

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2024-1732, 2024-1658
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
CAROL A. SEYMOUR,	:	
	:	Court of Appeals
Appellee.	:	Case No. 22AP-721

**BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
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INTRODUCTION

Ordinary people judge causation every day. The most intuitive way to do so is to think in counterfactuals: if A had not happened, then B would not have resulted. When that is the case, A caused B. The law is no different, except perhaps its penchant for antique phraseology. Lawyers would say that, *but for* A happening, B would not have happened. Indeed, the but-for test “emerged unchallenged from the mists of time” as the way to determine if one thing caused another. John D. Rue, *Returning to the Roots of the Bramble Bush: The “But for” Test Regains Primacy in Causal Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679, 2684 (2003). And because of its practical clarity, intuitive appeal, and academic rigor, the but-for test is the “most widely accepted test” for determining causation. David W. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1768 (1997).

However, the but-for test stumbles in certain situations involving multiple causes that contain more force than necessary to trigger the harm (sometimes called “overdetermined cause” scenarios). And to fill the gap, many courts have taken up the “substantial factor” test. Rue, *Returning to the Roots*, at 2685–87. This substantial-factor test has met its critics, but it is still standing. Some have noted that the substantial-factor test “has come to have a number of different meanings in the jurisprudence,” leading to “nation-wide confusion on the matter.” Robertson, *Common Sense*, at 1776. Still, even the test’s critics recognize that it has a “fully legitimate” and even “necessary” role in solving the

problem of overdetermined cause. *Id.* at 1776–77. The important task, then, is to differentiate when the substantial-factor test hinders clarity and when it provides it.

This brief aims to explain when and how applying the substantial-factor test enhances the law. First, it looks at what the substantial-factor test means. Then it addresses the two overdetermined-cause circumstances that call for its application. And finally, it explains how the but-for and substantial-factor tests may contribute to this case and future cases with similar issues.

STATEMENT OF AMICUS INTEREST

The Attorney General is the State’s “chief law officer” and has an interest in the orderly and consistent application of Ohio’s causation requirements in criminal law. R.C. 109.02.

STATEMENT OF THE CASE AND FACTS

I. Seymour provides drugs to Robby Alsey, who dies of an overdose.

Robby Alsey struggled with heroin addiction, and Carol Seymour stood to profit from his vice. *State v. Seymour*, 2024-Ohio-5179, ¶¶3, 7 (10th Dist.) (“App.Op.”). Seymour was a drug broker and courier who received fees and goods in exchange for facilitating drug deals. *Id.* ¶7. The day that Alsey died, Seymour ferried him for a heroin purchase in exchange for antifreeze for her car. *Id.* ¶¶6–7. An hour later, Alsey was dead. *Id.* ¶4.

The police were able to re-create Alsey’s day using cellphone data. It showed that Seymour picked up Alsey, made several calls to the drug dealer, drove Alsey to the

dealer's house, and drove him home. *Id.* ¶5. Seymour also admitted that she took Alsey to the drug dealer and knew that he was there to buy heroin. *Id.* ¶6. In fact, Seymore was the last person to hold the packet of heroin before handing it to Alsey. *Id.*

As it turns out, heroin was not the only drug in Alsey's body when he died. The forensic pathologist who performed the autopsy found that "heroin, kratom, methylphenidate ('Ritalin'), and diphenhydramine ('Benadryl') intoxication" was the cause of death. *Id.* ¶9. He testified that he could not "'single out one drug that was more responsible than the others'" and that "all four drugs 'worked together to cause the death'" and each "'contributed' to Alsey's death." *Id.* (quoting Tr. at 326–27, 336, 354). He also agreed that "without each of the four drugs, he would possibly be alive." Tr. 336. Testing further showed that Alsey died, at most, five hours after taking the heroin. App.Op.¶11.

II. Seymour is convicted, but the appeals court reverses.

At a bench trial, the trial court found Seymour guilty of involuntary manslaughter, corrupting another with drugs, and trafficking in heroin. *Id.* ¶1. It sentenced her to four years' imprisonment. *Id.* ¶12. Seymour appealed the involuntary-manslaughter and corrupting-another-with-drugs charges, arguing that the State failed to present sufficient evidence of actual causation for both. *Id.* ¶14. Both crimes require that the defendant "cause" a certain result, either causing "serious physical harm to the other person" by causing them to use a controlled substance, R.C. 2925.02(A)(3), or causing "the death of

another [person] ... as a proximate result of” committing another felony. R.C. 2903.04(A). (Seymour is not contesting the fact that she caused Alsey to take the heroin, *see* R.C. 2925.02(A)(3), or that Seymour’s drug trafficking would be the “proximate cause” of Alsey’s overdose if the heroin caused the death, *see* R.C. 2903.04(A). She only contests whether the heroin she provided caused his death.)

The Tenth District reversed the trial court. It recognized that “Ohio courts have consistently applied the ‘but-for’ test” to determine causation, including in involuntary manslaughter cases. App.Op.¶¶20–21. After analyzing some case law, the court concluded that “deviation from the standard ‘but-for’ causation analysis should only be done in rare instances” and that the court “ha[d] several concerns with the application of the ‘substantial factor’ test in cases involving mixed-drug overdoses.” *Id.* ¶¶34, 36 (quotation omitted). It also mentioned its concern that Seymour was an addict and perhaps should not have been prosecuted despite her role in the drug deal. *Id.* ¶39.

The Tenth District went on to cast doubt on the substantial-factor test. It wrote that the test would “water down the requirements for proving actual causation” and “risk intensely unpredictable results.” *Id.* ¶41. In view of the criticism of the substantial-factor test, the court concluded that “the plain language of” the two statutes at issue “require[s] the application of the ‘but-for’ test to determine actual causation.” *Id.* ¶¶41–44. And assuming there was doubt about the correct standard, the court applied the rule of lenity to choose the but-for test. *Id.* ¶44.

Finally, the court applied the but-for test. It concluded that heroin was not the but-for cause of the overdose. It reasoned that, because no expert could testify that Alsey “would not have died but for the use of kratom, Ritalin, or Benadryl,” the heroin was also not a but-for cause. *Id.* ¶47 (quotation omitted). The court certified a conflict with the Third District Court of Appeals regarding the proper test for causation. *Id.* ¶50.

Judge Leland dissented in part. He wrote that Ohio law supports finding actual causation when “the defendant’s conduct combined with other occurrences to jointly result in a legal injury,” as long as “(1) the defendant’s conduct was a ‘substantial factor’ in bringing about the harm, and (2) there is no other rule of law that relieves the defendant of liability.” App.Op.¶54 (Leland, J., dissenting in part) (quotation omitted). This case, in Judge Leland’s opinion, called for application of the substantial-factor test. *Id.* Under that test, the heroin Seymore helped Alsey procure was easily a substantial factor in Alsey’s death, given how close in time his heroin use was to his death, and given that Alsey had used the other three drugs without heroin many times before without overdose. *Id.* ¶¶56–58. However, even under the but-for test, Judge Leland wrote that “the state presented sufficient evidence” that “heroin was the but-for cause of Alsey’s death—after all, Alsey had ingested Benadryl, Ritalin, and kratom with some regularity, but he died only upon the introduction of heroin into his system.” *Id.* ¶55. The State appealed.

ARGUMENT

This Court accepted the following propositions of law:

First Proposition of Law:

*The concepts of “cause * * * as a proximate result” in R.C. 2903.04(A) and “cause” in R.C. 2925.02(A)(3) do not require strict but-for causation, but rather require proof that the defendant’s conduct was a substantial or contributing factor in the death or serious physical harm.*

Second Proposition of Law:

Even if either R.C. 2903.04(A) or R.C. 2925.02(A)(3) requires but-for causation, the State need only prove that the death or serious physical harm would not have occurred absent the defendant’s conduct. The State need not prove that the defendant’s conduct alone would have caused death or serious physical harm, and the existence of other necessary causes does not negate but-for causation.

Causation has often perplexed members of the bench, the bar, and the academy. One point of contention on causation has been whether and how to apply the substantial-factor test. A review of the legal literature confirms that the substantial-factor test has both legitimate and illegitimate uses. But when deployed correctly, the substantial-factor test rounds out the idea of cause-in-fact so that it comports with both logic and legal norms. This brief outlines what the substantial-factor test is, what it can accomplish, and when its application goes astray. It then explains why Seymour’s heroin was the cause of Alsey’s death.

As a preliminary point, this brief pulls extensively from tort law because causation, as a factual question, operates essentially the same in both tort and criminal law. And Ohio courts have said that “it is well established that Ohio law generally defines ‘cause’ in criminal cases identically to the definition of ‘proximate cause’ in civil cases.” *State v. Carpenter*, 2019-Ohio-58, ¶51 (3d Dist.).

I. The substantial-factor test is an alternative to the but-for test in certain circumstances.

The substantial-factor test arose, in large part, by accident. The best anyone can tell, the term first arose in a 1911 law review article that used the term as synonymous with “superseding cause,” which bears no relationship to its usage today. W. Jonathan Cardi, *Goodbye Substantial Factor, Hello Doull v. Foster!*, 16 J. Tort L. 81, 83 (2023). The first known case to apply a substantial-factor test is a famed dispute in which two separate fires merged upon the plaintiff’s property to destroy it. *Id.* at 83–84 (citing *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 146 Minn. 430, 179 N.W. 45 (1920)). From there, the substantial-factor test gained popularity to the point of adoption into the First Restatement of Torts. *Id.*

Even at an early age, the substantial-factor test bore uncertain meaning. In *Anderson*, the court was not entirely clear on which of several possible meanings it assigned to the test. *Id.* at 84. And the First Restatement intended the test only to *limit* the range of causation—rather than add to it—by requiring not only but-for causation, but also a substantial relationship to the harm (similar to the foreseeability analysis of legal cause). *Id.* at 84–85.

Today, “an overwhelming majority of jurisdictions still use the substantial factor language as a pillar of factual-causation reasoning,” *id.* at 81, but not all jurisdictions mean the same thing by the term. Most use the test in one of four ways: 1) requiring both but-for causation and that the conduct was a substantial factor in causing the harm,

2) replacing the but-for test, 3) ostensibly replacing the but-for test, but really just using a different name for the but-for test, and 4) curing the deficit when the but-for test fails in overdetermined-cause situations. *Id.* at 87–93.

Only the last of those four uses is worth preserving. The first use, upon deeper look, is using the substantial-factor test like the “legal cause” factor, which probes “whether the particular injury the plaintiff suffered was sufficiently associated” with the risk or harm at issue. Robertson, *Common Sense*, at 1780. While legal cause is important, using the term “substantial factor” instead of the more established term “legal cause” is “not conducive to clarity.” *Id.* The second use unnecessarily jettisons a bedrock standard in favor of a newer and, albeit useful, definitively less concrete standard. As a result, “valuable precision of analysis is lost and nothing is gained.” *Id.* And the third is only a mix-up of terminology; it fails to add value because “language is being wasted.” *Id.* at 1779. Only the fourth use—a cure for overdetermined-cause situations—has appreciable acceptance in academia and arguable utility to the law. *Id.* at 1777–78. This brief thus means this fourth use for the substantial-factor test.

The details about how to operationalize the substantial-factor test are up for debate, and available for this Court’s decision and clarification. The Second Restatement of Torts offers three considerations for applying the substantial-factor test: 1) “the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;” 2) whether the actor’s effect was “continuous and active” up

until the harm or only “created a situation” that enabled someone else to trigger the harm; and 3) “lapse of time.” Restatement (Second) of Torts §433 (1965). The better path, however, would be to adopt the “acceleration” and “contribution” rules that courts have long approved and used. Under the acceleration rule, which dates back as far as the 1600s, a person is part of the cause if they accelerate the harm even by a moment. Eric A. Johnson, *Cause-in-Fact After Burrage v. United States*, 68 Fla. L. Rev. 1727, 1746–57 (2016). The contribution rule, which dates at least to 1858, explains that a person is a cause if he “really contributed mediately or immediately to the [harm], as it actually took place, in a degree sufficient for the law’s notice.” *Id.* at 1759 (quoting 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* §653 (2d ed. 1859)).

In sum, the substantial-factor test is a gap-filling alternative test in two distinct circumstances where the but-for test consistently fails to deliver a result that comports with common sense or notions of justice. Turn to those two circumstances now.

II. The substantial-factor test fills the gap in two overdetermined-cause circumstances.

Recall that the but-for test is about comparing reality to a counterfactual — what would have happened if the defendant had complied with minimal legal standards. That ordinarily produces a logical and satisfying result, but in two situations, it does not. The first is when two independent forces would have caused the same harm regardless of the other, and the second is when many forces combine to create one harm together, but none is necessary on its own for the harm to happen. Both circumstances are called

“overdetermined cause” situations because there are more forces than necessary to cause the harm. And for the reasons explained below, the but-for test in these situations “fails to capture ordinary usage” of the term “causation.” Johnson, *Cause-in-Fact*, at 1734. Take them in turn.

A. The test solves the independent-and-sufficient-forces problem.

The famous independent-and-sufficient-causes case is when two fires converge on the same house and destroy it. Either fire was able (or “sufficient”) to destroy the house on its own, but by happenstance, they did it together instead. If a court runs but-for causation on each fire, both will turn out not to be the “cause.” If Fire A had not happened, then Fire B would have destroyed the house, so Fire A is not the cause. And if Fire B had not destroyed the house, then Fire A would have, so Fire B is not the cause. Thus, under the but-for test, neither fire caused the house to turn to ash. That is “obviously false,” so the but-for test has failed. Robertson, *Common Sense*, at 1777.

In sum, each fire was “independent” of the other fire, and each fire was “sufficient” to cause the harm all by itself. That means there is an overdetermined-cause problem because there are more forces than the minimum necessary for the harm to occur. And when that happens, *each* cause could claim that it was not the but-for cause, which leads to an absurd result where there was no identifiable cause.

Even some of the substantial-factor test’s greatest critics agree that the test is appropriate in this circumstance. See Joseph Sanders, et. al., *The Insubstantiality of the*

“Substantial Factor” Test for Causation, 73 Mo. L. Rev. 399, 416–17 (2008). And although cases in which this actually occurs are “rare,” Restatement (Third) of Torts: Phys. & Emot. Harm §27 cmt. b (2010), that just means the principle should apply only when warranted, not that courts should avoid applying it or treat it as disfavored.

To be sure, there are other possible solutions to the problem of independent and sufficient forces, but none are as helpful as the substantial-factor test, even with its flaws. Some cannot apply to criminal law because they involve changing the burdens of proof, which the criminal law cannot do as the civil law can. See Robertson, *Common Sense*, at 1782–84 (discussing shifting the burden to co-defendants and applying *res ipsa loquitur*). Some would not make sense in the criminal setting because they involve imposing proportionate or shared liability, but guilt or innocence for a particular crime is an all-or-nothing proposition for each defendant. *Id.* at 1784–86, 89–94 (discussing loss of chance, joint and several, and market share theories). Another would fail because it involves shifting to a new cause of action to fit the defendant’s acts, but criminal law would not permit re-casting a crime into a different, bespoke criminal violation to establish causation. *Id.* at 1787–89 (discussing liability for destroying plaintiff’s cause of action against another). One alternative solution would work sometimes: treat two defendants as one actor, that is, “unitize” them and determine but-for causation for them both at the same time. *Id.* at 1781–82. But in the criminal context, that would work only when two defendants are accomplices and thus can be “vicariously responsible” for each other’s actions.

Id. at 1781. In any other context, combining the defendant's acts with another person's would fail.

The Third Restatement of Torts does not adopt the substantial-factor test, but it still agrees that the but-for test cannot stand alone because of overdetermined-cause scenarios. It advises that "while the but-for standard ... is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause." Restatement (Third) of Torts: Phys. & Emot. Harm §27 cmt. c (2010). And while it eschews the substantial-factor test, it offers the same basic intuition in its solution: "Multiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but-for standard does not. Thus, the standard for causation in this Section comports with deep-seated intuitions about causation and fairness in attributing responsibility." *Id.* Instead of the substantial-factor test, the Restatement would have this rule control: "If multiple acts occur, each of which under [the but-for test] alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." *Id.* Regardless of whether that would be a better formulation (or perhaps just confusing to juries), the Restatement agrees that but-for is not the only test courts should use to determine causation.

B. The test solves the many-combined-forces problem.

The second overdetermined-cause situation in which the but-for test fails is when many smaller forces combine to cause an effect, but no one force would have been able to cause the result on their own, and no one force was itself necessary for the result.

For example, suppose three different people each add a poison pill to the victim's water, but only two poison pills would be necessary to cause death. If a court ran ordinary but-for analysis, then each person could claim that he was not the but-for cause because the other two would have killed the victim even if he had not been involved. *See Sanders, The Insubstantiality*, at 417. Person A would say that Persons B and C would have killed him even if A had not been involved, and B and C each would make the same argument. Thus, the but-for test would conclude that *none* of the three caused the poisoning. Again, that is obviously wrong.

But courts are not required to conclude that no one and nothing caused the victim's untimely death. Instead, courts can recognize this as an overdetermined-cause situation: there were more poisoners than necessary to cause the death. That should trigger the court to apply the substantial-factor test. And in this situation, each poisoner would be considered a substantial factor even though they would not be a but-for cause.

The Third Restatement offers another way to judge combined-force situations. Its formulation may be more disciplined, but it also stretches the bounds of easy explanation. The Restatement calls this an instance of "multiple sufficient causal sets," by which it

means the court could isolate the three poisoners into “causal sets” of two poisoners each. Restatement (Third) of Torts: Phys. & Emot. Harm §27 cmt. f (2010). Because Poisoner A is necessary to a causal set of Poisoners A and B or A and C, then the Restatement would consider Poisoner A to be a cause of the poisoning. And because Poisoner B is necessary to a causal set of Poisoners B and A or B and C, then B is likewise a cause. And the same for C. While the theory makes sense, its practical value is less certain. At bottom, every proposed test must face “one important metric: will juries understand this stuff?” Joseph S. Berman, *Theory Meets Reality: Clarifying the Standard in Multiple Cause Negligence Cases*, 103 Mass. L. Rev. 12, 16 (2022). And while multiple-causal-sets theory may put a professor’s mind at ease, it may have the opposite effect on the nerves of the average juror.

C. The test causes problems only when used outside of overdetermined-cause situations.

When used properly, the substantial-factor test “provide[s] a solution” to the overdetermined-cause problem that the but-for test cannot adequately address. *See Sanders, The Insubstantiality*, at 416. “The real trouble begins” not from using the test for these purposes, but from “go[ing] a step further” and applying the substantial-factor to other situations or for other purposes outside of solving the overdetermined-cause problem. *Id.* at 418. In other words, the substantial-factor test is not an elixir for “any multiple causation case in which analysis appears difficult.” *Id.* It is one particular, specialized tool. Surveying the field shows at least four ways that courts have misstepped in applying the substantial-factor test.

Injecting Unnecessary Analysis. First, the substantial-factor test has no place when the but-for test already shows causation. When multiple forces work together to achieve an end, but each is *necessary* to the result, each is a cause even under the but-for test. For example, if three children worked together to tip over a cow, and two could not have done it on their own, each child is a but-for cause of the cow tipping. In this situation, courts need not employ the substantial-factor test at all, and doing so only creates confusion because “but-for causation on its own would have (and should have) sufficed.” Berman, *Theory Meets Reality*, at 14. This is why the but-for test should always come *first*, and courts should move to the substantial-factor test only if (1) the but-for test finds no causation, *and* (2) the case presents an overdetermined-cause problem.

Measuring Triviality. Second, the substantial-factor test should not be used as an extra layer on top of but-for as a way of weeding out tiny causes. To be sure, the Second Restatement of Torts “envisi[on]ed a separate role for the substantial factor test” in which it weeds out “but-for causes [that] are sufficiently trivial that they should be ignored.” Sanders, *The Insubstantiality*, at 418. After all, infinite tiny forces always combine in the background without which a result would not occur—everything from being born or happening to meet, to sleeping in or forgetting a coat. And one rarely thinks of those as “causes” in the relevant sense.

But the better view is not to use the substantial-factor test that way. Rather than deny that those smaller forces are causes, it is better to explain that they are excluded from

responsibility for reasons other than the “cause” requirement. In the Third Restatement of Torts, for example, the authors removed substantiality from the requirements for causation and instead included it in the scope of liability. Restatement (Third) of Torts: Phys. & Emot. Harm §36 cmt. b (2010). In other words, someone who contributes .01% of the harm is probably liable for about .01% of the damages. In criminal law, insubstantial-cause problems could be solved in other ways. For example, a criminal conviction that requires causation usually requires “actual *and* legal cause.” *Carpenter*, 2019-Ohio-58 at ¶51 (emphasis added). Legal cause includes foreseeability. *Id.* at ¶53. And many insubstantial causes will not *foreseeably* lead to the harm because the defendant would not be able to foresee that such a small contribution would lead to the ultimate result. Also, the defendant often would not have the necessary mens rea when his contribution was truly insubstantial.

In short, other backstops in the criminal law will prevent criminalization of acts that are technically but-for causes but that are insubstantial or innocent. And using substantial-factor to replace those mechanisms leads to confusion rather than clarity.

Replacing Other Doctrines. Another way the substantial-factor test can go awry is when courts use it to replace a different helpful doctrine. For example, most would agree that Henry Ford is not the cause of every car accident. The clearest reason why is that his involvement “is superseded by intervening events,” like poor driving or modern manufacturing errors. *Cardi, Goodbye*, at 96. The reason is not that he is “an ‘insubstantial’

cause of every modern car accident.” *Id.* When doctrines with standards like “reasonableness, foreseeability, or directness/remoteness” can apply, court should not replace those more concrete standards by “leaving the causal complexities captured by the phrase ‘substantial factor’ to instinct.” *Id.* at 96–97.

Doubling for Normative Judgment. Finally, the substantial-factor doctrine is not meant to inject a normative judgment about the defendant’s culpability into the “factual inquiry” of causation. *Cardi, Goodbye*, at 98. For instance, if one of the three people who poisoned the victim’s water *thought* he was adding a nutritious vitamin, he still caused the poisoning just the same. Whether he is culpable as a criminal is a different question. And in that scenario, the mens rea requirement would explain why the would-be-vitamin-adder who accidentally added poison is not guilty of intentional homicide. When the substantial-factor test tries to serve double-duty as both causation test and measure of culpability, it “diverts causation from its essential purpose, robs it of its essential nature,” and creates a “diffuse and confused” application of the standard. *Id.* at 98.

* * *

Two final notes. First, there is a potential third category of overdetermination in which one cause completely supersedes another cause. For example, if Person A poisons the victim, but Person B shoots her before the poison can take effect, then Person B’s bullet supersedes Person A’s poison. *Johnson, Cause-in-Fact*, at 1739–40 (Johnson calls this “spurious causal sufficiency”). But that scenario is arguably just a variation of the

independent-and-sufficient forces problem. And it is solved by the same substantial-factor analysis described below. *See id.* at 1750–54, 1760–65. So this brief does not address that scenario in detail.

Second, this Court should not be dissuaded by the United States Supreme Court’s opinion in *Burrage v. United States*, which opted against using the substantial-factor test to determine causation when applying a federal statute. 571 U.S. 204 (2014). In addition to being a nonbinding case about a federal statute, that Court’s review of causation suffers from several flaws that do not recommend themselves to this Court, including misreading the authorities it cited for its analysis. Johnson, *Cause-in-Fact*, at 1733–37. As a result, the opinion “delivers results that are starkly at odds with the common understanding of causation.” *Id.* at 1737. Moreover, the *Burrage* Court recognized that the but-for test is not capable of handling some overdetermined-cause situations. *Burrage*, 571 U.S. at 214–15. But it did not expound on what courts should do in such circumstances.

III. Seymour’s heroin caused Alsey’s death.

No matter what path this Court takes, the Tenth District got it wrong. Instead of its analysis, it should have analyzed causation this way:

- 1) Determine whether the purported cause of death was the but-for cause. If it was, then it was the factual cause.
- 2) If the purported cause was not the but-for cause, ask whether this is an overdetermined-cause situation.

- a. If there were two or more independent and sufficient causes, then it is.
 - b. If there were multiple combined forces with more power than necessary to cause the harm, then it is.
 - c. If it is neither overdetermined-cause situation, then the purported cause is not the factual cause.
- 3) If it is an overdetermined-cause situation, determine whether the purported cause was a substantial factor.
- a. If it accelerated the harm, then it is a substantial factor.
 - b. If it meaningfully contributed to the causal mechanism, then it is a substantial factor.

Following this analysis, this Court should first look to see whether Seymour's heroin was the but-for cause of Alsey's death. Drawing on the trial record, it was. But if the Court finds that doubtful, it should recognize this as an overdetermined-cause situation. That triggers the need for the substantial-factor test. And under that test, Seymour's heroin is the factual cause of Alsey's death.

A. Seymour's heroin was the but-for cause of Alsey's death.

Recall that the doctor who performed the autopsy testified that the cause of death was "heroin, kratom, methylphenidate ('Ritalin'), and diphenhydramine ('Benadryl') intoxication." App.Op.¶9. He also said that "all four drugs 'worked together to cause the

death''' and each "'contributed' to Alsey's death." *Id.* (quoting Tr. at 326–27, 336, 354). Removing any one of the four drugs, Alsey "would possibly be alive." Tr. 336.

In this situation, the but-for test handles causation on its own. Each of the four drugs, according to the expert, was necessary for the death. That means that, but for the heroin, Alsey would not have died. Ergo, the heroin caused Alsey's death. It does not matter that other drugs also helped cause Alsey's death, just as it would not matter that two other children also helped tip the cow. *See* above at II.C. And since this case arises as a sufficiency challenge, the fact that the expert's testimony supports that conclusion should close this case.

The Tenth District missed this point because it asked the wrong question. Although it set out to answer whether "heroin was the 'but-for' cause of death," it ended up resting on the uncertainty of whether Alsey would have died "but for the use of kratom, Ritalin, or Benadryl." App.Op.¶47. That framing would, at best, tell whether the kratom, Ritalin, or Benadryl were a cause of the death. But that is irrelevant to the question at hand.

B. If but-for fails, Seymour's heroin still caused Alsey's death.

If each of the four drugs were not necessary for Alsey's death, then this is an over-determined-cause situation. After all, if each was not necessary to cause death, then it must be that the four drugs were *more than* the amount necessary to cause the death. (It cannot be that the four were *less than* the amount necessary to cause the death, or he would still be alive.) And the but-for test would fail in this situation because the idea that Alsey died

from an overdose caused by no drugs is “obviously false.” Robertson, *Common Sense*, at 1777. That calls for using the substantial-factor test, not settling for the silly conclusion that *nothing* caused Alsey’s overdose. So we turn to the substantial-factor test.

First, sufficient evidence supports the conclusion that Seymour’s heroin accelerated Alsey’s death. After all, “Alsey had ingested Benadryl, Ritalin, and kratom with some regularity, but he died only upon the introduction of heroin into his system,” so even if the other three drugs were going to kill Alsey eventually, the heroin almost certainly sped the result. App.Op.¶55 (Leland, J., dissenting in part). Further, Alsey died within an hour of returning home with the heroin. App.Op.¶4. The close relationship in time signals that heroin hastened Alsey’s death.

Second, even if Seymour’s heroin did not accelerate Alsey’s death, it certainly contributed to the causal mechanism. The causal mechanism was suppression of Alsey’s faculties to the point that his body ceased to function. App.Op.¶9. The heroin, without question, contributed to that causal mechanism and thus is a cause of the death.

Alternatively, this Court could apply the Second Restatement’s factors, and they would lead to the same place. Restatement (Second) of Torts §433 (1965). First, looking at the number of factors and their effect, Seymour’s heroin was one of only four factors that contributed to Alsey’s death. And it was likely the most powerful because, according to the forensic pathologist, heroin is “the one [drug] that” he had “probably seen the most overdoses for ... out of these drugs.” Tr. 337. Second, looking to the nature of the actor’s

effect, Seymour's heroin acted on Alsey's body continuously and actively until his death; it did not merely create a dangerous situation. And third, looking at the timeline, there was a short lapse in time—at most five hours, App.Op.¶11, but almost definitely less than one hour, App.Op.¶4—between Alsey consuming the heroin and dying. Seymour's heroin was a substantial factor in Alsey's death, so it was a cause.

* * *

This case provides this Court an opportunity to clarify an important standard. Just as no one should be convicted if they fail to meet a causation element, no criminal should walk free because he falls between the cracks in the but-for test for causation. Lower courts will benefit from clarity that the but-for test does not stand alone in defining causation in the law. They will also benefit from instructions on when and how to apply the substantial-factor test so that the method and results will be as uniform as possible.

CONCLUSION

For the foregoing reasons, the Court should reverse the Tenth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae Ohio Attorney General Dave Yost in Support of Appellant was served on May 19, 2025, by e-mail on the following:

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