

DEFENDING DEATH BY DISTRIBUTION CASES: A CHECKLIST

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Last Updated: June 17, 2020

As of December 1, 2019, two new drug-induced homicide (DIH) laws went into effect in North Carolina: (1) death by distribution of certain controlled substances¹ and (2) aggravated death by distribution of certain controlled substances.² Death by distribution is a Class C felony, which carries a maximum punishment of 231 months of imprisonment. Aggravated death by distribution is a Class B2 felony, which can be punishable for up to 484 months of imprisonment.

This checklist has been adapted from the “[Drug-Induced Homicide Defense Toolkit](#)” by Beety, et al.,³ and the University of North Carolina School of Government blog post, “[Defending Death by Distribution Cases](#)”, by Phil Dixon. This checklist is meant to help criminal defense attorneys identify possible defenses to these new North Carolina DIH laws, but we do strongly recommend consulting the “[Drug-Induced Homicide Defense Toolkit](#)” and “[Defending Death by Distribution Cases](#)” for more in-depth analysis of the defenses presented here.

DEATH BY DISTRIBUTION

A person is guilty of this offense if all of the following elements are met:

- (1) The person unlawfully sells at least one certain controlled substance.⁴
- (2) The ingestion of the certain controlled substance or substances causes the death of the user.
- (3) The commission of the offense in subdivision (1) of this subsection was the proximate cause of the victim’s death.
- (4) The person did not act with malice.

Defense Based on Causation

The death by distribution statute requires both *actual* and *proximate* causation. Causation is a question for the jury.

- *Actual causation* requires the State to establish that, but-for the act of the defendant, the victim would still be alive. This is an objective test, and it is often in dispute in drug-induced death prosecutions.

Strategies	<input type="checkbox"/> Engage a defense expert. Can review the cause of death, challenge the methodology of the prosecution’s medical expert, closely examine the death certificate and autopsy, and look at the decedent’s medical history to determine whether an alternate cause of death exists.
	<input type="checkbox"/> Special jury instruction. Since North Carolina has not yet issued pattern jury instructions for the new death by distribution statute, it is recommended that defense attorneys request a special jury instruction. Note that even once a pattern is released, attorneys should still consider special instructions and modifications to the pattern as appropriate to issues in the case.

¹ G.S. § 14-18.4(b).

² G.S. § 14-18.4(c).

³ Valena Elizabeth Beety, Alex Kreit, Anne Boustead, Jeremiah Goulka, Caitlin Scott, and Leo Beletsky, “Drug-Induced Homicide Defense Toolkit” (October 4, 2019). Available at SSRN: <https://ssrn.com/abstract=3265510> or <http://dx.doi.org/10.2139/ssrn.3265510>.

⁴ “Certain controlled substance” includes any opium, opiate, or opioid; any synthetic or natural salt, compound, derivative, or preparation of opium, opiate, or opioid; cocaine or any other substance described in G.S. 90-90(1)(d); methamphetamine; a depressant described in G.S. 90-92(a)(1); or a mixture of one or more of these substances. G.S. § 14-18.4(d).

Strategies	<input type="checkbox"/> Pre-existing conditions. Although tort law recognizes pre-existing conditions as a proximate causation argument, North Carolina has explicitly rejected them in the criminal context. ⁵ However, a pre-existing condition argument may be useful to defend against actual causation, with the aid of a defense expert, to show that the victim would have died even without having ingested the controlled substance.
	<input type="checkbox"/> “But-for” v. “Contributed.” Drug use and overdose deaths often involve mixed substances, including drugs and alcohol. The language of G.S. 14-18.4(b) states that the controlled substance obtained from the defendant must have been the “actual” cause of death, rather than a contributing factor. This is important because, in <i>United States v. Burrage</i> , the Supreme Court held that the express language of a federal death by distribution statute imposed a “but-for” causation standard. ⁶ The Court reasoned that the “but-for” language required that the use of the drug distributed by the defendant had to be an independently sufficient cause of the victim’s death or serious bodily injury. This is different from a “contributing” factor, which lowers the burden for law enforcement and the State. Although <i>Burrage</i> involved an issue of statutory interpretation on the federal level, a parallel argument on the state level could convince a jury that the prosecution did not meet its burden of proof regarding but-for causation.

- *Proximate causation* focuses on the foreseeability of the harm from the defendant’s act.
 - There can be more than one proximate cause of death. However, if the defendant’s act is even *one* proximate cause of the user’s death, criminal responsibility will attach.

Strategies	<input type="checkbox"/> Intervening causes. An unforeseeable intervening act may break the link of causation to the defendant. Note that the buyer’s act of sharing the controlled substance with the deceased user may not break the causal chain. ⁷
	<input type="checkbox"/> Multiple drug usage. If the user ingested multiple drugs prior to the death, your defense expert may be able to opine that the drug sold did not contribute to the cause of death. Note that the success of this argument will be largely fact-specific, complex, and difficult.

Defense Based on Expert Testimony

Strategies	<input type="checkbox"/> <i>Daubert</i> Hearing to Challenge the State Expert’s “but-for” testimony. N.C. R. Evid. 702 requires: (1) an expert witness to be qualified by knowledge, skill, experience, training or education; (2) relevant testimony, and (3) reliable testimony. Consider asking the Court for a <i>Daubert</i> hearing to challenge the state’s expert testimony that the distributed drug is the but-for cause of the decedent’s death. ⁸ Also, consider the fact that North Carolina uses medical examiners and (in rare cases) ⁹ coroners to determine causes of deaths. A medical examiner is a physician who is appointed to determine cause and manner of death, whereas a coroner is an elected official who is not required to have any medical background. Unfortunately, despite these differences, the
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⁵ *State v. Luther*, 285 N.C. 570 (1974).

⁶ 571 U.S. 204 (2014).

⁷ *State v. Parlee*, 209 N.C. App. 144 (2011).

⁸ *Daubert v. Merrill Dow. Pharm., Inc.*, 509 U.S. 579 (1993).

⁹ Only Avery, Hoke, and Yadkin counties use coroners for this purpose.

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	testimony in both cases may be given the same weight by a jury. The jury may also not detect any potential bias. Accordingly, defenders should consider querying the cause of death, manner of death for possible evidence of bias, and whether law enforcement or the coroner was biased in providing information to the prosecution. Also note that if it is a coroner making the determination and giving the opinion, they are ripe for a Rule 702 challenge.
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Defense based on Joint-User/Joint Possession

- *Joint User Doctrine*: when two individuals jointly and simultaneously obtain possession of a drug to use with each other, their only crime is personal drug abuse because they do not intend to distribute it further.
 - Can potentially be grounds for dismissing the charges at the close of the State’s evidence, and before the verdict is issued, since the argument is that the evidence does not establish distribution as a matter of law.
 - This will likely be a fact-sensitive analysis.

Strategies	<input type="checkbox"/> Parse the statutory language and/or legislative history of “sell.” Consider whether this means that both users must be present and purchase the drug (actual possession) for the joint-user defense to apply, and/or whether a person can acquire possession of an item without being present at the point of sale (constructive possession).
	<input type="checkbox"/> Argue by way of analogy. In <i>Weldon v. United States</i> , the Seventh Circuit used the following analogy: two friends ordered takeout together and one friend went to pick up the food. The Court held that it would be odd to conclude that the friend who drove to pick up the takeout “distributed” the food.

AGGRAVATED DEATH BY DISTRIBUTION

A person commits this offense if he or she commits death by distribution and been convicted of one of the following within the last seven years (note that any period of time during which the person was incarcerated is *excluded*):

<ul style="list-style-type: none"> • Death by distribution and aggravated death by distribution (G.S. 14-18.4); • Manufacture, sale or delivery, or possession with intent to manufacture, sell or deliver, a controlled substance (G.S. 90-95(a)(1)); 	<ul style="list-style-type: none"> • Engaging in a continuing criminal enterprise (G.S. 90-95.1); • Employing or intentionally using a minor to commit a drug law violation (G.S. 90-95.4) Drug trafficking (G.S. 90-95(h)); 	<ul style="list-style-type: none"> • Promoting drug sales by a minor (G.S. 90-95.6); • Drug trafficking (G.S. 90-95(h)); or • A substantially similar conviction to one of these offenses.
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Note that the strategies listed under the Death by Distribution statute would also apply to Aggravated Death by Distribution, since it is a lesser-included offense.

Lesser-Included Offenses?

- G.S. 14-8.4 does *not* include death by distribution of certain controlled substances as a lesser-included offense of murder in violation of G.S. 14-17(b)(2).