded gun to rob a bank, but that same level of risk is not at play here. Selling drugs is wrong, but it is not equivalent to the risk associated with handling a loaded gun in the course of a bank robbery.

3. The Aggravated "Death Results" Charge Is Not A Strict Liability Crime.

Finally, § 841 is not comparable to the narrow categories of statutes that do not require *mens rea*. For example, § 841 is in no way comparable to "sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent." *Morissette*, 342 U.S. at 251 n.8. Nor is § 841 comparable to "public welfare" or "regulatory" offenses where the Court has understood Congress to impose a form of strict liability. *Staples*, 511 U.S. at 606. Public welfare statutes almost always "provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary," *id.* at 616, much less a mandatory sentence of twenty years or life. Considering the severe penalty for the current offense, it cannot be considered a public welfare offense.

Moreover the "death results" language is common in federal criminal statute. See, e.g., 18 U.S.C. § 43 (Force, Violence, and Threats Involving Animal Enterprises); 18 U.S.C. § 247 (Damage to Religious Property); 18 U.S.C. § 670 (Theft of Medical Products); 18 U.S.C. § 844 (Importation, Manufacture, Distribution, and Storage of Explosive Materials); 21 U.S.C. § 841(b)(1)(A)(viii) (Prohibited Acts A (Meth)); 18 U.S.C. § 1038 (False Information and Hoaxes); 18 U.S.C. § 1091 (Genocide); 8 U.S.C. § 1324 (Bringing in and Harboring Certain Aliens); 18 U.S.C. § 1347 (Heath Care Fraud); 18 U.S.C. § 1365 (Tampering with Consumer Products); 18 U.S.C. § 2113 (Bank Robbery); 18 U.S.C. § 2119 (carjacking); 18 U.S.C. § 2332b (Acts of Terrorism Transcending National Boundaries); 18 U.S.C. § 2237 (Failure to Heave to,

Obstruction of Boarding, or Providing False Information); 18 U.S.C.§ 2245 (sexual abuse resulting in death); 18 U.S.C. § 2262 (Interstate Violation of Protection Order); 18 U.S.C. § 2261 (Interstate Domestic Violence); 49 U.S.C. § 30170(a)(1) (reporting requirements for motor vehicle safety); and 49 U.S.C. § 20703 (Accident Reports and Investigation). The Eighth Circuit's ruling, if upheld, would place all of these statutes, and others, into a new and broad category of crimes for which a defendant may be held strictly liable for a death or serious bodily injury. Given the presumption against strict liability crimes, *Staples*, 511 U.S. at 606, *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), the Court should reject such a drastic expansion.

E. Heroin Use Was Not A Substantial Factor In Mr. Banka's Death, Nor Was Mr. Banka's Death Foreseeable.

The record in this case affirmatively establishes that heroin use was *not* a substantial cause in Mr. Banka's death and that Mr. Banka's death was *not* a foreseeable consequence of his partial use of the heroin Mr. Burrage sold him. At trial, both of the prosecution's expert witnesses testified that the "but for" cause of Mr. Banka's death was "mixed drug intoxication," J.A. 157, 191-92, and that heroin was not an independent cause of that death, J.A. 159-60, 208. The expert testimony also established that Mr. Banka took many drugs that would have contributed to the slowing down of Mr. Banka's respiratory system, which caused his death. J.A. 54, 154. Without evidence that the heroin distributed by Mr. Burrage could have independently caused Mr. Banka's death the substantial factor test cannot be met.

Dr. McLemore, for example, could not say whether the approximately .41 grams of heroin that was miss-

ing from the one gram bag purchased from Mr. Burrage would have caused Mr. Banka to overdose. J.A. 169. This is because Mr. Banka had abused opiates for many years, and such drug use creates a tolerance. J.A. 167-69. The amount of heroin that causes an individual to overdose depends greatly on that person's tolerance to opiates. J.A. 168-69. Given these facts, the substantial factor test cannot be satisfied because, as Professor LaFave points out, the substantial factor test only applies to situations where "two causes, each alone sufficient to bring about the harmful result, operate together to cause it." *Supra* § 6.4(b), at 468. Neither of the doctors could testify that the heroin alone would have been sufficient to bring about Mr. Banka's death. J.A. 159-60, 208.

Similarly, the evidence cannot support a finding that Mr. Banka's death was foreseeable. Mr. Burrage had only known Mr. Banka for a short period of time, and only for a few days according to Mr. Banka's wife. J.A. 98. Such a short acquaintanceship makes it unlikely that Mr. Burrage knew of Mr. Banka's plans to go on a drug-using spree or about Mr. Banka's health problems. Moreover, there is no evidence that the heroin that Mr. Burrage distributed to Mr. Banka was particularly strong or that 1 gram, J.A. 103, was a particularly dangerous amount. Given the relatively small number of overdoses compared to the number of drug possessors (at most 2%),[13] these facts do

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[13] In 2007, approximately 8,000 people died from "unintentional drug poisoning" from heroin and cocaine. Ctr. for Disease Control, *Unintentional Drug Poisoning in the United States* (July 2010), http://www.cdc.gov/homeandrecreationalsafety/pdf/poison-issue-brief.pdf. That same year, 395,854 people were arrested for possessing heroin and/or cocaine. *Compare* U.S. Dep't of Justice, *Crime in the United States 2007*, Arrest Data Table 29 (Sept. 2008), http://www2.fbi.gov/ucr/cius2007/data/table_29.

not support a finding that the hazard produced by Mr. Burrage would ordinarily lead to the death of a buyer of heroin. Mr. Banka's death is simply too "extraordinary" a consequence for Mr. Burrage to face the severe punishment in § 841(b)(1)(C). LaFave, *supra* § 6.4, at 464.

This is not to say that the common law requirements of substantial factor and foreseeability present problems of proof in drug cases. If the prosecution's experts could have determined that the heroin sold to Mr. Banka would have independently caused Mr. Banka's death then the substantial factor test could be satisfied, but that was not proven here. Likewise, if it had been shown that Mr. Burrage should have known about the drug spree or should have known that the drugs were of a dangerous quantity or quality, then foreseeability could be satisfied. But, here, the evidence was too weak to satisfy these necessary causation standards. Mr. Burrage's conviction must be overturned.

II. CONTRIBUTING CAUSE IS NOT SUFFICIENT FOR A CONVICTION FOR DISTRIBUTION OF DRUGS RESULTING IN DEATH.

Regardless of whether the Court endorses the proximate cause standard advocated by Mr. Burrage, the Court should reverse because the district court erred by submitting the contributing factor instruction.[14] A

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html, *with id.* Arrest Table (Sept. 2008), http://www2.fbi.gov/ucr/cius2007/arrests/index.html.

[14] The jury instruction given at trial read: "For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the Defendant was a contributing cause of Joshua Ban-

contributing factor standard fails to satisfy any interpretation of the causation standards required.

A. The Text Of § 841 Does Not Support A Contributing Cause Standard.

Most fundamentally, the district court's use of the contributing factor standard finds no support in the text of § 841(b)(1)(C). Had Congress intended the lesser contributing factor standard to apply, there are a variety of ways in which Congress could have drafted the statute that would not have implicated "but for" and proximate causation standards. For example, Congress could have written the statute to impose a penalty of twenty years to life if "such substance contributed to the death or serious bodily injury of another," or if "such substance played any part in the death or serious bodily injury of another." But that is not what Congress wrote, Congress wrote in the "results in" language instead, and as discussed above in *supra* Part I.A., that language carries with it a settled meaning in criminal common law.

B. If "Death Results" Can Be Read As Requiring Only "Contributing Cause" Then The Statute Is Gravely Ambiguous And The Rule Of Lenity Applies.

Any reading of the statute that would allow a contributing cause instruction would mean that the statute is gravely ambiguous. *Dean*, 556 U.S. at 577 (""To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute."") (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138-39 (1998); see also *United States* v. *Hayes*, 555 U.S. 415, 436 (2009) (Roberts, C.J., joined by Scalia, J., dissenting) ("Because construction of a criminal

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ka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death." J.A. 241-42.

statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.") (quoting *Crandon* v. *United States*, 494 U.S. 152, 160 (1990)); *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (stating that the rule of lenity is founded, in part, on "fair warning … of what the law intends to do if a certain line is passed."). Under this Court's precedent, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (citing *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). Thus if the statute is ambiguous, the stricter causal standards should attach.

C. "But For" Cause Is Required And Is Not Satisfied By A Contributing Causation Standard.

Contributing cause is an inadequate jury instruction when "but for" cause is required. As discussed above, the common law of criminal causation requires "but for" causation at a minimum. See *supra* notes 7-8. "But for" is "[t]he cause without which the event could not have occurred." *Black's Law Dictionary*, *supra*, at 250. Contributing cause does not meet this traditional "but for" definition. It is a much more lenient causal standard, defined merely as: "A factor that — though not the primary cause — plays a part in producing a result." *Id.*

As noted, under "but for" causation, when more than one cause contributed to the result, then the act of the defendant must have been a "substantial factor" leading to the proscribed result. See *supra* note 9. This showing is not required to establish contributing cause, and substantiality was explicitly rejected in the district court's jury instruction. Moreover, not

every action that may have contributed to a harm, also necessarily qualifies as a substantial factor. Restatement (Second) of Torts § 433 cmt. d (1965); see also *Abney*, 766 N.E.2d at 1177 (jury instruction requiring only a "contributing cause" was error when "substantial cause" was required).

The Solicitor General concedes that at least "but-for causation" is required, but contends that "contributing cause" could be "but-for" cause in some circumstances. Br. Opp'n 16. But this contention relies entirely upon principles of civil tort law which allows that "'combined conduct, viewed as a whole, is a but-for cause of the [harm].' When 'application of the but-for rule to [each of the actors] individually would absolve all of them [of liability], the conduct of each is a cause in fact of the [harm].'" *Id.* (quoting Keeton et al., *supra*, at 268). Prosser and Keeton make clear, however, that this is a civil tort test and an alternative to the "substantial factor test." Keeton et al., *supra*, at 268. Such a standard has no place in criminal law.

As Professor LaFave observes, "with crimes, where the consequences of a determination of guilt are more drastic (death or imprisonment, generally accompanied by moral condemnation, as contrasted with a mere money payment) it is arguable that a closer relationship between the result achieved and that intended or hazarded should be required." LaFave, *supra* § 6.4(c), at 472. Professor LaFave continues to endorse the substantial factor test for criminal law: "Was the defendant's conduct a substantial factor in bringing about the forbidden result?" *Supra* § 6.4(b), at 469. The weight of the common law stands behind the substantial factor test in the criminal context. See *supra* note 9.

The differing policy goals behind criminal and tort law also counsel against applying more lenient civil standards of causality to § 841. For instance, a lesser standard of causation in the civil context necessarily assumes other devices to mitigate against liability for an overdetermined harm such a joint and several liability, burden shifting, comparative fault, insurance, and bankruptcy. Indeed, in the oft-cited example of *Summers* v. *Tice*, 199 P.2d 1 (Cal. 1948) (en banc), the California Supreme Court recognized that justice required the burden of proof to fall upon the co-defendant in circumstances where it was impossible for a plaintiff to show which of the two negligent actors caused his harm. But such a result would never be constitutionally tolerable had the co-defendants been tried for assault and the prosecution relieved of its duty to prove its case against both defendants beyond a reasonable doubt. Nor can a criminal defendant transfer his liberty interests through insurance or discharge his deprivation through bankruptcy, like a civil defendant may do. Thus, a number of other legal devices that make a broadened concept of causation tolerable in civil cases are largely unavailable to the criminal defendant.

The alternative test cited by the Solicitor General is meant to ensure that victims of civil torts are not left "without a remedy in the face of the fact that had none of [the tortfeasors] acted improperly the plaintiff would not have suffered harm." Keeton et al., *supra*, at 268-69. In criminal law, however, where severe penalties and moral condemnation apply, more stringent causality is necessary to ensure that prosecutors satisfy their burden with respect to charges of aggravated versions of crimes. See, e.g., *Jones* v. *United States*, 526 U.S. 227, 251-52 (1999). For example, even for strict liability offenses, the Model Penal

Code provides that causation is not established unless the actual result is a probable consequence of the actor's conduct to protect "against the limitless extrapolation of liability without fault." Model Penal Code § 2.03, Explanatory Note. Moreover, the severe penalties that apply for violation of § 841(b)(1)(C) call for a stricter causal standard. Those convicted under the statute face up to life in prison, and some face mandatory life. Such stiff penalties should not attach unless the defendants' actions substantially caused the death, not merely played minor contributing roles. Thus, the Solicitor General's alternative civil tort theory should not be extended to criminal law.

D. Proximate Cause In The Criminal Context Requires A Closer Causal Connection Than The Contributing Cause Instruction Here.

Not every contributing cause is also a proximate cause.[15] According to the common law, criminal defendants should only be held liable for foreseeable harms. See *supra* note 11. But not every cause that contributes to a result is foreseeable.

Moreover, if this Court endorses the "contributing cause" instruction, then a new and broad category of aggravated crimes will become strict liability crimes.

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[15] *Jim Walter Res., Inc.* v. *Riles*, 903 So. 2d 118, 125 (Ala. Civ. App. 2004) (stating that "all contributing causes are not necessarily proximate causes"); *Aitchison* v. *Reter*, 64 N.W.2d 923, 927 (Iowa 1954) (noting that the less stringent contributing cause, not proximate cause, is required); *Stumpf* v. *Panhandle E. Pipeline Co.*, 189 S.W.2d 223, 227 (Mo. 1945) (stating that "it is not sufficient that plaintiff['s] … negligence contributed to the cause … of his injury … [but plaintiff's negligence] must have been a proximate cause"); *Equitable Life Assur. Soc. of U.S.* v. *Gratiot*, 14 P.2d 438 (Wyo. 1932); *see also* 57A Am. Jur. 2d *Negligence* § 437 (2013).

Strict liability means "[l]iability that does not depend on actual negligence or intent to harm …." *Black's Law Dictionary*, *supra*, at 998. Including a jury instruction of proximate cause, with its focus on foreseeability, avoids this expansion of criminal liability.

Even according to this Court's civil precedent, drawing "the line between the proximate and the remote causes" requires that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Scheffer* v. *Washington City, V.M. & G.S.R. Co.*, 105 U.S. 249, 252 (1881) (quoting *Milwaukee & St. P.R. Co.* v. *Kellogg*, 94 U.S. 469, 475 (1876)). Likewise, the Court has insisted that proximate cause is "the efficient cause and not a merely incidental cause which may be nearer in time to the result." *Lanasa Fruit S.S. & Importing Co.* v. *Universal Ins. Co.*, 302 U.S. 556, 562 (1938). Finally, proximate cause "'refers to that cause which is most nearly and essentially connected with the loss as its efficient cause.'" *Standard Oil Co. of N.J.* v. *United States*, 340 U.S. 54, 58 (1950) (quoting *Dole* v. *New England Mut Marine Ins. Co.*, 7 F.Cas 837, 853 (D. Mass. 1864)). But contributing cause, encompassing any cause that "plays a part in producing a result," is a far more lenient standard than proximate cause. *Black's Law Dictionary*, *supra*, at 250.

The district court's instruction on contributing cause was error, and, at a minimum, Mr. Burrage should get a new trial.

CONCLUSION

For all of these reasons, the Court should overturn Mr. Burrage's conviction and remand the case for a new trial.

Respectfully submitted,

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APPENDIX

1. 21 U.S.C. § 841(a)-(b) provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving-

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of

such substance shall be not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than twenty years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any ana-

logue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of

supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than twenty years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the ab-

sence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior convic-

tion, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than twenty years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not

to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such persons shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised

release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than twenty years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.