Supreme Court of Ohio Clerk of Court - Filed January 02, 2020 - Case No. 2019-0822

In the Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2019-0729, 2019-0822
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
MARK A. PRICE,	:	
	:	Court of Appeals
Appellant.	:	Case No. 107096

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

SUSAN J. MORAN (0067094)
55 Public Square, Suite 1616
Cleveland, Ohio 44113
(t) 216-965-5763
(f) 440-617-1529
SusanMoranLaw@gmail.com

Counsel for Appellant
Mark Price

DAVE YOST (0056290)
Attorney General of Ohio

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
*Counsel of Record
DIANE R. BREY (0040328)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor
KATHERINE E. MULLIN (0084122)*
*Counsel of Record
Assistant Prosecuting Attorney
The Justice Center, 8th Floor

1200 Ontario Street
Cleveland, OH 44113
216-443-7800
216-443-7602 fax
kemullin@prosecutor.cuyahogacounty.us

Counsel for Appellee
State of Ohio

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INTRODUCTION

Mark Price sold the fentanyl-laced heroin that took the life of James Dawson. The State charged Price with corrupting another with drugs, in violation of R.C. 2925.02(A)(3). That statute provides:

> No person shall knowingly … [b]y any means, administer or furnish to another or induce or cause another to use a controlled substance, and thereby *cause* serious physical harm to the other person, or cause the other person to become drug dependent.

R.C. 2925.02(A)(3) (emphasis added).

The statute does not define what it means by "cause," so the word must be understood to retain its traditional legal meaning. Under that traditional meaning, "cause" includes two concepts: actual cause and legal cause. To show actual cause, the State usually must show that the victim's injuries would not have occurred but for the defendant's criminal conduct. To show legal cause, the State must prove that the victim's injuries were "a direct, natural, reasonably foreseeable consequence" of the defendant's conduct, "as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience." *State v. Bacon*, 6th Dist. Lucas No. L-14-1112, 2016-Ohio-618, ¶83 (citations and internal quotes omitted). Both concepts recognize the possibility that there can be multiple causes. The existence of other causes does not defeat liability unless those other causes are so unforeseeable that they sever the direct, natural connection between the defendant's conduct and the victim's injury.

This case presents the question whether the trial court adequately instructed the jury on causation. It did. The trial court properly instructed the jury on but-for cause when it told them they could convict Price *only if* the government proved that Price took some act "without which, [Dawson's death] would not have occurred." Trial Transcript ("Tr.") 1090. And it properly instructed the jury that, even though the act had to bear a sufficiently direct connection to Dawson's death, the mere fact that *other factors* also played a causal role did not constitute a defense to liability. Tr. 1090–91.

Price alleges a single error. He says in his proposition of law that the trial court should have instructed the jury that "a distributor of drugs is only responsible for causing death to the user of those drugs when the evidence proves that the ingestion of the drugs provided by the distributor was an independent cause of death *and that*, but for the ingestion of drugs, the user would not have died." Br. 4 (emphasis added). In other words, Price argues that the trial court should have instructed the jury that it could convict him *only if* it determined not only that his drugs were the but-for cause of Dawson's death, but also that those drugs were so potent that they would have killed Dawson even if other drugs and physical ailments had not contributed to his death.

There are a number of problems with this argument. The first is that Price did not seek such an instruction in the trial court. Instead, he asked the court to instruct that the "cause" element required proof of *either* but-for cause *or* independent sufficiency. It appears that he never sought to have the jury instructed that it had to find *both*

but-for cause *and* independent sufficiency until he appealed. Regardless, Ohio law does not require the State to prove both but-for cause and independent sufficiency. Price purports to divine this requirement from *Burrage v. United States*, 571 U.S. 204 (2014)—a U.S. Supreme Court case interpreting a federal statute. But *Burrage* interpreted the statute before it to require proof of *either* but-for causation or independent sufficiency—it did not read the causal language in the statute before it to require proof of both. So *Burrage*, the case on which Price bases his argument, gives him no support.

In sum, Price seeks to reverse the trial court for declining to give an instruction he never sought, based on a misunderstanding of a U.S. Supreme Court case that, if it applied, would undermine Price's case. The Eighth District rightly rejected Price's claim, and so should this Court.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The State is interested here in two ways. Ohio has suffered greatly from the opioid epidemic, including from heroin and fentanyl. The Attorney General has an interest in combating that epidemic by ensuring that the State's drug laws are enforced and that drug traffickers are appropriately punished. Additionally, the Attorney General has an interest in ensuring that Ohio's criminal drug trafficking laws are properly construed and applied.

STATEMENT OF THE CASE AND FACTS

1. The police found James Dawson dead in his apartment on August 2, 2016. They collected evidence in the apartment, including pills, Dawson's cell phone, and a "white pinkish powder residue and … a straw" of the sort "commonly used" to ingest drugs. *State v. Price*, 8th Dist. Cuyahoga No. 107096, 2019-Ohio-1642 ("App. Opp."), ¶4. Dawson's phone showed text messages from earlier that day in which Dawson arranged a drug buy. App. Opp. ¶5. The texts' recipient, Tierra Fort, lived in the same apartment building. App. Opp. ¶6. The police obtained warrants to arrest Fort and search her apartment. And, during that search, they found a digital scale, crushed powder similar to the substance found in Dawson's apartment, a rock composed of the same substance, a plastic straw with residue, and Fort's cell phone. App. Opp. ¶7. Later testing would show that the powder, the straw, and the "rock" contained heroin and fentanyl. App. Op. ¶27.

Fort admitted to having had a conversation with Dawson in which he sought to buy heroin from her. App. Opp. ¶8. Fort's phone also showed that she had communicated with someone whom Fort identified as her drug supplier—a man she knew as "Bam." Bam turned out to be Mark Price, the defendant in this case. App. Opp. ¶¶10–11.

The State eventually concluded that Price sold the drugs that caused Dawson's death. Investigators determined that, after Dawson reached out to Fort, Fort contacted

Price about buying heroin. Price responded; for $100, he gave Fort a baggie with a gram of what appeared to be heroin, but which was apparently laced with fentanyl. She then called Dawson, who came to her apartment, said hello to Price, and took the drugs. App. Opp. ¶12, 27.

In light of all this, the State indicted Mark Price for two counts of corrupting another with drugs in violation of R.C. 2925.02(A)(3)—one count based on the heroin and another based on the fentanyl. The State also indicted him for involuntary manslaughter and for other drug-trafficking related crimes. App. Op. ¶3.

2. At trial, one of the main disputes centered around the cause of Dawson's death. Price's expert opined that Dawson died from causes unrelated to drug use (perhaps an enlarged heart) and that the high levels of fentanyl could be attributed to "post-mortem distribution." App. Opp. ¶¶25, 31; Tr. 523–25. In contrast, the State's expert—Dr. Felo, the chief deputy medical examiner and forensic pathologist—concluded that Dawson died of "acute intoxication by the combined effects of escitalopram, fentanyl, and mirtazapine," but that the fentanyl was the "primary cause" of death. App. Opp. ¶24; Tr. 512, 521–522, 541, 549. (The two drugs other than fentanyl are antidepressants. Tr. 502.) Dr. Felo opined that the "fentanyl by itself" (in other words, without the other two drugs) could have caused the death. Tr. 512.

At trial, Dr. Felo elaborated on the autopsy and toxicology testing that led him to this conclusion. During the autopsy, Dr. Felo learned that Dawson had an enlarged

heart, congested and abnormally heavy lungs, and a pulmonary edema. Tr. 498–501. The toxicology results showed fentanyl and the two antidepressants, as well as a cigarette tobacco product, in Dawson' blood samples. Tr. 502. While the levels of the antidepressants were at a level consistent with normal dosage for the (prescribed) medications, the level of fentanyl (for which the victim did not have a prescription) was at a significantly high level—"one that is commonly seen with death." App. Opp. ¶¶19–21; Tr. 509–11, 540. Dr. Felo explained that fentanyl can cause "respiratory depression" to the point that the lungs stop functioning and the person dies, Tr. 504, and that Dawson died within twenty minutes of the fatal fentanyl dose. App. Opp. ¶22; Tr. 507. Dr. Felo also testified to two other facts he learned about Dawson: Dawson had been abusing drugs for twenty years, and had previously attempted suicide. App. Opp. ¶26; Tr. 537–38.

Dr. Felo's testimony was consistent with (though not compelled by) testimony from Meghan Peters, a forensic scientist and drug chemist for the county medical examiner's office. Peters testified that the whitish-pinkish powder and tube found in the victim's apartment had tested positive for heroin and fentanyl, as did the "rock" found in Fort's apartment. App. Opp. ¶27.

Before the case went to the jury, the defense requested a jury charge on causation that tracked the holding of *Burrage v. United States*, 571 U.S. 204 (2014). Specifically, Price's counsel asked the court to instruct the jury that it could convict Price only if it

determined that the drugs he sold were *either* an "independently sufficient cause of the victim's death or bodily injury" *or* "the but-for cause of death or injury." Tr. 1074. The trial court denied that request, opting instead to use the causation instructions like those laid out in the Ohio Jury Instructions ("OJI"). *See* OJI-CR 417.23, 417.25. It is worth quoting those instructions in full, with italics emphasizing a few parts that are important to the issues in this case:

> Cause. The State charges that the act or failure to act of the Defendant caused the death of James Dawson. Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces the death of a person, *and without which, it would not have occurred*.
>
> Natural consequences. The Defendant's responsibility is not limited to the immediate or most obvious result of the Defendant's act or failure to act. The Defendant is also responsible for the natural and foreseeable consequences or results that follow in the ordinary course of events from the act or failure to act.
>
> Other causes not a defense. *There may be one or more causes of an event, however, if a Defendant's act or failure to act was one cause, then the existence of another cause is not a defense*.
>
> Intervening causes. *The Defendant is responsible for the natural consequences of the Defendant's unlawful act or failure to act even though the death of a person was also caused by the intervening act or failure to act of another person or agency*.
>
> Independent intervening cause of death. If the Defendant inflicted an injury not likely to produce death, and if the sole and only cause of death was natural cause or fatal [in]jury inflicted by another person, the Defendant who inflicted the original injury is not responsible for the death.
>
> Causation. Conduct is the cause of a result if it is an event, but for which the result in question would not have occurred.

Tr. 1090–91 (emphasis added).

After receiving these instructions, the jury found Price *not guilty* of involuntary manslaughter, but *guilty* on both charges—one relating to fentanyl, and the other to heroin—of corrupting another with drugs. App. Op. ¶34; Tr. 1210–12. The trial court sentenced Price to eight years on each count of corrupting another with drugs, to be served consecutively for a total of sixteen years. Tr. 1247–49. (The court of appeals

merged those two counts for sentencing purposes. App. Op. ¶82. That part of its decision is not relevant to this appeal.)

3. On appeal, Price argued (among other things) that the trial court improperly instructed the jury on causation. The Eighth District affirmed, reasoning that the trial court correctly stated the law applicable to the evidence at trial. App. Op. ¶43. The court of appeals noted that the trial court's charge on causation included the substance of the *Burrage* charge Price sought. In other words, the trial court gave a but-for instruction when it told the jury that it could convict Price *only if* the government proved beyond a reasonable doubt that Dawson's death "would not have occurred without" Price's action (providing the drugs). App. Op. ¶¶42–43.

In issuing its ruling, the Eighth District determined that its ruling on the jury instructions conflicted with a decision from the Fifth District Court of Appeals, *State v. Kosto*, 5th Dist. Licking No. 17CA54, 2018-Ohio-1925, ¶¶21–29. In that case, the Fifth District held that "the 'but-for causality' rationale of *Burrage* must also be applied to the element of 'causing serious physical harm' to another under R.C. 2925.02(A)(3)," and that under that standard, there was insufficient evidence that Kosto was guilty of corrupting another with drugs (heroin, in that case). *Id.* at ¶29. The Eighth District *sua sponte* certified a conflict. App. Op. ¶44.

4. Price appealed, both by providing notice of the certified conflict and by filing a jurisdictional memorandum. This Court granted review and consolidated the cases,

which present a single issue: "Whether the 'but-for causality' rationale of *Burrage v. United States*, 571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), applies to the 'cause serious physical harm to [another]' element of R.C. 2925.02(A)(3)." *09/25/2019 Case Announcements*, 2019-Ohio-3797.

ARGUMENT

<u>*Amicus* Attorney General's Proposition of Law:</u>

> *A trial court properly instructs the jury on causation, for purposes of R.C. 2925.02(A)(3), when it instructs that "causation" requires proof beyond a reasonable doubt that the defendant provided drugs to another person; that the death or serious physical harm would not otherwise have occurred; and that those drugs, in a natural or continuous sequence, directly produced the death or serious physical harm.*

The Court should affirm the judgment below.

A. The Ohio Jury Instructions on causation properly state the test applicable to R.C. 2925.02(A)(3).

1. This case asks how trial courts ought to instruct juries about the causation element of R.C. 2925.02(A)(3). That statute says:

> No person shall knowingly …. [b]y any means, administer or furnish to another or induce or cause another to use a controlled substance, and thereby cause serious physical harm to the other person, or cause the other person to become drug dependent.

The section mentions "cause" twice. The first causation requirement is irrelevant here—it applies to cases in which the defendant is accused of "caus[ing]" the victim to take a controlled substance. The second requirement, which is relevant here, requires the government to show that the defendant took one of the prohibited acts, and that the

act "thereby cause[d] serious physical harm to the other person, or cause[d] the other person to become drug dependent."

What does "cause" mean? The statute provides no special definition, so the word presumptively retains the meaning it has throughout criminal law. After all, when "particular words and phrases have in law acquired a fixed legal signification, and are thus incorporated into a statute, the legal presumption is, that the legislature meant to use them in this legal sense." *Turney v. Yeoman*, 14 Ohio 207, 218 (1846). And "it is well established that Ohio law generally defines 'cause' in criminal cases" to encompass "actual" and "legal" causation. *State v. Carpenter*, 3d Dist. Seneca No. 13-18-16, 2019-Ohio-58, ¶ 51. R.C. 2925.02(A)(3) should be interpreted to incorporate that ordinary meaning. Accordingly, it is worth saying a bit more about the actual- and legal-causation concepts that the statute incorporates.

Actual cause. Actual causation is often called but-for causation, because it requires the government to prove that, but for the defendant's illegal conduct, the victim would not have sustained the injury he did. *See State v. Phillips,* 74 Ohio St. 3d 72, 80 n.2, 1995-Ohio-171; *State v. Mitchell*, 3d Dist. Union No. 14-19-14, 2019-Ohio-5168, ¶23; *State v. Stutler*, 5th Dist. Stark No. 2018CA00066, 2019-Ohio-2120, ¶28 (citations omitted); *State v. Potee*, 12th Dist. Clermont No. CA2016-06-045, 2017-Ohio-2926, ¶33; *State v. Franklin*, 10th Dist. Franklin No. CA2016-06-045, 2008-Ohio-462, ¶25; *State v. Dixon*, 2d

Dist. Montgomery No. 18582, 2002-Ohio-541, *16–17 (citations omitted); *State v. Lovelace*, 1st Dist. Hamilton No. C-990063, 137 Ohio App. 3d 206, 216 (1999) (citation omitted).

The traditional understanding of actual-causation also includes two other well-established principles. The first is that, in rare circumstances, "the 'but for' test is inapplicable and an act or omission can be considered a cause in fact if it was a 'substantial' or 'contributing' factor in producing the result." *Carpenter*, 2019-Ohio-58, ¶52 (citations omitted). For example, a defendant can "be held criminally responsible where the defendant's conduct combined with other occurrences" to cause injury. *State v. Hall*, 12th Dist. Preble No. CA2015-11-022, 2017-Ohio-879, ¶72. In this case, the court did not give an instruction on this reduced form of causation. As a result, this case does not present the question whether such an instruction might be proper in a corrupting-another-with-drugs prosecution.

The second well-established principle is that there can be multiple but-for causes. Thus, whether a defendant's conduct is the *sole* cause of the victim's injury has no bearing on whether it is an *actual* cause. *See State v. Wilson*, 10th Dist. Franklin No. 03AP-592, 2004-Ohio-2838, ¶18 (citation omitted); *see also Phillips*, 74 Ohio St.3d at 81 & n.2, 85. If the rule were otherwise, no one would ever be guilty: *every* crime has multiple but-for causes, because *every* crime is made possible only by countless past events (births, meetings, and so on) stretching back to the dawn of time. So but-for cause does not mean "sole" cause.

Legal causation. To prove legal causation, the State must generally show that the victim's injury was "a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience." *State v. Bacon*, 2016-Ohio-618, ¶83; *accord State v. Dykas*, 8th Dist. Cuyahoga No. 92683, 185 Ohio App. 3d 763, 2010-Ohio-359, ¶24. The idea here is to keep criminal defendants from being sent to jail simply because they engaged in an illegal act that formed one attenuated causal link in a series of events that led to the victim's injuries. For example, if a person drives negligently and someone else on the road takes a different route home to avoid the negligent driver, only to be hit by lightning on the way home, the negligent driver is the but-for cause of the second driver's death. But the first driver is not the *legal* cause of death—the lightning strike was so unforeseeable that, legally speaking, it severed the relationship between the first driver's misconduct and the second driver's death. *See* Katz, *et al.*, 3 Baldwin's Ohio Practice Criminal Law, Section 96:5, at 205 (3d Ed. 2009).

As the foregoing might suggest, legal causation, just like but-for causation, is not defeated by the existence of some additional or intervening cause. "An offender who has inflicted injuries capable of causing death cannot escape culpability for homicide," for example, "simply because intervening assailants have inflicted injuries that also contributed to the victim's death." *State v. LaMar*, 95 Ohio St.3d 181, 198, 2002-Ohio-2128 (citing *State v. Keene*, 81 Ohio St.3d 646, 655–56, 1998-Ohio-342). Instead, an intervening

cause defeats liability only if it severs the direct, natural, and reasonably foreseeable connection between the defendant's acts and the victim's injuries; "[o]nly a reasonably unforeseeable intervening cause will absolve one of criminal liability." *State v. Osman*, 4th Dist. Athens No. 09CA36, 2011-Ohio-4626, ¶48 (quoting *Dykas*, 185 Ohio App. 3d 763 at ¶24). Thus, if police officers crash during a high-speed chase, injuring bystanders, the defendant who led officers on that chase qualifies as the legal cause of the bystanders' injuries. *See Lovelace*, 137 Ohio App. 3d at 217–18. When a homeowner shoots a burglar, the burglar's accomplice is the legal cause of the burglar's death. *State v. Chambers*, 53 Ohio App.2d 266, 272–273 (9th Dist. Lorain 1977); *see also State v. Swiger*, 5 Ohio St.2d 151, 155 (1966) (murder conviction affirmed where elderly victim of a robbery and beating died from a massive pulmonary embolism after she was confined in a hospital after her injuries from defendant); *accord State v. Johnson*, 60 Ohio App.2d 45, 52 (1st Dist. Hamilton 1977), *aff'd.*, 56 Ohio St.2d 35 (1978). And a woman who leaves her children home alone for the night is the legal cause of their death if, as a result of her not being home, the children die in a fire. *State v. Hall*, 2017-Ohio-879, ¶¶72–85. Even negligent medical treatment does not break the causal link to wounds inflicted by a defendant, absent gross negligence or willful maltreatment by the medical personnel. See *State v. Hanna*, 95 Ohio St.3d 285, 293–94, 2002-Ohio-2221 (citing *State v. Carter*, 64 Ohio St.3d 218, 226, 1992-Ohio-127, and *State v. Beaver*, 119 Ohio App. 3d 385, 394 (11th Dist. Trumbull 1997)).

2. With all this in mind, turn to the question whether the trial court properly instructed the jury on causation. "In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights." *State v. Wilks*, 154 Ohio St. 3d 359, 2018-Ohio-1562, ¶115 (internal quotation marks omitted). Did the jury instructions mislead the jury?

No; the court correctly stated the law of causation, and introduced no risk of the jury's being misled. Again, this is what the court told the jury:

> Cause. The State charges that the act or failure to act of the Defendant caused the death of James Dawson. Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces the death of a person, and without which, it would not have occurred.
>
> Natural consequences. The Defendant's responsibility is not limited to the immediate or most obvious result of the Defendant's act or failure to act. The Defendant is also responsible for the natural and foreseeable consequences or results that follow in the ordinary course of events from the act or failure to act.
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> Other causes not a defense. There may be one or more causes of an event, however, if a Defendant's act or failure to act was one cause, then the existence of another cause is not a defense.
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> Intervening causes. The Defendant is responsible for the natural consequences of the Defendant's unlawful act or failure to act even though the death of a person was also caused by the intervening act or failure to act of another person or agency.
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> Independent intervening cause of death. If the Defendant inflicted an injury not likely to produce death, and if the sole and only cause of death was natural cause or fatal [in]jury inflicted by another person, the

> Defendant who inflicted the original injury is not responsible for the death.
>
> Causation. Conduct is the cause of a result if it is an event, but for which the result in question would not have occurred.

Tr. 1090–91.

The instructions told the jury that they could convict Price only if the State proved that Price "caused the death of James Dawson." It then defined "cause" in a way that properly defined actual and legal cause. The court adequately instructed on *actual* cause when it told that jury: "Cause is an act or failure to act which … produces the death of a person, and *without which,* it [the death] would not have occurred." (emphasis added). The court further instructed that "[c]onduct is the cause of a result if it is an event, *but for which* the result in question would not have occurred." (emphasis added). These instructions ensured that the jury would not convict unless it found beyond a reasonable doubt that Dawson would not have died but for Price's illegal acts. With respect to *legal* cause, the court instructed the jury that "[c]ause is an act or failure to act which *in a natural or continuous sequence directly produces the death of a person*." (emphasis added). This ensured that Price would not be convicted unless the jury found beyond a reasonable doubt that Dawson's death was "a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience." *Bacon*, 2016-Ohio-618, ¶83 (citations omitted).

The court then went on to explain that there "may be one or more causes of an event," and a defendant is "responsible for the natural consequences of [his] unlawful act or failure to act even though the death of a person was also caused by the intervening act or failure to act of another person or agency." Tr. 1090–91. These principles restate hornbook law: the existence of another cause or an intervening event, by itself, does not defeat liability.

* * *

Because the Eighth District correctly held that the trial court properly instructed the jury on the law of causation, this Court should affirm.

B. Price is wrong that the trial court committed reversible error by failing to give the *Burrage* instruction.

1. In the trial court, Price asked for an instruction based on *Burrage v. United States*, 571 U.S. 204 (2014). In that case, the Supreme Court of the United States considered the meaning of a provision in the federal Controlled Substances Act, which "imposes a 20-year mandatory minimum sentence on a defendant who unlawfully distributes a Schedule I or II drug, when 'death or serious bodily injury *results from* the use of such substance.'" *Id*. at 206 (quoting 21 U.S.C. §§841(a)(1), (b)(1)(A)–(C)). More precisely, the Court took up the question whether the "results from" language encompassed a situation in which "use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim's death or injury." *Id*. The Court held that the answer was no: "at least where use of the drug distributed by the defendant is not an in-

dependently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. Section 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Id*. at 218–19.

Price sought to have the court instruct the jury that, unless the drugs he sold were an "independently sufficient cause of the victim's death or bodily injury," he could not be held liable unless the drugs he sold were "the but-for cause of death or injury." Tr. 1074. The trial court declined to give that instruction, but that provides no basis for reversal. A trial court need not give a requested jury instruction verbatim; the court may choose its own language for the jury charge. *State v. Sneed*, 63 Ohio St.3d 3, 9 (1992) (citations omitted).

As an initial matter, *Burrage* has no binding effect on Ohio courts—the Court was interpreting a federal statute with different language. More fundamentally, *Burrage* is consistent with the instructions the trial court gave. Again, the trial court instructed the jury that it could convict *only if* it found that the drugs Price sold were the but-for cause of Dawson's death. *See above* 14–17. That is an even stricter instruction than the *Burrage* instruction Price sought: whereas a *Burrage* instruction would have allowed the jury to convict based on a finding that Price's drugs were *either* the but-for cause and an independently sufficient cause of Dawson's death, the actual instructions permitted a conviction *only if* the jury found Price to be a but-for cause.

Perhaps sensing the problem with the instruction he sought, Price suggests a new instruction on appeal. The trial court, he says, should have instructed the jury that "a distributor of drugs is only responsible for causing death to the user of those drugs when the evidence proves that the ingestion of the drugs provided by the distributor was an independent cause of death *and that*, but for the ingestion of drugs, the user would not have died." Br. 4. So, whereas Price asked the trial court to instruct the jury that it could convict based on a finding of but-for cause *or* a finding that the drugs sold were independently sufficient to cause death, he now argues that the trial court should have required the jury to make *both* findings before convicting.

The Court should reject this argument. For one thing, the trial court should not be reversed for failing to give instructions Price never sought. *See State v. Riley*, 10th Dist. Franklin No. 06AP-6091, 2007-Ohio-4409, ¶4; *State v. Morrow*, 8th Dist. Cuyahoga No. 79738, 2002-Ohio-5320, ¶18. Anyway, the instruction Price wants is legally flawed. A defendant's act can constitute actual and legal cause of an injury without being "independently sufficient" to cause that injury. As *Burrage* itself recognized, "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." 571 U.S. at 211 (citation omitted). And the person who administers that poison has "caused" death—in both a legal and an actual sense—even though the poison *was not* independently sufficient to cause death. The At-

torney General is not aware of any State in the country that would acquit the defendant in such a case on the ground that his poison was not independently sufficient to cause death.

In arguing for an independent-sufficiency requirement, Price seems to be confusing the holding in *Burrage*. Again, that case held that, "at least where use of the drug distributed by the defendant is not an *independently sufficient* cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. Section 841(b)(1)(C) unless such use is a but-for cause of the death or injury." 571 U.S. at 218–19. Price takes this to mean that the government must prove but-for causation *and* independent sufficiency. That is the opposite of what the Court held: its point was that, if the government is *unable* to prove but-for causation, it may be able to establish causation by proving independent sufficiency. This independent-sufficiency alternative allows the government to prove causation in the rare case where "multiple sufficient causes independently, but concurrently, produce a result." *Id*. at 214. For example, consider the case of a user who dies after simultaneously taking lethal doses of both cocaine and fentanyl. In a case like that, *no* drug is a but-for cause of death; the fentanyl would have caused death if the cocaine had not, and *vice versa*. The independent-sufficiency alternative avoids the absurd consequence of holding that no one—neither the cocaine dealer nor the fentanyl dealer—"caused" the user's death. So the independent-sufficiency option in *Burrage* does not increase the government's bur-

den. To the contrary, it *eases* the burden by giving the government two options for proving causation. Thus, the trial court's decision not to give an instruction on independent sufficiency *helped* Price, because it took one option for proving causation off the table, and allowed the jury to convict Price only if it found the drugs he sold to be a but-for cause.

2. Price alludes to a couple of other arguments, but neither fares any better. First, he seems to take umbrage with the trial court's instructions on other causes and intervening causes. Apparently, he thinks that there can be just one but-for cause. He is wrong as a matter of Ohio law, as explained above. And his argument contradicts the very case on which he places so much reliance: "*Burrage* made clear that there can be multiple but-for causes of an event." *United States v. Feldman*, 936 F.3d 1288, 1316 (11th Cir. 2019). As the Supreme Court properly explained, an act constitutes a but-for cause if it "combines with other factors to produce the result"—"the straw that broke the camel's back" is just as much a but-for cause as the straws that preceded it. *Burrage*, 571 U.S. at 211. All of that perfectly accords with the instructions the trial court gave.

Finally, Price says the trial court erred by declining to admit evidence that Dawson took the drugs hoping to kill himself. There are two problems with that argument. First, this Court did not grant review of this evidentiary determination. Second, the Court properly excluded this evidence because it was irrelevant. Whether Dawson took the drugs because he wanted to kill himself or because he wanted to get high, Price

stood in precisely the same causal relationship to Dawson's death: he supplied the illegal drugs that ended Dawson's life. That a drug user would use the drugs to kill himself is not so unforeseeable that it defeats legal causation.

CONCLUSION

For the above reasons, the Court should affirm the Eighth District's judgment.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Benjamin M. Flowers
BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
DIANE R. BREY (0040328)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 2nd day of January, 2020, by U.S. mail and e-mail on the following:

SUSAN J. MORAN
55 Public Square, Suite 1616
Cleveland, Ohio 44113
SusanMoranLaw@gmail.com

MICHAEL C. O'MALLEY
KATHERINE E. MULLIN
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
kemullin@prosecutor.cuyahogacounty.us

/s Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General