DRUG DELIVERY RESULTING IN DEATH (DDRD) CHARGES IN CONTEXT: THE OVERDOSE CRISIS, PUBLIC HEALTH, AND DDRD PROSECUTIONS

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DRUG-INDUCED HOMICIDE DEFENSE TOOLKIT

HEALTH IN JUSTICE ACTION LAB

AT NORTHEASTERN UNIVERSITY SCHOOL OF LAW

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I. INTRODUCTION

We are two decades into an overdose crisis that keeps getting worse. In 2017, approximately 72,000 people died of a drug overdose in the United States.[1] Overdose is now the leading cause of death for people under fifty.[2] Conventional wisdom holds that we are finally embracing a public health-type approach to this crisis rather than the usual punitive one. While it is true that there is a growing embrace of increasing access to the opioid antidote naloxone[3] and evidence-based treatment,[4] and of reducing the stigma associated with substance use and addiction,[5] progress on these and other vital public health interventions remains abysmally slow.[6] Meanwhile, "progress" is anything but slow on expanding the punitive approach. Prosecuting accidental overdose deaths as homicides is the new, growing trend.

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[1] FARIDA B. AHMAD ET AL., PROVISIONAL DRUG OVERDOSE DEATH COUNTS (2018), https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[2] Josh Katz, *Drug Deaths in America Are Rising Faster Than Ever*, N.Y. TIMES (June 5, 2017), https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html.

[3] *See* LINDSAY LASALLE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 4 (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf.

[4] *See id*.

[5] *See* Wayne D. Hall & Michael Farrell, *Reducing the Opioid Overdose Death Toll in North America*, PLOS MED., at 2 (July 31, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6067703.

[6] *See* German Lopez, *How to Stop the Deadliest Drug Overdose Crisis in American History*, VOX (Dec. 21, 2017), https://www.vox.com/science-and-health/2017/8/1/15746780/opioid-epidemic-end.

Drug-induced homicide (DIH) and felony murder statutes have been on the books for decades.[7] DIH statutes emerged during the height of the "drugs and crime" era of crack-cocaine.[8] These provisions were passed under the assumption that they would be used to prosecute major drug traffickers for deaths that their products caused.[9] Despite the theater of passing them, they were not used much. Indeed, in our research, we found only one example of a DIH-type prosecution in the 1980s, involving the high-profile death of John Belushi and the California felony murder law, and a mere 13 in the 1990s.[10] However, a paradigm shift is underway, in which law enforcement and prosecutors treat as crimes what used to be considered accidents.[11] Under pressure to respond to mounting overdose deaths, prosecutors and police have taken to using these provisions with increasing frequency and fervor. The media has responded in kind,

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[7] For general background on DIH laws and prosecution, especially for non-lawyers, see Zachary A. Siegel & Leo Beletsky, *Charging "Dealers" With Homicide: Explained*, THE APPEAL (Nov. 2, 2018), https://theappeal.org/charging-dealers-with-homicide-explained/, and Rosa Goldensohn, *You're Not a Drug Dealer? Here's Why the Police Might Disagree*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/overdoses-murder-crime-police.html.

[8] *See* Bobby Allyn, *Bystanders To Fatal Overdoses Increasingly Becoming Criminal Defendants*, NPR (July 2, 2018), https://www.npr.org/2018/07/02/623327129/bystanders-to-fatal-overdoses-increasingly-becoming-criminal-defendants.

[9] *See* LASALLE, *supra* note 3, at 9 (quoting Act of June 4, 2003, 2003 Vt. Acts & Resolves 141).

[10] *See Drug Induced Homicide*, HEALTH IN JUSTICE ACTION LAB, https://www.healthinjustice.org/drug-induced-homicide (last visited Jan. 20, 2019).

[11] *See, e.g.*, Mark Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*, 3 NAT'L ATT'YS GEN. TRAINING & RES. INST. J. 26 (Feb. 2018), https://www.naag.org/publications/nagtri-journal/volume-3-number-1/prosecuting-drug-overdose-cases-a-paradigm-shift.php (advocating for a prosecutorial "paradigm shift"). *See also* LASALLE, *supra* note 3, at 11.

with a threefold increase in coverage of these prosecutions since 2010, spiking from 363 stories in 2011 to 1,178 in 2016.[12]

Today, almost half of state jurisdictions have a special statute that can be used to mount a drug-induced homicide prosecution.[13] Federal law also has one by way of a sentence enhancement.[14] Although the laws all use an analogous instrumental framework, these provisions use a variety of criminal law mechanisms, including felony-murder, depraved heart offenses, or involuntary manslaughter. At the extreme end of the punitive spectrum, there are among these laws' provisions like West Virginia's, which imposes sentences of up to life in prison.[15] The Trump administration has advocated seeking not just the similarly long federal sentence enhancement—mandatory life sentences for most death or serious bodily injury cases for people with prior "serious drug felony" convictions—but possibly even the death penalty.[16]

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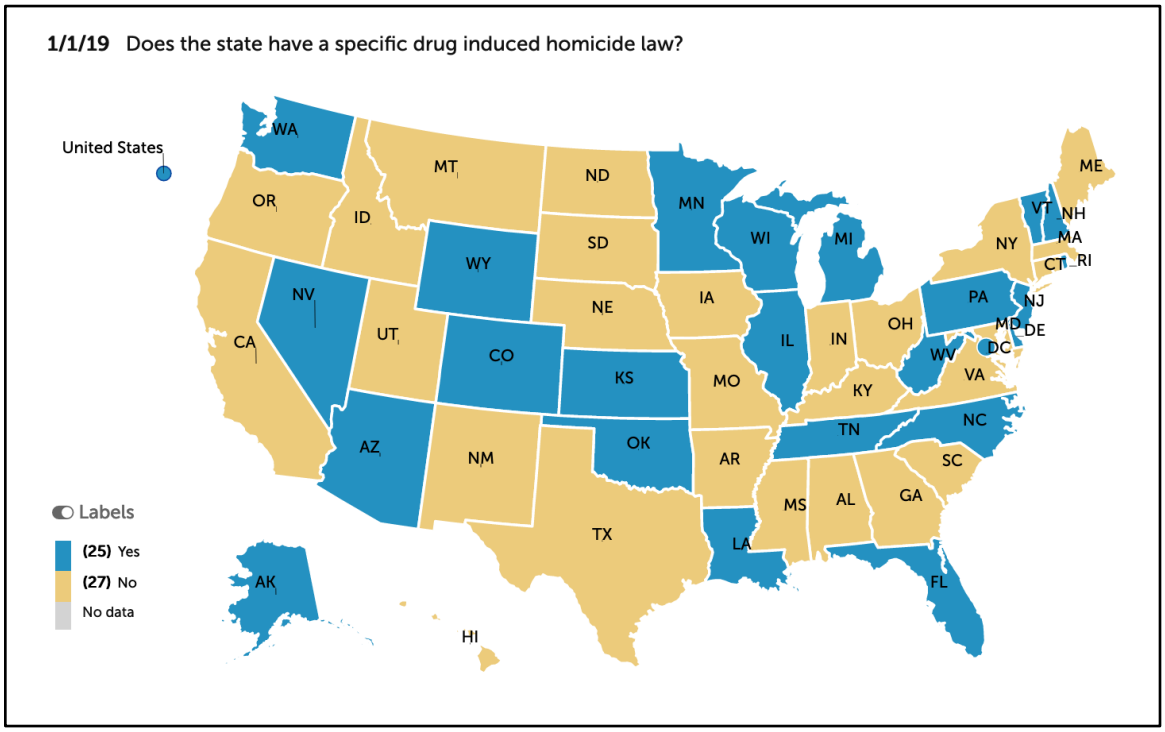
[12] *See generally* LASALLE, *supra* note 3, at 2 (noting the increase in press coverage of drug-induced homicide prosecutions).

[13] *See* Health in Justice Action Lab & Legal Science, PRESCRIPTION DRUG ABUSE POLICY SYSTEM, *Drug Induced Homicide Laws* (Jan. 1, 2019), http://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032 (a collaboration with Mission LISA on developing a comprehensive dataset and interactive tool of drug-induced homicide statutes and their elements).

[14] *See* 21 U.S.C. §§ 841(b), 960(b).

[15] W. VA. CODE ANN. § 61-2-2.

[16] German Lopez, *Read: Jeff Sessions's memo asking federal prosecutors to seek the death penalty for drug traffickers*, VOX (Mar. 21, 2018), https://www.vox.com/policy-and-politics/2018/3/21/17147580/trump-sessions-death-penalty-opioid-epidemic.



Some of these provisions are strict liability statutes requiring no criminal intent (*mens rea*).[17] Others require a recklessness or criminal negligence standard to be met.[18] However, none of the state or federal provisions require a financial exchange to take place or exclude small-time dealers or fellow users from prosecution; those being charged with an underlying trafficking offense involving higher drug quantities may face stiffer penalties.[19]

It should be noted, however, that a specialized drug-induced homicide or similar statute is not necessary for an individual to be charged in a fatal overdose: criminal negligence or other

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17 *See* Health in Justice Action Lab & Legal Science, *supra* note 20 (interactive map).

18 *Id.*

19 *See, e.g.*, 21 U.S.C. § 841(b)(1).

generic statutes can—and are—being strategically deployed in these cases.[20] One of those strategies involves a collaboration with federal prosecutors: local district attorneys threaten that the feds will swoop in with their long sentence enhancement (including a mandatory life term for people with previous "serious" drug felonies) if the defendant doesn't accept a plea deal featuring charges under a generic state statute.[21]

There are many problems with these laws and their enforcement. DIH statutes are ostensibly intended to target major traffickers; enforcement is ostensibly intended to "send a message" deterring kingpins. However, research indicates that almost all prosecutions are actually ensnaring low-level drug dealers or individuals who do not even fit the characterization of a "dealer."[22] Analyses by the Health in Justice Action Lab,[23] Drug Policy Alliance,[24] and by the

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20 *See* LASALLE, *supra* note 3, at 2.

21 North Carolina is an example of a state where this is happening. The NDAA's white paper on opioids recommends using this approach:

> Prosecution of drug offenses in the federal system typically enhances cooperation by charged defendants, usually provides better tools for rewarding cooperation, may result in fewer discovery obligations and discovery practice, and often results in quicker resolutions. The easiest way to do this is to form or participate in a federal task force, under which state investigators become federal task force officers.

National District Attorneys Association (NDAA), *The Opioid Epidemic: A State and Local Prosecutor Response*, at 7 (Oct. 12, 2018), https://ndaa.org/wp-content/uploads/NDAA-Opioid-White-Paper.pdf. *See also* 21 U.S.C. §§ 841(b), 960(b).

22 *See id*. at 3, 11, 14.

23 *See Drug Induced Homicide*, *supra* note 10.

24 *See* LASALLE, *supra* note 3.

New York Times[25] revealed that the majority of these drug-induced homicide cases do not involve "traditional" drug dealers, but rather friends, family, and co-users of the overdosed decedent. Individuals suffering from Opioid Use Disorder who are jailed or imprisoned in these cases face an enormous spike in risk of death from overdose during their first few weeks after release.[26]

In cases that *do* involve commercialized drug distribution, there is a high likelihood of racial bias. Health in Justice Action Lab's analysis suggests that a disproportionate number of charges are being brought in cases where the victim is non-Hispanic white and the dealer is a person of color. Generally, the Lab found that people of color accused of drug-induced homicide or similar crimes receive sentences 2.1 years longer, on average, than white defendants.[27] Considering that average sentence lengths in these cases range from five to ten years, people of color are receiving disproportionately-longer sentences; as of October, 2019, the median DIH sentence for a person of color was eight years, compared to five for white defendants: a difference of 60% over a 10-year period.[28]

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[25] *See* Rosa Goldensohn, *They Shared Drugs. Someone Died. Does that Make Them Killers?*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html.

[26] *See* Shabbar I. Ranapurwala et al., *Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015*, 108 AM. J. PUB. HEALTH 1207, 1209 (2018).

[27] *Drug Induced Homicide*, *supra* note 10.

[28] *Id*.

Presently, there are two primary avenues for defending against prosecutions under drug-induced homicide statutes.[29] First, the defense can challenge the prosecution's effort to establish causation—that the drug(s) in question was the legal cause of the decedent's overdose. Second, in cases that involve a user who was sharing drugs with another user, the joint-user (or "joint-purchaser") defense may apply. This defense can undermine the underlying distribution charge that is an essential element of DIH prosecutions.

While the DIH approach tends to use strict liability principles to establish guilt, some states and federal circuits still maintain mental state requirements, and so for these states, *mens rea* arguments can be pursued. If the defendant has been charged under a statute that includes a *mens rea* element, insufficient evidence of the requisite mental state may also be a viable defense.[30]

There are many problems with these arrests and prosecutions, and much remains to be learned. This Toolkit is intended to serve as an informational guide for defense counsel and other interested parties working to mount a defense for individuals charged with drug-induced homicide or similar crimes resulting from overdoses. The creation of this Toolkit was spurred by two related trends: (1) information from parents, news reports, and other sources about inadequate legal defense being provided to many individuals charged with these crimes, and (2)

[29] In addition to these two primary defenses, there are two limited possible approaches to defending these cases. One is by way of Good Samaritan statutes. These provide full or partial immunity to arrest or prosecution to people who seek help from emergency services. As of this writing, only two states (Vermont and Delaware) extend these protections to drug delivery resulting in death, but this may offer value in mitigating sentence length.

[30] Because many DIH statutes impose strict liability and the required mental state varies among non-strict liability DIH statutes, this Toolkit does not analyze *mens rea* based defenses.

widespread efforts by prosecutors to disseminate information and tools that aid other prosecutors and law enforcement personnel in investigating and bringing drug-induced homicide and related charges, including presentations at conferences,[31] continuing legal education modules, webinars,[32] and the like. We hope that this Toolkit will assist defenders and families and, perhaps with time, will encourage police and prosecutors to focus their resources on more effective strategies for reducing crime and delinquency.

This Toolkit was produced in a collaboration led by the Health in Justice Action Lab, which aims to inject scientific evidence and public health principles into the conversation in order to level the playing field in this rapidly expanding prosecutorial offensive. The Toolkit is intended to be a living document, updated regularly and available for no cost on the Social Science Research Network.[33]

II. AVAILABLE DEFENSE #1: CAUSATION

A. Discussion

Causation is an important issue in many drug-induced homicide prosecutions. As summarized by the Supreme Court in *Burrage v. United States*,

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[31] *See Law Enforcement Track*, NATIONAL RX DRUG ABUSE & HEROIN SUMMIT (last updated Mar. 25, 2016), http://nationalrxdrugabusesummit.org/law-enforcement/#LEN4.

[32] *See Webinars*, SMART PROSECUTION: ASS'N OF PROSECUTING ATTORNEYS, https://www.smartprosecution.org/recent-webinars (last visited Jan. 20, 2019).

[33] Available at: https://ssrn.com/abstract=3265510 or http://dx.doi.org/10.2139/ssrn.3265510.

> [t]he law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause . . . . When a crime requires "not merely conduct but also a specified result of conduct," a defendant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result."[34]

Accordingly, defense counsel may choose to litigate the traditional causation requirements—including the actual (or but-for) causation and the legal (or proximate) causation—in drug-induced death prosecutions.

This section discusses both requirements as well as the intervening actor doctrine. Specific strategies for raising causation issues at trial—including challenging the methodology of the prosecution's medical expert, hiring a toxicologist or forensic pathologist to testify regarding the cause of death, and closely scrutinizing the death certificate and medical examiner autopsy report—are discussed in Part III below.

1. But-For Causation

Under traditional causation principles, the first step to determining whether a defendant's acts caused death is the but-for causation requirement. But-for causation "represents '*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.'"[35] But-for causation requires the prosecutor to prove that, but for the

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[34] 571 U.S. 204, 210 (2014) (first citing H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 104 (1959); then quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a) (2d ed. 2003)).

[35] *Burrage*, 571 U.S. at 211 (quoting Model Penal Code § 203(1)(a)).

defendant's acts, the harm would not have occurred when it did.[36] Although but-for causation is easily met in most traditional homicide prosecutions, it is often in dispute in drug-induced death prosecutions.[37] This is because traditional homicides involve things like bullets, blades, or blunt force trauma, whereas death from overdose involves the chemically-induced suppression of the respiratory system leading to asphyxiation and sometimes choking on vomit.

In addition, drug use and overdose deaths often involve other substances including drugs and alcohol. The majority of overdose cases in Massachusetts, for example, have involved depressants in addition to opioids.[38] This raises significant questions about causation if charges are brought against a defendant for providing heroin but not the benzodiazepines also used by the decedent. Accordingly, courts are split on whether the particular drugs at issue in the case were the "but-for" cause of death or merely "contributed" to death.

In *Burrage*, the United States Supreme Court resolved the question of whether but-for causation applies to the federal drug-induced death statute.[39] The law levies heavy mandatory minimum penalties in some controlled-substance prosecutions—including, in several situations, life sentences for individuals previously convicted of drug felonies—"if death or serious bodily

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[36] *See Causation*, LAWSHELF EDUC. MEDIA, https://lawshelf.com/courseware/entry/causation (last visited January 20, 2019).

[37] *See* LASALLE, *supra* note 3, at 41; *see also* Thomas P. Gilson et al., *Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions—The Burrage Decision*, 7 ACAD. FORENSIC PATHOLOGY 87, 88 (2017).

[38] Martha Bebinger, *It's Not Just Heroin: Drug Cocktails Are Fueling The Overdose Crisis*, WBUR COMMONHEALTH (Nov. 13, 2015), https://www.wbur.org/commonhealth/2015/11/13/drug-overdose-cocktails (reporting on research from the first half of 2014 showing four times as many overdose deaths involving heroin featured polypharmacy use versus heroin alone).

[39] *See* 571 U.S. at 206.

injury results from the use of" the substance.[40] For a time, courts were split on the question of whether the traditional but-for causation principles applied to this statute or whether, by using the phrase "results from," Congress indicated an intent to apply a broader approach to causation.[41] In *Burrage*, the Supreme Court held that but-for causation is required under the federal statute.[42]

Burrage involved the death of Joshua Banka, "a long-time drug user."[43] On the day Banka died, he smoked marijuana and then injected crushed oxycodone pills he had stolen from a roommate.[44] Later, Banka and his wife bought one gram of heroin from Burrage.[45] Banka injected some of the heroin and was found dead by his wife a few hours later.[46] The police found a number of drugs in Banka's house and car, including alprazolam, clonazepam, oxycodone, and hydrocodone.[47] At Burrage's trial, two medical experts testified that the heroin was a

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[40] 21 U.S.C.A. § 841(b)(1)(A)(iii) (Westlaw through Pub. L. No. 115-338); *see also* 21 U.S.C.A. § 960(b)(1)–(3) (Westlaw through Pub. L. No. 115-338) (stating penalties).

[41] *See* Benjamin Ernst, *A Simple Concept in a Complicated World: Actual Causation, Mixed-Drug Deaths and the Eighth Circuit's Opinion in United States v. Burrag*e, 55 B.C.L. REV. E. SUPP. 1, 2 (2014).

[42] *See* 571 U.S. at 218–19.

[43] *Id.* at 206.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

contributing factor in Banka's death.[48] But neither was able to say "whether Banka would have lived had he not taken the heroin," given the evidence of polypharmacy use from his possessions and his post-mortem toxicology screen.[49] The trial court declined to give Burrage's requested jury instructions on causation and denied his motion for judgment of acquittal.[50] Burrage was convicted and sentenced to 20 years under 21 U.S.C. § 841(b)(1)(C).[51] The Eighth Circuit affirmed.[52]

The Supreme Court reversed Burrage's conviction and held that the "results from" language in the federal statute "imposes a requirement of but-for causation."[53] In reaching this conclusion, the Court reasoned that it had previously held that language similar to this requires "but-for" causation in other contexts.[54] The Court also noted that "Congress could have written § 841(b)(1)(C) to impose a mandatory minimum when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done. It chose instead to use language that imports but-for causality."[55] Accordingly, the Court concluded, "at least where use of the drug distributed by the

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48 *Id.* at 207.

49 *Id.*

50 *Id.* at 207–08.

51 *Id.* at 208.

52 *Id.* (citing United States v. Burrage, 867 F.3d 1015 (8th Cir. 2012), *rev'd*, 571 U.S. 204 (2014)).

53 *See id.* at 214, 219.

54 *Id.* at 212–14.

55 *Id.* at 216 (citations omitted).

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. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury."[56] But-for causality must be proven beyond a reasonable doubt, which can be a heavy burden for law enforcement and the prosecution.[57]

It should be noted that in state court, the usefulness of *Burrage* will depend on whether the language of the relevant state drug-induced death statute uses "but-for" or "contributes to" language.[58] Indeed, in *Burrage*, the Supreme Court distinguished the federal statute from five state statutes that use the phrase "contributes to death or serious bodily injury or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done."[59] Of course, since this is an issue of statutory interpretation, state courts are free to decline to follow *Burrage* regardless of the statutory language at issue. Nevertheless, *Burrage* makes a compelling argument for applying its rule absent express statutory language that modifies

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[56] *Id.* at 218–19.

[57] *See* Gilson et al., *supra* note 37. See *infra* Section VI.A (regarding the downstream effects of this burden).

[58] Check using the Health in Justice Action Lab's interactive tool, *supra* note 13.

[59] 571 U.S. at 216 (internal quotations omitted); *see also, e.g.*, People v. XuHui Li, 67 N.Y.S.3d 1, 6 (N.Y. App. Div. 2017) (citing N.Y. Penal Law § 125.15 (McKinney, Westlaw through L.2019, chapters 1 to 8)). In *XuHui Li*, the court declined to apply *Burrage* in a drug-induced death manslaughter prosecution on the grounds that "*Burrage* interpreted specific causation language employed by Congress in the federal Controlled Substances Act, which language is not included in New York's manslaughter statute." 67 N.Y.S.3d at 6.

traditional causation principles and is a useful case if but-for causation is being litigated in state court.

2. *Proximate Causation and Foreseeability*

In addition to but-for causation, traditional criminal causation principles also require proof of proximate causation. Proximate cause, also called legal cause, is a way of identifying a but-for cause

> [t]hat we're particularly interested in, often because we want to eliminate it. We want to eliminate arson, but we don't want to eliminate oxygen, so we call arson the cause of a fire set for an improper purpose rather than calling the presence of oxygen in the atmosphere the cause, though it is a but-for cause just as the arsonist's setting the fire is.[60]

Proximate cause requires proof that death was a reasonably foreseeable consequence of the defendant's conduct. However, some statutes use a strict liability approach.[61] Most circuits have concluded that the federal drug-induced death statute does not require proof of proximate

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[60] United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010).

[61] *See* Health in Justice Action Lab & Legal Science, *supra* note 13. *See also infra* Section VI.F (discussing the use of a strict liability approach). Notably in its recent decision in Commonwealth v. Jesse Carrillo, possibly taking into account an argument raised by the Health in Justice Action Lab and our co-author Lisa Newman-Polk in our amicus curiae brief, the Massachusetts Supreme Judicial Court acknowledged that the legislature had considered creating a strict liability DIH crime but did not enact it. Instead, the court chose to explicitly require "specific evidence that the defendant knew or should have known that his or her conduct created 'a high degree of likelihood that substantial harm will result,'" in order to "convict the person who sold or gave the heroin to the decedent of involuntary manslaughter." Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. at 31 (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf (internal citation omitted). Finding that the prosecution "proved no additional facts that transformed the inherent possibility of an overdose arising from any use of heroin into a high degree of likelihood of an overdose", the court vacated Carrillo's conviction for involuntary manslaughter. *Id.* at 32.

cause.[62] Because the United States Supreme Court has not addressed the issue,[63] litigants should continue to request a proximate causation instruction if only to preserve the issue.[64]

3. Intervening Cause Limitation

Under traditional criminal law causation principles, the intervening cause rule provides an important limit on the scope of criminal liability. Under this principle, if an independent act intervenes between the defendant's conduct and the result, it can break the causal chain and defeat proximate cause.[65] A leading treatise on causation explained the idea this way: "[t]he free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first

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[62] *See* United States v. Alvarado, 816 F.3d 242, 250 (4th Cir. 2016) (citing United States v. Cobb, 905 F.2d 784, 789 (4th Cir. 1990)) ("[W]e conclude that the district court fairly stated the controlling law in refusing to instruct the jury that § 841(b)(1)(C) contains a foreseeability requirement."); *see also* United States v. Burkholder, 816 F.3d 607, 621 (10th Cir. 2016) ("We thus hold that § 841(b)(1)(E)'s provision that 'death . . . results from the use' of a Schedule III controlled substance requires only proof of but-for causation.") (omission in original); United States v. Webb, 655 F.3d 1238, 1250 (11th Cir. 2011). In *Webb*, the court cited multiple cases and noted that "some focus on foreseeability and others on proximate cause." 655 F.3d at 1250.

[63] One of the two questions on which the Supreme Court granted review in *Burrage* was "[w]hether the defendant may be convicted under the 'death results' provision . . . without separately instructing the jury that it must decide whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense." 571 U.S. at 208 (citing United States v. Burrage, 569 U.S. 957 (2013)). However, the court "[found] it necessary to decide only" the question of actual causation. *Id*. at 210.

[64] See *Burkholder*, 816 F.3d at 621–24 (Briscoe, J., dissenting), for a thorough and reasoned argument that the federal statute requires proof of foreseeability. Judge Briscoe believed the statute should be read to include a proximate cause requirement, stating he was "not persuaded that Congress clearly intended to impose a strict liability on a criminal defendant for any death resulting from his drug-trafficking offense." *Id.* at 624.

[65] *See* HART & HONORÉ, *supra* note 34, at 326.

actor of criminal responsibility."[66] Based on this principle, courts have held outside of the drug-induced homicide context that "the causal link between [a defendant's] conduct and the victim's death [is] severed when the victim exercised his own free will."[67]

Applying this rule to drug-induced death prosecutions would have the potential to significantly limit their reach since one could plausibly describe most drug users themselves as intervening actors. Few drug users are pressured by the distributor to use drugs; they make the choice to obtain and use the drug themselves. Indeed, the user often actively seeks out a seller to buy drugs. Moreover, the user controls the amount she chooses to ingest, and whether or not to use more than one drug at the same time (indeed, most opioid overdose deaths involve multiple substances, as illustrated in figure 1 below).[68] And so, even though a person's decision to use drugs may be the product of a substance use disorder, it would still seem to qualify as an act of free will within the intervening cause doctrine. Nevertheless, courts have generally been skeptical of the idea, with at least one going so far as to state that suicide would not defeat causation under the federal drug-induced death statute.[69]

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66 *Id.*

67 *E.g.*, Lewis v. Alabama, 474 So.2d 766, 771 (Ala. Ct. Crim. App. 1985).

68 *See also* Kandel DB, et al., *Increases from 2002 to 2015 in prescription opioid overdose deaths in combination with other substances*, 178 DRUG ALCOHOL DEPEND. 501 (Sep. 1, 2017), https://www.ncbi.nlm.nih.gov/pubmed/28719884.

69 Zanuccoli v. United States, 459 F. Supp. 2d 109, 112 (D. Mass. 2006) ("Suicide through heroin overdose meets the statute's terms, because it is a 'death resulting from the use of' the heroin, irrespective of the victim's state of mind.").

Even so, there is only limited jurisprudence on intervening cause in these cases. As with proximate causation, the Supreme Court's decision in *Burrage* did not directly address whether the intervening cause rule should apply to federal drug-induced death cases.[70]

In addition, one court expressed concern in dicta about the prospect of permitting liability under this provision where the victim died by suicide:

> That could lead to some strange results. Suppose that, unbeknownst to the seller of an illegal drug, his buyer was intending to commit suicide by taking an overdose of drugs, bought from that seller, that were not abnormally strong, and in addition the seller had informed the buyer of the strength of the drugs, so that there was no reasonable likelihood of an accidental overdose.[71]

Accordingly, as with proximate cause above, defendants should consider requesting an intervening cause instruction if only to preserve the issue.

B. Challenging the Scientific Evidence[72]

This section provides examples of possible ways defendants can challenge the scientific claims upon which drug-induced homicide prosecutions are based. Recall that if a jurisdiction

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[70] *See* United States v. Rodriguez, 279 F.3d 947, 951 n.5 (11th Cir. 2002) ("While other circuits have held that the 'death or serious bodily injury' enhancement contained in § 841(b)(1) does not require a finding of proximate cause or foreseeability of death, these circuits have not addressed whether there is an intervening cause exception to the enhancement provision. . . . In light of our disposition, we too need not decide whether there can be an intervening cause exception to the enhancement provision.").

[71] United States v. Hatfield, 591 F.3d 945, 950 (7th Cir. 2010).

[72] This section is adopted and excerpted from an article drafted by Valena E. Beety. *See generally* Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983 (2018). For an example of how to employ some of the strategies discussed in this Section, see this transcript of the direct and cross examination of a medical examiner in federal court.

uses a but-for test, *Burrage* requires prosecutors charging DIH cases to prove beyond a reasonable doubt that the distributed drug was the "but-for" cause of death.[73] The experts at trial were unable to prove this when the decedent was on a cocktail of other drugs.[74] Accordingly, the "but-for" test requires the states using that approach to provide a medical expert to confirm that the decedent would still be alive if he had not taken the specific drug given to him by the accused. This section discusses tactics to consider in such circumstances.

1. Ask the Court for Expert Funds to Hire a Toxicologist or Forensic Pathologist/Medical Examiner

A toxicologist—for the state or the defense—will be hard-pressed to make an exclusive "but-for" finding if there are other drugs or supplements in the decedent's blood stream.[75] A forensic pathologist/medical examiner may be able to challenge the autopsy finding by looking at the medical history of the decedent to determine whether an alternate cause of death exists.[76]

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[73] Burrage v. United States, 571 U.S. 204, 210, 216 (2014).

[74] *Id.* at 216–19.

[75] *See* Erin Schumaker, *Almost All Overdose Deaths Involve Multiple Drugs, Federal Report Shows*, HUFFINGTON POST (Dec. 12, 2018), https://www.huffingtonpost.com/entry/multiple-drugs-overdose-deaths-report_us_5c0fe121e4b06484c9ff3b2f.

[76] *See* Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System*, 7 NAT. ACAD. ELDER L. ATT'YS J. 199, 210 (2011) ("Lay coroners rely heavily on the external condition of the deceased and any available medical records when determining cause and manner of death.").

2. *Ask for a Daubert or Frye Hearing to Challenge the State Expert's "But-For" Testimony*

Federal Rule of Evidence 702's[77] expert witness admissibility requirement, expounded upon by the *Daubert v. Merrill Dow Pharm., Inc.*[78] decision, requires that experts offer some kind of specialized knowledge, that their testimony be based on sufficient facts or data, and that it be the product of reliable methodology that has been properly applied to the present case.[79] *Daubert* requires trial judges in both civil and criminal proceedings to determine "whether the reasoning or methodology underlying the testimony is scientifically valid . . . ."[80]

Consider asking the court for a *Daubert* hearing to challenge the state expert's finding that the distributed drug is the but-for cause of the decedent's death. Useful queries address underlying health conditions, herbal supplements, the toxicology report (particularly evidence of other drugs, depressants, and alcohol consumed), the autopsy report if one was performed, and even the death certificate (which may say homicide as the manner of death and overdose as the cause of death before any toxicology analysis was even performed).

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[77] A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

[78] 509 U.S. 579 (1993).

[79] *Id.*

[80] *Id.* at 592–93.

Finally, as discussed below, consider challenging the state expert's expertise and impartiality. If a coroner determined the cause or manner of death, that means a layperson—likely with no scientific background—determined the death was an overdose and a homicide. Death investigations are not standardized across the United States. No national qualifications exist for death investigators, and often no state qualifications beyond being an adult and living in the jurisdiction—neither quality being based on skill, training, or expertise. Instead, death investigators can simply be local officials in rural counties.[81]

Some jurisdictions have *Frye*[82] hearings instead of *Daubert* hearings. In these hearings, the "general acceptance" test looks to the scientific community to determine whether the evidence in question has a valid, scientific basis. Despite the different frameworks, the outcome of these hearings is unlikely to vary substantially. The bottom line is that it is important to adequately scrutinize the scientific evidence presented.

3. *Consider the State Official's Expertise*

Of central importance is whether the jurisdiction has a coroner or a medical examiner (ME) system. In a coroner system or a mixed Medical Examiner/Coroner system, the coroner may have decided the manner of death (homicide, suicide, accident, natural, or undetermined), and

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[81] As one example, former Associate Justice Antonin Scalia died in West Texas, where the death investigation was governed by the justice of the peace and local judge. Justice Scalia was found in bed with a pillow over his eyes, and his breathing apparatus shut off, and yet the justice of the peace declared the death to be from natural causes, issued his findings over the phone, and never had an official examine the body. There was no autopsy. Ira P. Robbins, *A Deadly Pair: Conflicts of Interest Between Death Investigators and Prosecutors*, 79 OHIO ST. L. J. 902, 903 (2018).

[82] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

may also have determined the cause of death: an overdose. Coroners and MEs differ significantly in their qualifications and in the nature of their roles.[83]

A medical examiner is a physician who is appointed to determine cause and manner of death. Notably, the medical examiner also determines whether an autopsy should be conducted.[84] A medical examiner is generally a forensic pathologist who has graduated from medical school, received training in anatomical or clinical pathology, and received formal training in forensic pathology in a fellowship program.[85] Forensic pathology is a "subspecialty of medicine devoted to the investigation and physical examination of persons who die a sudden, unexpected, suspicious, or violent death."[86]

A coroner is typically a county elected official, tasked with investigating deaths and with determining what the manner of death was, whether an autopsy is necessary, and in some jurisdictions, identifying the cause of death.[87] Despite this range of medico-scientific responsibilities, coroners are not required to have any medical background. They must only meet

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83 For more on comparisons between coroners and medical examiners, including subconscious and conscious bias in these roles, *see* Beety, *supra* note 72.

84 *See* NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE U.S.: A PATH FORWARD 248 (Nat'l Acad. Press 2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

85 *See id.*

86 *Id.* at 256.

87 *See id.* at 247.

minimum statutory requirements such as residency and minimum age.[88] In extreme examples, in Indiana two seventeen-year-old high school seniors have been appointed deputy coroner.[89] Accordingly, it should come as no surprise that the continuation of the coroner system has been repeatedly and increasingly questioned.[90]

Indeed, the push for the elimination of the coroner system and replacement by scientifically-trained individuals dates back as far as the 1920s.[91] Yet the coroner system remains today in some states. This is concerning because, depending on the jurisdiction, either laypeople or

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[88] *Id.* ("Typical qualifications for election as a coroner include being a registered voter, attaining a minimum age requirement ranging from 18 to 25 years, being free of felony convictions, and completing a training program, which can be of varying length. The selection pool is local and small.").

[89] *Id.* (citing Associated Press, *Teen Becomes Indiana's Youngest Coroner*, NEWS OK (May 12, 2007), https://newsok.com/article/3053301/teen-becomes-indianas-youngest-coroner) ("Jurisdictions vary in terms of the required qualifications, skills, and activities for death investigators. . . . Recently a 17-year old high school senior successfully completed the coroner's examination and was appointed a deputy coroner in an Indiana jurisdiction."). That deputy coroner was appointed by her father, the county coroner. *See* Linsey Davis, *Amanda Barnett, Indiana's Youngest Death Investigator*, WTHR: NEWS (Apr. 15, 2016), https://www.wthr.com/article/amanda-barnett-indianas-youngest-death-investigator. Another teen was appointed more recently. Rachael Krause, *High School Works Clark County's Youngest Deputy Coroner*, WAVE 3 NEWS (Aug. 15, 2018), http://www.wave3.com/story/37527919/high-school-senior-works-as-clark-countys-youngest-deputy-coroner/. The only academic training required was a forty-hour course. *Id.*

[90] *See* Kelly K. Dineen, *Addressing Prescription Opioid Abuse Concerns in Context: Synchronizing Policy Solutions to Multiple Complex Public Health Problems*, 40 LAW & PSYCHOL. REV. 1, 41–42 (2016) ("Availability bias may also extend to the decisions made by coroners and physicians in selecting a cause of death on death certificates. The significant publicity around opioid related deaths may increase the attribution of death to *opioid* poisoning rather than one of the multiple other drugs or alcohol present in the systems of most victims.").

[91] *See* Bryan, *supra* note 76, at 216 ("If leading scientists in 1928 deemed the coroner system 'anachronistic,' it is difficult to justify its continued operation today. The apparent shortfall of the system to engage medical science in the performance of death investigations is simply unacceptable.").

> As early as 1928, even before the advent of modern forensic science, experts began recommending that the office of coroner be abolished in favor of scientifically trained staff. Almost 90 years later, this advice appears to have been ignored in some areas, where coroners may be eligible for election simply by being registered voters with clean criminal records.

Alex Breitler, *'Too much power': Rethinking sheriff-coroner role*, RECORDNET.COM (Dec. 9, 2017), https://www.recordnet.com/news/20171209/too-much-power-rethinking-sheriff-coroner-role.

medical experts are given the same task—determining how a person died—and the determinations of both are typically perceived as carrying the same scientific rigor even when that perception is entirely inaccurate.[92] And that determination is vital to the existence of any criminal investigation or prosecution that follows.

4. Challenging the Scientific Basis of Death Certificates and Medical Examiner Autopsy Reports

As observers and scholars have noted, scientific evidence has a different weight and status because it is often seen as impartial and impervious to bias.[93] When a death certificate says homicide, that finding is assumed to be the result of an independent determination, separate and apart from the role of the police and prosecutor in the criminal investigation. Similarly, when an autopsy report determines the manner of death as overdose, the report is viewed as scientific evidence of a higher status than most of the non-scientific evidence that will be presented against the defendant at trial.[94] These notions of absolute impartiality are quite false.

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92 *See* Bryan, *supra* note 76, at 210:

> Lay coroners rely heavily on the external condition of the deceased and any available medical records when determining cause and manner of death. At best, this approach is divorced from the scientific method (which requires a standardization of methods of investigation and the use of reliable modes of testing and inquiry) and relies too heavily on instinct, practical experience, or the completeness of medical records. At worst, it is completely ad hoc and involves a large potential for bias if the county coroner knows the deceased or their family.

93 *Id.* at 542 (citing Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725 (2011)).

94 NAT'L RESEARCH COUNCIL, *supra* note 84, at 85–88.

a. Query Determination of Cause of Death as Overdose

Coroners and even medical examiners are increasingly playing fast and loose with determinations of overdose as the *cause* of death. Coroners *and* MEs increasingly find cause of death—overdose—without eliminating other causes.[95] This is particularly true with state coroners who are overwhelmed by the number of deaths in their jurisdictions. Indeed, some deaths in Pennsylvania have been reported as overdoses with no toxicology reports,[96] and the NDAA encourages developing partnerships with coroners because they "may be able to perform a quick verbal assessment of causation based on the evidence at the scene."[97]

Importantly, coroners in some jurisdictions determine both the cause of death (overdose) as well as the manner of death (homicide, accident). Pennsylvania, which leads the nation in DIH prosecutions, is one of these states. There, the DEA noted that "determining causation related to overdoses is subjective and can vary widely depending on the investigative efforts/abilities of the coroner and the evidence available for review, which results in inherent difficulties in making

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95 *But see* Frank Main, *Kratom, Health Supplement Targeted by FDA, Linked to 9 Deaths in Cook County*, CHI. SUN TIMES (Mar. 5, 2018), https://chicago.suntimes.com/news/kratom-health-supplement-targeted-by-fda-linked-to-8-deaths-in-cook-county ("According to Cook County medical examiner's records, there have been nine cases since 2016 in which mitragynine was listed as a cause of death–in each instance along with at least one drug, often opioids such as heroin or fentanyl."); Charles Ornstein, *Measuring the Toll of the Opioid Epidemic Is Tougher Than It Seems*, PROPUBLICA (Mar. 13, 2018), https://www.propublica.org/article/measuring-the-toll-of-the-opioid-epidemic-is-tougher-than-it-seems; Jake Harper, *Omissions On Death Certificates Lead To Undercounting Of Opioid Overdoses*, NPR (Mar. 22, 2018), https://www.npr.org/sections/health-shots/2018/03/22/595787272/omissions-on-death-certificates-lead-to-undercounting-of-opioid-overdoses.

96 *Id.* at 28.

97 NDAA, *supra* note 21, at 9.

causation decisions."[98] Accordingly, particularly in coroner states, this is an important area for defenders to query.

b. Query Determination of Manner of Death as Accident or Homicide for Evidence of Bias

Medical examiners and some coroners can legally determine whether the *manner* of death from an overdose was an accident *or* a homicide. This follows the National Association of Medical Examiners (NAME) standards, which provides that an overdose can either be determined an accident or a homicide.[99] If the death certificate names the manner of death as a homicide, defense attorneys can question this description.

Bias on the part of the medical examiner or coroner should receive special attention from defenders. Without a clear toxicology report to comply with *Burrage*, a death certificate of homicide—rather than accident—is valuable support for a drug-induced homicide prosecution.

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[98] DEA PHILADELPHIA FIELD DIVISION, INTELLIGENCE REPORT: ANALYSIS OF DRUG-RELATED OVERDOSE DEATHS IN PENNSYLVANIA, 2015, 28 (July 2016) (citing Ben Allen, *No Standard Exists in PA to Accurately Track Heroin Overdose Deaths*, WITF (Apr. 9, 2015), http://www.witf.org/news/2015/04/how-accurate-are-the-states-heroin-overdose-statistics.php. At the time, Pennsylvania ranked eighth in the country for drug overdose deaths, according to the Centers for Disease Control and Prevention. *Id.* at 1 (citing *Drug Overdose Mortality by State*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last visited Feb. 6, 2019), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm).

[99] *See* Gregory G. Davis et al., *National Association of Medical Examiners Position Paper: Recommendations for the Investigation, Diagnosis, and Certification of Deaths Related to Opioid Drugs*, 3 ACAD. FORENSIC PATHOL. 77, 81 (2013).

Importantly, it is NAME's position that "medical examiner and coroner independence is an absolute necessity for professional death investigation."[100]

There are many strong influences on MEs and coroners. One bias is personal experience and related social network effects. Take, for example, the approach of Lycoming County Coroner Charles Kiessling Jr., president of the Pennsylvania State Coroners Association. After typically determining overdose deaths as accidents, a friend's son died of an overdose. He then changed his policy to identify all heroin overdose deaths as homicides. He adopted the standard, ineffectual[101] law enforcement strategy of *sending a message*: "If you chose to sell heroin, you're killing people and you're murdering people. You're just as dead from a shot of heroin as if someone puts a bullet in you. . . . Calling these accidents is sweeping it under the rug."[102]

Another common bias is politics. Recall that coroners are elected officials—and sometimes the county sheriff, too. Even if they are not also the sheriff and are at least officially "independent of law enforcement and other agencies, … as elected officials [coroners] must be responsive to the public, and this may lead to difficulty in making unpopular determinations of

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[100] Judy Melinek et al., *National Association of Medical Examiners Position Paper: Medical Examiner, Coroner, and Forensic Pathologist Independence*, 3 ACAD. FORENSIC PATHOL. 93, 94 (2013).

[101] *See infra* Section VI, including Section VI.B (sending the wrong message to the wrong people).

[102] Eric Scicchitano, *Heroin Deaths Labeled Killings: Lycoming Coroner Says Move Will Draw Attention to Epidemic*, DAILY ITEM (Mar. 22, 2016), https://www.dailyitem.com/news/heroin-deaths-labeled-killings-lycoming-coroner-says-move-will-draw/article_dc9e2518-f07e-11e5-9fa7-d7680fbbfb52.html; *see also* Sarah Larimer, *Heroin Overdoses Aren't Accidents in This Country. They're Now Homicides.*, WASH. POST (Mar. 30, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/03/30/heroin-overdoses-arent-accidents-in-this-county-theyre-now-homicides/?utm_term=.63df566e1f4c.

the cause and manner of death."[103] Politics, including the hope of reelection or election to higher office, may accordingly shape or even predetermine the finding.

Perhaps the most powerful influence comes from the prosecutor and law enforcement. Even though NAME deems medicolegal death investigations to be public health rather than criminal justice functions,[104] there are few restrictions on prosecutors or law enforcement involvement in death investigations.[105] "In rural counties, the coroner may be more likely to see himself as part of the law enforcement team sharing the same goals as the police and prosecutors, which results in a situation known as 'role effects.'"[106] Indeed, some of the investigative staff for the coroner

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[103] NAT'L RESEARCH COUNCIL, *supra* note 84, at 247.

[104] Melinek et al., *supra* note 100, at 97 ("Unlike with crime laboratory examinations, which are usually generated to determine guilt or innocence, the medicolegal death investigation is primarily a public health effort.").

[105] *See* LASALLE, *supra* note 3, at 25 (citing HEROIN EPIDEMIC: THE U.S. ATTORNEY'S HEROIN AND OPIOID TASK FORCE, U.S. DEP'T OF JUSTICE (last updated May 4, 2017), https://www.justice.gov/usao-ndoh/heroin-epidemic) (describing the U.S. Attorney's Heroin and Opioid Task Force in the Northern District of Ohio: "The Task Force developed specific protocols to treat fatal heroin overdoses as crime scenes, with investigators and prosecutors going to every scene to gather evidence.").

> It is also not surprising to find that the coroner was present at the autopsy. The coroner may be employed by the local sheriff and may not be an independent officer or a separately elected official; he or she may be paying the pathologist to perform the autopsy and all the other autopsies in the county. Also present at the autopsy may be the investigating officers and all sorts of other law enforcement agents. Prior to conducting the autopsy these investigating officers will have "briefed" the pathologist about to perform the autopsy about their investigation and what they believed to have occurred. In this regularly occurring scenario, you can be certain what the resultant findings will be: homicide.

Mark A. Broughton, *Understanding and Addressing the Challenges in Homicide and Murder Defense Cases*, *in* HOMICIDE DEFENSE STRATEGIES: LEADING LAWYERS ON UNDERSTANDING HOMICIDE CASES AND DEVELOPING EFFECTIVE DEFENSE TECHNIQUES 7, 25 (Thomas Reuters/Aspatore 2014).

[106] *See* Beety, *supra* note 72, at 1000. Conversely, depending on the availability of services in a rural jurisdiction, the rural official may also see the justice system as the only provider of public health services.

may be former police officers,[107] or in the extreme cases of Nevada, Montana, and California, the coroner may also be the sheriff.[108] The NDAA's white paper on opioids explicitly urges prosecutors to develop partnerships with coroners.[109]

Sometimes interference and influence is direct. As the Minnesota Supreme Court said when reversing a conviction where the prosecutor interfered with the defense's forensic pathologist expert, "some police and prosecutors tend to view government-employed forensic scientists . . . as members of the prosecution's 'team.'"[110]

A survey of NAME members found that seventy percent of respondents had been subjected to outside pressures to influence their findings, and when they resisted these pressures, many of the medical examiners suffered negative consequences.[111] Of responding pathologists, twenty-two percent had "experienced political pressure to change death certificates from elected and/or appointed political officials."[112] Knowledge of these forms of pressure and negative

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[107] *See* Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL'Y REV. 275, 304 (2015) (citing JOHN COOPER, INQUESTS 24 (Hart Publishing Ltd 2011)).

[108] *See, e.g.*, S. 1189, 2016 Leg. (Cal. 2016) ("Existing law authorizes the board of supervisors of a county to consolidate the duties of certain county offices in one or more of specified combinations, including, but not limited to, sheriff and coroner, district attorney and coroner, and public administrator and coroner.").

[109] NDAA, *supra* note 26, at 9 ("One key partnership that can also prove helpful is with the coroner's office. Coroners may be able to perform a quick verbal assessment of causation based on the evidence at the scene. Many jurisdictions may not do full autopsies when the circumstances and case history support the opioid overdose death.").

[110] State v. Beecroft, 813 N.W.2d 814, 834 (Minn. 2012), quoting Mark Hansen, *CSI Breakdown: A Clash Between Prosecutors and Forensic Scientists in Minnesota Bares A Long-Standing Ethical Dispute*, 96 A.B.A J. 44, 46 (Nov. 2010).

[111] Melinek et al., *supra* note 100, at 93.

[112] *Id.* at 94.

consequences for resisting would likely spread beyond the individuals directly affected, chilling professional independence.

It is important to keep in mind that MEs and coroners, "aware of the desired result of their analyses, might be influenced—even unwittingly—to interpret ambiguous data or fabricate results to support the police theory."[113] "Tunnel vision has been shown to have an effect in the initial stages of criminal investigations and this is a significant issue because all subsequent stages of the investigation will potentially be impacted by the information generated at this initial stage."[114]

This is why the NAME Standards state that death investigators "must investigate cooperatively with, but independent from, law enforcement and prosecutors. The parallel investigation promotes neutral and objective medical assessment of the cause and manner of death."[115] Furthermore, "[t]o promote competent and objective death investigations: . . . Medico-legal death investigation officers *should operate without any undue influence from law enforcement agencies and prosecutors*."[116] Accordingly, defenders should consider querying

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[113] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 293 (2006) (footnote omitted); *see also* MacMahon, *supra* note 107, at 306 ("Often, however, even those coroners who are elected directly are likely to be deeply embedded in law enforcement—too deeply embedded to provide independent oversight.").

[114] Sherry Nakhaeizadeh et al., *The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations*, 4 BRIT. J. AM. LEGAL STUD. 527, 539 (2015) (citing Findley & Scott, *supra* note 113).

[115] NAT'L ASS'N OF MED. EXAMINERS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 1 (Oct. 16, 2006).

[116] *Id.* (emphasis added).

whether the LE or coroner in the case was biased even to the extent of being a de facto "member[] of the prosecution's 'team.'"[117]

III. AVAILABLE DEFENSE #2: JOINT-USER / JOINT POSSESSION

A. Overview

The joint-user doctrine provides that when "two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse—simple joint possession, without any intent to distribute the drug further."[118] The legal basis for this rule is that users who jointly acquire drugs to use with each other are in either constructive or actual possession of the drugs from the time of the purchase.[119] Because a person cannot distribute an item to someone who already possesses it, joint-purchasers cannot be convicted of distributing to each other. In the words of the New Jersey Supreme Court in *State v. Morrison*,[120] "[i]t hardly requires stating that the 'transfer' of a controlled substance cannot occur . . . if the intended recipient already possesses that substance."[121] And to quote the Second Circuit's decision in *U.S. v. Swiderski,* "simple joint possession does not pose any of the

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117 Hansen, *supra* note 110.; *see also* Robbins, *supra* note 81.

118 United States v. Swiderski, 548 F.2d 445, 450 (2d Cir. 1977).

119 *See id*. at 448, 450.

120 902 A.2d 860 (N.J. 2006).

121 *Id.* at 867.

evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a 'continuing criminal enterprise' or in drug distribution."[122]

In cases where the joint-user defense applies, it can defeat the underlying charge of distribution. Because distribution is the foundation of every drug-induced homicide prosecution, a successful joint-user defense will also defeat the drug-induced homicide charge.

Significantly, because a joint-user claim is not an affirmative defense but an argument that the evidence does not establish distribution as a matter of law, it can potentially be grounds for dismissing the charges before trial (as demonstrated by *State v. Morrison*, discussed below).

B. Application to Drug-Induced Homicide Prosecutions

In *People v. Edwards*,[123] the California Supreme Court reversed the defendant's convictions for furnishing heroin and for felony-murder (with the furnishing charge as the predicate felony) where "the trial court erred in failing to instruct the jury that defendant could not be convicted of furnishing heroin to Rogers if he and Rogers were merely co[-]purchasers of the heroin."[124] Relying on a prior California case,[125] the court found that:

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[122] 548 F.2d at 450.

[123] 702 P.2d 555 (Cal. 1985).

[124] *Id.* at 556.

[125] The *Edwards* court did not use the terms "joint-user" or "joint-purchaser" and did not cite to any joint-user cases, including the seminal joint-user case *United States v. Swiderski*, suggesting that they might have been unaware of these cases. Nevertheless, the decision in *Edwards* closely tracks the joint-user cases.

> The distinction drawn . . . between one who sells or furnishes heroin and one who simply participates in a group purchase seems to us a valid one, at least where the individuals involved are truly "equal partners" in the purchase and the purchase is made strictly for each individual's personal use. Under such circumstances, it cannot reasonably be said that each individual has "supplied" heroin to the others. We agree with defendant that there was substantial evidence from which the jury could reasonably have concluded that he and Rogers were equal partners in *both the financing and execution* of the heroin purchase.[126]

What is required to demonstrate that defendant and decedent were joint-users? The key question, in the words of the New Jersey Supreme Court in *Morrison*, is "whether defendant distributed the heroin to [the decedent] or whether both jointly possessed the heroin at the time defendant purchased the drug from the street dealer."[127] Under this principle, the joint-user defense does not apply where one person purchased drugs on her own and later shared the drugs with a friend; that sort of social sharing is still considered to be distribution.[128] Instead, both users must have possessed the drugs from the outset. The court in *Morrison* concluded, based on its review of relevant case law, that the joint-user inquiry requires a "fact-sensitive analysis."[129]

> Among the factors to be considered are whether the relationship of the parties is commercial or personal, the statements and conduct of the parties, the degree of control exercised by one over the other, whether the parties traveled and purchased the drugs together, the quantity of the drugs involved, and whether one party had sole possession of the controlled dangerous substance for any significant length of time.[130]

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[126] *Edwards*, 702 P.2d at 559 (emphasis added) (footnotes omitted).

[127] 902 A.2d at 867.

[128] *See* United States v. Wallace, 532 F.3d 126, 130–31 (2d Cir. 2008).

[129] 902 A.2d at 870.

[130] *Id.*

In that case, Lewis Morrison was charged with the drug-induced death of his friend Daniel Shore.[131] In New Jersey, the statute is a strict liability crime.[132] Morrison and Shore had "pooled their money . . . [and] bought four decks of heroin" at around 3 a.m. one morning.[133] Morrison and Shore were together when they bought the heroin, but Morrison negotiated the purchase and took the initial physical control of the heroin.[134] Morrison "placed the decks in his pocket and, after driving out of the city, gave one to Shore."[135] Morrison and Shore drove to Morrison's house and used the heroin they had purchased.[136] Shore died of a heroin overdose a few hours later.[137]

After conducting its "fact-sensitive analysis," the court determined that Shore possessed the drugs from the start, noting that Morrison and Shore were friends; that they pooled their money

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[131] *See id.* at 862. In this case, a grand jury indicted and defense counsel moved to dismiss the drug-induced death and distribution charges prior to trial on the grounds that the prosecutor had presented insufficient evidence to support them. *See id.* at 864. The trial court agreed, and the State appealed. *See id*.

The case made its way to the New Jersey Supreme Court. Relying on the joint-user doctrine, the New Jersey Supreme Court upheld the trial court's dismissal of the charges against Morrison. *See id.* at 871.

[132] *See* N.J. STAT. ANN. § 2C:35-9(a) ("Any person who manufactures, distributes or dispenses methamphetamine, lysergic acid diethylamide, phencyclidine or any other controlled dangerous substance classified in Schedules I or II, or any controlled substance analog thereof, in violation of subsection a. of N.J.S. 2C:35-5, is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and is guilty of a crime of the first degree.").

[133] *Morrison*, 902 A.2d at 862–63.

[134] *See id.* at 863.

[135] *Id.*

[136] *Id.*

[137] *See id.* at 863–64.

together to make the purchase; and that Shore was physically present at the time of the purchase.[138] The court concluded as follows:

> The evidence clearly implies that when defendant bought the four decks both were in joint possession of the drugs—that is, defendant had actual possession and Shore constructive possession of the heroin. Viewing the evidence in the light most favorable to the State, we agree with the trial court that because defendant and Shore simultaneously and jointly acquired possession of the drugs for their own use, intending only to share it together, defendant cannot be charged with the crime of distribution.[139]

C. Analyzing the Simultaneous Acquisition Requirement

Courts are split on how they interpret the joint-user doctrine's requirement that the drugs be simultaneously acquired. Some courts have held or implied that users must be physically present at the time of purchase to be joint-possessors. Other courts have taken a more holistic approach, finding that the defense may apply where users pool their money to buy drugs even if they are not both physically present for the purchase. Check to see which approach courts in your jurisdiction have adopted.

1. Decisions Requiring Physical Presence

A majority of courts that have addressed the issue have held or implied that physical presence at the purchase is a prerequisite for the joint-user defense to apply. In *United States v.*

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[138] *See id.* at 870–71.

[139] *See id.* at 871 (citations omitted).

Wright,[140] for example, the Ninth Circuit held the defendant was not entitled to the "joint user" defense to possession with intent to distribute where a friend:

> [a]sked him to procure heroin so that they might use it together; she gave him $20 with which to buy the heroin but did not tell him where to buy it; he left her dwelling and procured the heroin; then he brought the heroin back and they "snorted" it together.[141]

Because Wright and his friend had not acquired the heroin "simultaneously,"[142] the court found Wright's conduct constituted "distribution."[143] Specifically, the court concluded that by purchasing the heroin, "Wright facilitated the transfer of the narcotic; he did not simply 'simultaneously and jointly acquire possession of a drug for their [his and another's] own use.'"[144]

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[140] United States v. Wright, 593 F.2d 105 (1979).

[141] *Id.* at 108.

[142] *Id.*

[143] *Id.* at 106.

[144] *Id.* at 108 (alterations in original). For additional cases holding or suggesting that physical presence is required, see United States v. Mancuso, 718 F.3d 780, 798 (9th Cir. 2013) (footnote omitted) ("Even assuming the *Swiderski* rule was binding in the Ninth Circuit, it would not apply to Mancuso's case, because the record does not support finding that any of the witnesses pooled money with Mancuso and traveled with him to acquire the cocaine jointly, intending only to share it together."); People v. Coots, 968 N.E.2d 1151, 1158 (Ill. Ct. App. 2012) (joining the courts that "have held that the fact that two or more people have paid for drugs will not prevent one of them from being guilty of delivery or distribution—or intent to deliver or distribute—if he alone obtains the drugs at a separate location and then returns to share their use with his co-purchasers."); State v. Greene, 592 N.W.2d 24, 30 (Iowa 1999) (declining to apply the joint-user "rationale where both owners did not actively and equally participate in the purchase of the drugs, even though the drugs were acquired for the personal use of the joint owners."); United States v. Washington, 41 F.3d 917, 920 (4th Cir. 1994) ("[A] defendant who purchases a drug and shares it with a friend has 'distributed' the drug even though the purchase was part of a joint venture to use drugs."); State v. Shell, 501 S.W.3d 22, 29 (Mo. Ct. App. 2016) (rejecting a joint-user argument where, although "Decedent requested that Defendant purchase the heroin for both men, Defendant was the one who, on his own, purchased the heroin from his drug dealer with his own money and delivered it to Decedent.").

2. *Decisions Not Requiring Physical Presence*

Some courts have held or implied that both users need not be physically present for the joint-user defense to apply. These jurisdictions still require simultaneous acquisition of the substance but, citing the principles of constructive possession, hold that a person can acquire possession of an item without being physically present at the point of sale.

In *Minnesota v. Carithers*,[145] for example, the court held that "[i]f a husband and wife jointly acquire the drug, each spouse has constructive possession from the moment of acquisition, whether or not both are physically present at the transaction."[146] In *Carithers*, the Minnesota Supreme Court considered a consolidated appeal of two cases involving prosecutions under a drug-induced homicide felony murder statute.[147] In one of the two cases, the defendant:

> went by herself to buy the heroin, but it appears undisputed that she was buying not just for herself but for her husband also. She brought the heroin home and used her half. After showing her husband where she hid the heroin, she left the house. During her absence, her husband prepared a syringe and injected himself. He . . . died of an overdose.[148]

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[145] State v. Carithers, 490 N.W.2d 620 (Minn. 1992).

[146] *Id.* at 622.

[147] *See id.* at 620–21 ("Minnesota Statute § 609.195(b) (1990) is a special felony murder statute declaring it murder in the third degree if one, without intent to kill, proximately causes the death of another person by furnishing—that is, 'directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering'—a schedule I or II controlled substance.").

[148] *Id.*

The court held that the joint-user defense applied because the defendant's husband constructively possessed the heroin as soon as it was purchased.[149] The court reasoned that, when a person is buying drugs on behalf of an absent spouse:

> [t]he absent spouse could be charged with constructive possession at any time following the purchase by his or her confederate. That the absent spouse did not exercise physical control over the substance at the moment of acquisition is an irrelevancy when there is no question that the absent spouse was then *entitled* to exercise joint physical possession.[150]

Accordingly, the joint-user defense applied and the court upheld dismissal of the felony murder charges.[151]

The New Jersey Supreme Court's multi-factor "fact-sensitive" test for determining whether users simultaneously acquired possession appears to take a similar approach.[152] Although physical presence was *one* of the factors in the New Jersey Supreme Court's test, it was not described as a necessary condition for the defense to apply. Moreover, the other factors—particularly "whether one party had sole possession of the controlled dangerous substance for any significant length of time"—suggest that users who pool their money to buy drugs to use

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[149] *See id.* at 622.

[150] *Id.*

[151] A number of courts have read *Carithers* to represent a broad application of the joint-user rule in comparison to cases like *Wright*. A recent Minnesota appeals court decision, however, read *Carithers* narrowly and suggested it may apply only to *spouses* who jointly purchase drugs. *See* State v. Schnagl, 907 N.W.2d 188, 199 (Minn. Ct. App. 2017) ("The aforementioned cases indicate that the holding in *Carithers* is narrow, and the existence of a marriage relationship is an important element in establishing joint acquisition and possession for purposes of a defense.").

[152] State v. Morrison, 902 A.2d 860, 870 (N.J. 2006).

shortly after the purchase might qualify for the defense, regardless of whether both were physically present at the sale.[153]

3. *Arguments in Support of a Broad Application of the Simultaneous Acquisition Requirement*

In cases where a defendant seeks to raise a joint-user defense, the scope of the simultaneous acquisition/possession rule is likely to be a key point of contention. Most jurisdictions have not yet resolved this question.[154] Although a majority of courts to have considered the issue have held that both users must be physically present at the sale for the joint-user defense to apply, there are strong policy and doctrinal arguments in favor of a broader application of the defense.

a. The Constructive Possession Doctrine

It is well established in law that a person can constructively possess an item that has not yet been delivered into his or her actual possession. Indeed, in possession prosecutions, the government often argues for a broad construction of constructive possession. These cases have led courts to hold that "a defendant also may be convicted of possession . . . of a controlled substance when his or her dominion and control are exercised through the acts of an agent."[155]

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[153] *Id.* (citation omitted).

[154] The most recent decision was just released in the Massachusetts decision in Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf.

[155] People v. Morante, 975 P.2d 1071, 1080 (1999) (citations omitted). This has the possible benefit of offering juries a compromise lesser included offense, and it is possible that a defense under a Good Samaritan law might apply (*see infra* Section VI.B), or that the lower charge opens the possibility of a treatment-oriented disposition rather than incarceration.

For instance, in *People v. Konrad*,[156] the Michigan Supreme Court held that the defendant constructively possessed cocaine where the evidence showed he "had paid for the drugs and that they were his—that is, that he had the intention and power . . . to exercise control over them."[157] Specifically, the evidence showed that the defendant had:

> made a prior arrangement with Joel Hamp and others to purchase a kilogram of cocaine, that he had already paid for the cocaine, that he told Joel to come to his house about seven that evening, and that, after he had been arrested, he had instructed his wife to direct Joel not to come. Joel arrived after 6:30 p.m. and acknowledged that he had something for the defendant.[158]

The court concluded that, although the drugs had never been in the defendant's physical presence, he constructively possessed them at the time his agent purchased them.[159] This is because a person "may constructively possess substances that their agents have *bought* for them."[160]

Similarly, the California Supreme Court has held that a person who directs an agent to purchase contraband on his behalf is guilty of possession as soon as the purchase is completed.[161] In *People v. White*, the defendant, Frank White, asked his roommate Conover to buy some heroin

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156 536 N.W.2d 517 (Mich. 1995).

157 *Id.* at 522.

158 *Id.*

159 *See id.* at 520–23.

160 *Id.* at 522.

161 People v. White, 325 P. 2d 985, 987 (Cal. 1958) (en banc).

for him.[162] Conover made the purchase while White was at work and left the heroin on White's dresser.[163] The police found the heroin before White arrived home from work.[164] Even though White never had physical access to the heroin, the court sustained his possession conviction.[165] The court reasoned that because Conover bought the heroin "pursuant to [White's] express instructions," White "had constructive possession as soon as the narcotic was acquired for him, and it is immaterial whether he had personal knowledge of the presence of the narcotic in the apartment."[166]

This principle should apply with equal force in the context of the joint-user doctrine. The *Carithers* court based its holding on this rationale, concluding that because "[t]he absent spouse could be charged with constructive possession at any time following the purchase by his or her confederate," the joint-user rule should apply.[167] Requiring both users to be physically present at the purchase for the joint-user rule to apply lets the government have it both ways, defining constructive possession broadly when it supports a conviction (i.e., to a constructive possession defendant) but narrowly when it supports the joint-user defense. This should be reason enough

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[162] *Id.* at 986.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 987.

[166] *Id*.

[167] State v. Carithers, 490 N.W.2d 620, 622 (Minn. 1992).

for courts to reject decisions like the Ninth Circuit's in *Wright* and to follow decisions like the Minnesota Supreme Court's in *Carithers*.

b. The Challenges of Elucidating the Physical Presence Aspect of the Simultaneous Purchase Requirement

The simultaneous purchase requirement can become farcical if physical presence is required and taken to the extreme. In the Seventh Circuit case *Weldon v. United States*,[168] for example, the court expressly rejected the government's argument that both users must physically interact with the seller to be joint-possessors.

> The government argues (with no judicial support) that the holding of *Swiderski* is inapplicable to this case because "Weldon was the only one of the three to get out of Roth's car and conduct a hand-to-hand exchange of money for heroin with the dealer." The implication is that the rule of *Swiderski* requires absurd behavior. Imagine Weldon, Roth, and Fields squeezing into the dealer's car and each handing the dealer a separate handful of money. What on earth would the dealer think of such antics? How would he react? What would he do? If he gave them the drug would they have to divide it on the spot in order to avoid being guilty of distribution? What matters is that the [users] were participants in the same transaction. No cases require literal simultaneous possession; *Swiderski* and another decision (very much like the present case) implicitly reject such a requirement.[169]

[168] 840 F.3d 865, 867 (7th Cir. 2016).

[169] *See id.* at 867.

The Seventh Circuit did not elaborate on the question of what it means for both users to have been "participants in the same transaction," however, due to the posture of the case—a motion to vacate a guilty plea as a result of ineffective assistance of counsel.[170]

D. Arguing for a Broad Application of the Joint-User Rule Based on Distinguishing Users from Sellers

A broad application of the joint-user rule is also supported by the policy goals of linking penalties to culpability while also distinguishing, to the extent possible, between users and people who are actively involved in the drug trade. These policy goals are inherent in the structure of drug laws and have sometimes been expressly stated by legislators. This was a motivating consideration in the court's decision in *Morrison*:

> The Legislature stated that "it is the policy of this State to distinguish between drug offenders based on the seriousness of the offense, considering principally the nature, quantity and purity of the controlled substance involved, and the role of the actor in the overall drug distribution network." . . . In passing the Act, the Legislature deemed the sentencing guidelines under the old drug laws inadequate in "identify[ing] the most serious offenders and offenses and [in] guard[ing] against sentencing disparity." . . . The consequences of a finding of distribution are significantly greater than that of possession. Whereas the maximum term of imprisonment for distributing heroin that causes a person's drug-induced death is twenty years, . . . the maximum term for possession of heroin is only five years . . . . The Legislature expected the criminal culpability of parties to bear some proportion to their conduct.[171]

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[170] *Id.* (first citing United States v. Swiderski, 548 F.2d 445, 448 (2nd Cir. 1977); then citing United States v. Speer, 30 F.3d 605, 608–09 (5th Cir. 1994)). As evidence that it is worth pursuing these arguments, and analogies like the one proposed in the next section *infra*, the Massachusetts Supreme Judicial Court noted that had the facts at issue in the case been closer to those in *Weldon*, it would have been willing to revisit precedent in order to apply the joint possession doctrine. Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. at 35-44 (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf.

[171] State v. Morrison, 902 A.2d 860, 870 (N.J. 2006) (alteration in original) (first quoting N.J. STAT. ANN. § 2C:35-1.1(c) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); then quoting § 2C:35–1.1(d); then citing N.J. STAT. ANN. § 2C:35-9(a) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); then citing N.J. STAT. ANN.

To hammer home this goal, it may be worthwhile to parse the statutory language and/or legislative of terms such as "sell"—as the Minnesota Supreme Court did in *Carithers*.[172] It may also be worthwhile to argue by way of analogy. Consider the analogy used by the Seventh Circuit in *Weldon*: if two friends order takeout together from a restaurant and one of them drives to pick up the food and pays for it with their pooled money, "[i]t would be very odd to describe what [the friend who drove to get the takeout] did as 'distributing' the food."[173]

IV. SENTENCING AND MITIGATION

At the federal level, DIH is written into law by way of a sentencing enhancement for drug delivery resulting in death or serious bodily injury.[174] Even though it is a sentencing enhancement, it is considered an element of the offense and must be alleged in the indictment.[175]

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§ 2C:43-6(a)(1) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); then citing N.J. STAT. ANN. § 2C:35-10(a)(1) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); and then citing § 2C:43-6(a)(3)); *see also*, *Swiderski*, 548 F.2d at 449. The *Swiderski* court noted that in interpreting criminal drug laws "it is important to understand their place in the statutory drug enforcement scheme as a whole, which draws a sharp distinction between drug offenses of a commercial nature and illicit personal use of controlled substances." *Swiderski*, 548 F.2d at 449.

[172] *See generally*, Carithers, 490 N.W.2d 620.

[173] Weldon v. United States, 840 F.3d 865, 866 (7th Cir. 2016).

[174] 21 U.S.C. §§ 841(b), § 960(b).

[175] *See* Andrea Harris & Lisa Lorish, *Litigation Strategies In Opioid Overdose Cases*, FEDERAL CRIMINAL PRACTICE SEMINAR – SPRING 2018 (April 13, 2018), https://nce.fd.org/sites/nce.fd.org/files/pdfs/LItigation%20Strategies%20in%20Opioid%20Overdose%20Cases.pdf. However in at least one federal case, the prosecution did not make the charge in the indictment, but instead later used DIH as an aggravating factor in sentencing, requesting 14 years of incarceration. *See* United States v. Reynoso, Case 1:17-cr-10350-NMG (D. Mass. Jun. 24, 2019) (prosecution's sentencing memo).

The sentences are quite severe—often mandatory life terms—but possibilities do exist in mitigation. For more information regarding federal sentencing, see the Federal Defenders information from its Federal Criminal Practice Seminars.[176]

At the state level, in addition to the usual considerations regarding sentencing and mitigation,[177] Good Samaritan laws may come into play.[178] In Vermont and Delaware, they may provide immunity to DIH charges for people who call 911 to seek help.[179] The rest of these laws only apply to possession and related crimes, but they may offer an opportunity for mitigation for other crimes. Indeed, approximately half of the statutes specifically provide that they can be used for mitigation more broadly.[180] For cases not going to trial, the possibility of mitigation may offer advantages in plea bargain negotiations.

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[176] *Id*.

[177] *See infra* Section VII (regarding the use of person-first language to humanize defendants and other people who use drugs or suffer addiction).

[178] *See* Network for Public Health Law, *Legal Interventions To Reduce Overdose Mortality: Naloxone Access and Overdose Good Samaritan Laws* (Dec. 2018), https://www.networkforphl.org/_asset/qz5pvn/network-naloxone-10-4.pdf. *See also* Legal Science, PRESCRIPTION DRUG ABUSE POLICY SYSTEM, *Good Samaritan Overdose Prevention Laws* (Jul. 1, 2018), http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153 (providing an interactive tool for a dataset of state Good Samaritan laws).

[179] *See* LASALLE, *supra* note 3, at 40.

[180] *See* Legal Science, *supra* note 178, at question 5.

V. CONSTITUTIONAL AND STATUTORY PROBLEMS WITH DIH ENFORCEMENT

A. Disparate Impact on People of Color

As with many elements of the War on Drugs and mass incarceration—though contrary to the conventional wisdom that the opioid crisis is a "white" problem—DIH enforcement appears to disproportionately target people of color. The Health in Justice Action Lab's preliminary analysis of the limited data available found that DIH-type prosecutions are more likely to be brought when the decedent is white, and that people of color receive median sentences that are 3 years longer than whites.[181] This pattern of practice that harkens back to one of the most egregious founding elements of the War on Drugs.[182]

It also points to the health problem of the low access to health care that is disproportionately experienced by people of color. Ironically, in areas where criminal justice institutions and actors are striving to bring increased access to services, these prosecutions may further undermine trust

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[181] *See Drug Induced Homicide*, *supra* note 10.

[182] For example, consider the statement of John Erlichman, Nixon's domestic policy advisor:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All: How to win the war on drugs*, HARPER'S (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/.

in police among people of color, steering them away from even beneficial police contact and inadvertently worsening disparities in access to care.

B. Denial of MOUD to inmates may violate the ADA or Rehabilitation Act

Considering that DIH defendants are overwhelmingly likely to suffer OUD themselves, the criminal justice system's tragic failure to provide pharmacotherapy is a critical problem for DIH enforcement.[183] If a carceral facility deprives an inmate suffering from OUD from receiving pharmacotherapy, some courts are beginning to hold that the failure may violate the Americans with Disabilities Act (local and state facilities) or the Rehabilitation Act (federal facilities).

For example, in *Pesce v. Coppinger*, the U.S. District Court in Boston issued an injunction requiring Massachusetts facilities to provide methadone to the plaintiff, and ruling that the commonwealth's policy depriving methadone to inmates with OUD violated the ADA (as well as the U.S. Constitution, see below).[184] Similarly, the U.S. Court of Appeals for the First Circuit affirmed a preliminary injunction ordering a jail in Maine to provide buprenorphine to treat an individual with OUD.[185]

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[183] *See* discussion *infra* Sections V.C and VI.B.

[184] *See* Pesce v. Coppinger, 1:18-cv-11972-DJC (slip op'n), (D. Mass. Nov. 28, 2018); *see also* Brief in Support of Plaintiff by amici, https://www.aclum.org/sites/default/files/field_documents/20181102_pesce_publichealthamicus.pdf.

[185] Smith v. Aroostook County, 922 F.3d 41 (1st Cir. 2019).

For in-depth treatment of the legal and advocacy issues regarding clients suffering OUD and regarding treatment in jails and prisons, the Legal Action Center provides a number of resources for attorneys.[186]

C. Forcing an inmate into withdrawal may violate the Eighth Amendment

Similarly, where facilities provide no inadequate treatment services and force inmates into the misery of withdrawal,[187] this may count as cruel and unusual punishment. In *Pesce*, the federal district court noted that the case met the First Circuit's tests of a "sufficiently serious" medical need—"meaning it was either diagnosed by a physician as mandating treatment or is so obvious that a layperson would recognize the need for medical assistance"—and that "defendants acted with intent or wanton disregard when providing inadequate care."[188] In that case, Pesce was receiving physician-prescribed treatment for his OUD, but the state refused to consider the medical dynamics of his case.

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[186] *See* Legal Action Center, *Substance Use: Medication Assisted Treatment Resources*, https://lac.org/resources/substance-use-resources/medication-assisted-treatment-resources/.

[187] *See* Brian Barnett, *Jails and prisons: the unmanned front in the battle against the opioid epidemic*, STAT NEWS (Jul. 2, 2018), https://www.statnews.com/2018/07/02/opioid-epidemic-jails-prisons-treatment/.

[188] *See* Pesce slip op'n. at 16 (citing cases). *See also* Legal Action Center, *supra* note 186 (for resources); *e.g.*, Legal Action Center, *Legality of Denying Access to Medication Assisted Treatment in the Criminal Justice System* (Dec. 1, 2011), https://lac.org/wp-content/uploads/2014/12/MAT_Report_FINAL_12-1-2011.pdf.

D. Cell phone searches and Carpenter

Cell phones automatically collect, store, and transmit an enormous amount of data about their users. Consequently, information obtained from cell phones, their manufacturers, service providers, and app developers has come to play a crucial role in criminal investigations. In this section, we highlight some of the important legal and practical considerations that arise when evidence from cell phones is used during the course of drug-induced homicide enforcement. As the applicable legal protections vary based on the type of information sought by law enforcement,[189] this section is divided up into three parts: one dealing with contents of communications and related metadata, one dealing with location information, and one dealing with information from the mobile applications ecosystem.

1. Contents and Metadata

First and foremost, cell phones are a rich source of information regarding an individual's communications. Communication records obtained from an individual's cell phone may include both the *content* of an individual's communications[190] and information *about* an individual's communications (also known as "metadata").[191] In DIH investigations, prosecutors are keen to access communication information. The National District Attorneys Association's white paper on the opioid crisis addresses this desire:

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[189] Ben Brown & Kevin Buckler, *Pondering personal privacy: a pragmatic approach to the Fourth Amendment protection of privacy in the information age*, 20 CONTEMP. JUST. REV. 227 (2017).

[190] Saved text messages are an example of the contents of an individual's communication that can be retrieved from their phone.

[191] Phone call metadata can include the identity of the caller and recipient, time of the call, and duration of the call.

> Of particular importance in the homicide investigation of a fatal overdose is the individual's cell phone. In many instances, a user will engage in a series of calls and/or texts with the drug dealer shortly before death to arrange the purchase of the fatal dose of product. It's important as part of the investigative process to seek the proper legal process to obtain subscriber information that can provide valuable intelligence to pursue a case. Obtaining phone records can take time and are sometimes difficult to pursue, but it can be one of the most critical parts of an investigation and can hold key evidence to successfully pursue a drug delivery in death statute case.[192]

Under federal law, law enforcement must obtain a warrant based on probable cause prior to accessing the contents of stored communications without notice or consent.[193] While, on its face, federal law distinguishes between contents of communications held in storage for 180 days or less (for which a warrant is always required)[194] and contents of communications held in storage for more than 180 days (which could be obtained with a subpoena),[195] it is now general practice to obtain a warrant regardless of the age of the communication as there is "no principled basis to treat email less than 180 days old differently from email more than 180 days old."[196] In contrast, federal law allows law enforcement to obtain a customer's name and "local and long distance telephone connection records" through an administrative subpoena,[197] and other non-content

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[192] NDAA, *supra* note 21, at 9.

[193] 18 U.S.C. § 2703 (a)-(c) (2018).

[194] *Id.* § 2703 (a).

[195] *Id.* § 2703 (b).

[196] Department of Justice, *Acting Assistant Attorney General Elana Tyrangiel Testifies Before the U.S. House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations* (2013), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-elana-tyrangiel-testifies-us-house-judiciary.

[197] 18 U.S.C. § 2703 (c). An administrative subpoena can also be used to obtain a range of basic subscriber information, including address and payment mechanism.

information through a court order.[198] However, some states have implemented stricter protections for certain types of communications metadata.[199]

There is also the issue of encryption. Where information on a phone is encrypted in such a way that law enforcement cannot access it, even a court order will not make the information available. For this reason, the NDAA, the FBI, and others in law enforcement are actively advocating that Congress amend the Communications Assistance for Law Enforcement Act of 1994 to require encryption technology to include backdoor access for law enforcement.[200]

2. *Location Tracking*

Second, data from an individual's cell phone can be used to track their *location* over a (potentially long) period of time by way of commercial records indicating which cell towers were connected to their phone at what times.[201] Also known as cell site location information (CSLI), this information can be used to track an individual in the past by leveraging previously stored cell site location records (also known as historical CSLI), or in real time by leveraging

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[198] 18 U.S.C. § 2703 (d).

[199] *See*, *e.g.*, People v. Sporleder, 666 P.2d 135 (Co. 1983). For a general discussion of state deviation from federal standards for law enforcement access to metadata, *see* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 Cath. U. L. Rev. 374 (2006).

[200] NDAA, *supra* note 21, at 7-9 ("Address the Obstacle of Smartphone Encryption").

[201] Marc McAllister, *GPS and Cell Phone Tracking: A Constitutional and Empirical Analysis,* 82 U. CIN. L. REV. 207, 225 (2013).

prospective CSLI.[202] In the DIH context, law enforcement may seek to use location information from both the suspect and victim as evidence that they were in the same location – and thus presumably may have interacted – shortly prior to the fatal overdose.

The Supreme Court recently clarified the legal protections that apply to cell phone location information in *Carpenter v. United States,* holding that law enforcement generally must obtain a warrant supported by probable cause prior to acquiring cell phone location information.[203] Because an individual has a reasonable expectation of privacy in the detailed, continuous location information that can be obtained through cell site records, law enforcement use of these records constitutes a search regulated by the Fourth Amendment.[204] However, the Supreme Court explicitly and narrowly limited the technology covered by their opinion in *Carpenter*, declining to "express a view on…real-time CLSI or 'tower dumps' (a download of information on all devices that connected to a particular cell site during a particular interval)."[205]

Defenders seeking to challenge law enforcement use of location information not covered by *Carpenter* should determine whether stronger privacy protections may be provided by state statute or jurisprudence. For example, although the Supreme Court excluded real-time CLSI from their opinion in *Carpenter*, the Florida Supreme Court has previously held that use of real-

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[202] Electronic Frontier Foundation, *Cell Phone Location Tracking or CSLI: A Guide for Criminal Defense Attorneys* (2017), https://www.eff.org/files/2017/10/30/cell_phone_location_information_one_pager_0.pdf.

[203] United States v. Carpenter, 585 U.S. ____, No. 16-402 (Jun. 22, 2018).

[204] *Id.* at 12.

[205] *Id.* at 17.

time CLSI to track a criminal suspect violated the Fourth Amendment because "a subjective expectation of privacy of location as signaled by one's cell phone – even on public roads – is an expectation of privacy that society is now prepared to recognize as objectively reasonable."[206] Additionally, as lower courts have already begun to explore whether this opinion may be extended to other technologies,[207] the protections available for other forms of location information may shift in the future.

3. Apps

Finally, prosecutors and law enforcement may be able to obtain a wide variety of information generated or transmitted by the mobile applications on an individual's smart phone. Mobile applications ("apps") are software designed to run on a mobile device and are widely employed by mobile device users[208] to add a variety of functionality to their phone. As many mobile apps derive much or all of their revenue by targeted advertising, they are incentivized to collect, store, and transmit an enormous amount of information about their users.[209] It is probable that

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[206] Tracey v. State, 152 So. 3d 504, 526 (Fla. 2014).

[207] *See*, *e.g.*, *Naperville Smart Meter Awareness v. City of Naperville*, No. 16-3755 (7th Cir. 2018) (holding that city-mandated smart energy meters that regularly collect and transmit energy-use data constitute a Fourth Amendment search, although this search is reasonable due to the governmental interest in modernizing the electrical grid), and *Florida v. Quinton Redell Sylvestre*, No. 4D17-2166 (Fla. 15th Cir. 2018) (holding that use of a cell-site simulator constitutes a Fourth Amendment search).

[208] According to one estimate, smartphone users "access 30 apps on a monthly basis" and "launch an average of at least 9 apps per day." Sarah Perez, *Report: Smartphone owners are using 9 apps per day, 30 per month*, TECH CRUNCH (2017), https://techcrunch.com/2017/05/04/report-smartphone-owners-are-using-9-apps-per-day-30-per-month/.

[209] Edward Balkovich et al., *Electronic Surveillance of Mobile Devices: Understanding the Mobile Ecosystem and Applicable Surveillance Law*, RAND CORP. RR800, 10 (2015), https://www.rand.org/pubs/research_reports/RR800.html.

prosecutors would seek to mine this broad range of information collected by mobile applications for insight into an individual's behaviors, social network, and locations.[210]

Because this information is frequently transmitted and stored off the user's device, it can be available even when the phone itself cannot be accessed – for example, should the phone be lost, destroyed, or encrypted. While the exact protections that apply will depend on the type of information transmitted by the mobile application, data transmitted by many commonly-used mobile apps may include the contents of electronic communications[211] (requiring a warrant),[212] as well as metadata about these communications (requiring a court order[213] or subpoena[214]). While this framework is doctrinally identical to the framework used for information about phone calls or text messages, law enforcement officers will be required to approach the application developer – rather than a phone company – to obtain this information. Some application developers have well-established mechanisms for receiving and processing law enforcement requests,[215] while

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[210] For a hypothetical description of how investigators might use information from mobile applications, *see* Edward Balkovich et al., *Helping Law Enforcement Use Data from Mobile Applications: A Guide to the Prototype Mobile Information and Knowledge Ecosystem (MIKE) Tool*, RAND CORP. RR1482 (2017), https://www.rand.org/pubs/research_reports/RR1482.html.

[211] For purposes of 18 U.S.C. § 2703, an electronic communication includes "any transfer of signs, signals, writing, images, sounds, data, or intelligence" through wire or electromagnetic means. *Id.* § 2501(12).

[212] *Id.* § 2703(a)-(c).

[213] *Id.* § 2703(d).

[214] *Id.* § 2703(c)

[215] *See, e.g.,* Instagram, *Information for Law Enforcement*, https://help.instagram.com/494561080557017 (last accessed Nov. 20, 2018).

others have not yet done so or might even make it difficult in order to deter law enforcement requests. Additionally, law enforcement may be unaware of the information collected by mobile applications or which developers to approach to obtain it.[216] Consequently, as a practical matter it may be relatively more difficult for law enforcement to obtain information from app developers than from telecommunication companies.

VI. PUBLIC POLICY ISSUES

DIH enforcement is a flawed strategy. While it may offer some emotional value to some of the bereaved, and it may provide some political value to law enforcement and prosecutors to be seen "doing something" about the opioid crisis, study after study demonstrates that tough law enforcement practices do not curb problematic drug use or trafficking on a large scale.[217] DIH enforcement doesn't work, and if one of its goals is to reduce overdose deaths, it exacerbates the problem.

A. DIH statutes purport to target major traffickers, but prosecutions target co-users and small-scale sellers

Nationwide, legislative history tends to be quite clear: criminal penalties for drug distribution are intended to target traffickers and dealers to stop them from preying on youth and people suffering addiction. Take the example of Massachusetts. In his June 1980 letter to the legislature submitting "An Act Providing Mandatory Terms of Imprisonment for Major Drug

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216 Balkovich et al., *supra* note 209, at 6.

217 *See* LASALLE, *supra* note 3, at 39.

Traffickers…"—which became the drug distribution statute currently enforced—then-Governor Edward King clearly identified the purpose and targets of the bill:

> The time has come to launch a new, more aggressive campaign against *those who operate and profit* from the death-dealing traffic in drugs. They should be the principal focus of law enforcement activities at the state and local level. We need major changes in the way our criminal system deals with *these dealers in drugs*.[218]

Statements supporting DIH statutes identify the same stated targets. Vermont's "death results" statute specifically states that it is directed "at the entrepreneurial drug dealers who traffic in large amounts of illegal drugs for profit," and that it "is not directed at" people who "resort to small-scale sale of drugs to support their addiction."[219]

There is a similar focus to operational and prosecutors' statements. The "strategic objectives" in New Jersey's 1993 "Statewide Narcotics Action Plan" were:

> to target repeat offenders, large scale or prolific distributors, upper echelon members of organized trafficking networks, manufacturers and persons who distribute to, or employ juveniles in, drug distribution schemes for investigation and prosecution; … [and] to disrupt organized drug trafficking networks by targeting key network members...[220]

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[218] *See* Commonwealth v. Jackson, 464 Mass. 758 (2013), *quoting* 1980 House Doc. 6652, at 1 (emphasis added by the Court).

[219] *See* 2003 Vermont Law P.A. 54, §1(2) (legislative findings). *See also* LASALLE, *supra* note 3, at 15-16 (quoting legislative statements nationwide, such as "We want to get the drug dealers. That is what this bill is designed to do.").

[220] NJ DIV. OF CRIMINAL JUSTICE, *Statewide Narcotics Action Plan* (Mar. 12, 1993), https://www.state.nj.us/lps/dcj/agguide/snap93.htm.

The National Heroin Task Force's recommendation that prosecutors bring more drug-induced homicide prosecutions was intended to target traffickers; it makes no mention of regular users.[221] A National Association of Attorneys General publication exhorted law enforcement and prosecutors to make a "paradigm shift" in how they think about overdose deaths—as crimes, not accidents—and that prosecuting them "is one tool in the law enforcement arsenal which, if used appropriately, can assist locally in focusing on the drug dealers who take advantage of those who have become addicted to opioids."[222] Or put simply in a public statement by former Ocean County, New Jersey, Prosecutor Joseph Coronato: "If you're going to be a dealer, and that heroin is going to kill somebody, we're going to take that death, that overdose . . . and treat it as a homicide."[223]

Despite the explicit intention of these laws and policies, their real world application almost always involves people who are not dealers or traffickers, but are instead are struggling with addiction and who purchase drugs on behalf of themselves and their peers. Nationwide research conducted by the Health in Justice Action Lab has found that a full half (50 percent) of drug-induced homicide and similar prosecutions are brought against other users, friends, relatives,

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221 *See* DEP'T OF JUSTICE, NATIONAL HEROIN TASK FORCE FINAL REPORT AND RECOMMENDATIONS, at 12 (Dec. 31, 2015), https://www.justice.gov/file/822231/download. ("Federal prosecutors should prioritize prosecutions of heroin traffickers when the distribution of that drug results in death or serious bodily injury from use of that product.").

222 *See, e.g.*, Neil, *supra* note 11.

223 Deluxe Team, *Do Drug-Induced Homicide Laws Punish Dealers or Kill Addicts*, BETTER LIFE RECOVERY (Feb. 3, 2016), https://abetterliferecovery.com/do-drug-induced-homicide-laws-punish-dealers-or-kill-addicts.

romantic partners, and people with whom the decedent had a non-dealer relationship.[224] Only 47 percent were brought against "traditional" drug dealers, many of whom were selling small amounts of drugs.[225]

A study conducted by the Drug Policy Alliance had similar findings.[226] State-specific research does, too: in New Jersey, 25 of 32 identified prosecutions were against friends of the decedent; in Wisconsin, 90 percent of prosecutions targeted friends, relatives, or low-level street dealers; and in several Illinois counties, prosecutions usually targeted whoever was the last person with the decedent at the scene of the accidental overdose.[227] An extensive study by the *New York Times* looking at prosecutions in Pennsylvania came to similar findings.[228]

This disconnect between the stated intent of the laws and the actual targets of day-to-day prosecution likely stems from the problem of proof. But-for causation à la *Burrage* can be hard to prove, and it can be almost impossible to prove against anyone other than the person who held the drugs prior to the decedent.[229] Some states have adopted a "contributes to" standard to ease the burden of proof. The NDAA's white paper on opioids recommends legislatures "mak[e]

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[224] *See* Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide, Fatal Overdose, and the Public's Health*, 4 UTAH L. REV. 833 (2019), https://dc.law.utah.edu/ulr/vol2019/iss4/4/. Visualizations of the data are available on the Lab's website at https://www.healthinjustice.org/drug-induced-homicide.

[225] *Id*.

[226] *See* LASALLE, *supra* note 3, at 41.

[227] *Id.* at 42 (summarizing studies).

[228] *See* Goldensohn, *supra* note 25.

[229] *See* Beletsky, *supra* note 224, at 57-58.

every person in the chain of delivery criminally liable for an overdose death[.]"[230] But even so, prosecutors have for the most part only found it practicable to pursue cases against tightly proximate individuals, which contradicts the deterrence rationale of the DIH concept.

*B. DIH enforcement actually **reduces** help-seeking, thereby **increasing** the risk that people will die from overdose*

From a public health perspective, DIH enforcement against people who use drugs harms three important and interrelated public health imperatives: (1) the timely administration of naloxone to reverse overdoses; (2) public education and harm reduction efforts to reduce isolation among those who use opioids; and (3) the 911 Good Samaritan law designed to encourage help-seeking behavior among overdose witnesses.

Naloxone nasal spray is simple to administer and effective at reversing overdoses, and it can be done by emergency responders, by fellow users, or by others (such as people in the user's circles or bystanders).[231] Overdose education and naloxone distribution (OEND) programs are now widespread (though not widespread enough). These programs are effective at improving the ability of both professional and lay responders to recognize and reverse overdose events to prevent a fatal outcome, as well as improving access to naloxone.[232]

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230 NDAA, *supra* note 21 at 9.

231 *See* Edward W. Boyer, *Management of Opioid Analgesic Overdose*, 367 N. ENG. J. MED. 146, 150–53 (2012) (discussing the use of naloxone to treat overdoses).

232 *See* Alexander Walley et al., *Opioid Overdose Rates and Implementation of Overdose Education and Nasal Naloxone Distribution in Massachusetts: Interrupted Time Series Analysis*, 346 BMJ f174 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4688551/. In the Massachusetts example, over 7,400 overdose rescues by first responders were reported to the Department of Public Health after the program began in 2015. *See* GOVERNOR'S PRESS OFFICE, *Press Release: Baker-Polito Administration Awards Nearly $1 Million in First Responder Naloxone Grants* (June 28, 2018), https://www.mass.gov/news/baker-polito-administration-awards-

Naloxone works, but only if administered in time.[233] It is therefore critical that someone else be present who can administer naloxone or call 911 to prevent accidental overdoses from turning fatal.[234] Accordingly, the second common intervention is a public health education campaign targeted to people who use drugs that discourages them from using drugs alone. Particularly in the current context of potent synthetics adulterating the illicit opioid drug supply, using alone places individuals at far greater risk of death than using with others. "Use alone, die alone," as the phrase goes.

However, most drug use is criminalized outside the medical setting, and therefore witnesses to overdose events are often reluctant to call 911 because doing so summons not just EMS but law enforcement. They fear legal consequences for themselves or the person overdosing, ranging from being arrested and prosecuted for a drug-related crime to losing their housing or shelter.[235]

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nearly-1-million-in-first-responder-naloxone-grants. To make naloxone nasal spray more accessible, it can now be purchased without a prescription. Mary Markos, *Prescription No Longer Needed to Buy Naloxone in Massachusetts*, BOSTON HERALD (Oct. 19, 2018), https://www.bostonherald.com/2018/10/19/prescription-no-longer-needed-to-buy-naloxone-in-massachusetts/.

[233] *See* Boyer, *supra* note 231.

[234] *See* Travis Lupick, *If They Die of an Overdose, Drug Users Have a Last Request*, YES! MAG. (Aug. 25, 2018), https://www.yesmagazine.org/people-power/if-they-die-of-an-overdose-drug-users-have-a-last-request-20180830 ("In public health messaging, the first thing that's said is, 'Don't use alone.' You want people to be using with someone or with a group of people[.]"). A person experiencing an overdose can also administer naloxone on oneself, though the window of opportunity for this may be quite brief.

[235] According to several studies, many people refuse to call 911 for fear of police involvement (ranging from one-third to one-half); for those who did call 911, many delayed making the call for several critical minutes while they faced those fears. *See* Amanda Latimore & Rachel Bergstein, *"Caught with a Body," Yet Protected by Law? Calling 911 for opioid overdose in the context of the Good Samaritan Law,* 50 INT'L J. DRUG POL. 82 (2017), https://www.sciencedirect.com/science/article/abs/pii/S0955395917302888. *See also* LASALLE, *supra* note 3 (summarizing studies).

Accordingly, almost all state legislatures—though regrettably *not* the federal government—have passed 911 Good Samaritan laws. These laws aim to remove the fears by carving out limited criminal amnesty for overdose victims and witnesses who call for help.[236]

Unfortunately, Good Samaritan laws are too narrowly drawn. In every state except Vermont and Delaware, these laws only provide immunity to charges for possession of drugs and drug paraphernalia for personal use, not to distribution or death resulting from overdose—and these laws vary state to state on whether they cover investigation, arrest, and/or prosecution.[237] In other words, they create a quandary for people calling 911: you (probably) won't get in trouble if the person experiencing an accidental overdose event survives, but if death occurs, you're calling the cops on yourself.

And that's if you are even aware of the law. Tragically, knowledge and understanding of 911 Good Samaritan laws is limited—among users and first responders as well as the public.[238]

On the flip side, in their efforts to "send a message" to deter illegal drug sales (and be seen to be "doing something" about the opioid crisis), law enforcement and prosecutors often seek—and receive—press coverage when bringing charges or securing a conviction.[239] Unfortunately, this is

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[236] *See* NETWORK FOR PUBLIC HEALTH LAW, *Legal Interventions To Reduce Overdose Mortality: Naloxone Access and Overdose Good Samaritan Laws* (Dec. 2018), https://www.networkforphl.org/_asset/qz5pvn/network-naloxone-10-4.pdf. *See also* Legal Science, *supra* note 178.

[237] *See* Section IV *supra* (regarding the relevance of Good Samaritan laws in mitigating sentence severity).

[238] *See* Caleb J. Banta-Green et al., *Police Officers' and Paramedics' Experiences With Overdose and Their Knowledge and Opinions Of Washington State's Drug Overdose-Naloxone-Good Samaritan Law*, 90 J. URBAN HEALTH 1102 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3853169/.

[239] Indeed, the studies mentioned above conducted by the Health in Justice Action Lab, the *New York Times*, and Drug Policy Alliance (and those it cited) are based upon the many hundreds of news articles available online.

a case of sending the wrong message to the wrong people. Arresting and prosecuting users and petty street dealers does not threaten kingpins, but it does it does put the word out that witnesses to an overdose may be arrested and charged. Worse, an increasing number of prosecutors and law enforcement leaders are calling for *all* overdose sites to be treated as crime scenes, which *itself* receives media coverage.[240] This increasingly common practice of treating every overdose scene as a crime scene is becoming widely known among users, and its chilling effect may help explain the relatively anemic impact of Good Samaritan laws on help-seeking observed thus far.[241] Indeed, this may become worse if the panic in law enforcement surrounding fentanyl, particular the myth that the mere bodily contact can trigger an overdose, continues to spread.[242]

Accordingly, if prosecutors are trying to "send a message" to people in the drug trade but are only targeting end-users, this strategy is bound to fail. Similarly, if they are trying to "send a message" to reduce drug overdose, it is bound to fail. These criminal justice efforts target the very people who are best positioned to summon life-saving help during overdose events: friends,

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[240] *See, e.g.*, LASALLE, *supra* note 3, at 23, 40; Allyn, *supra* note 8. *See also, e.g.*, NDAA, *supra* note 21, at 9 ("Law enforcement agencies and prosecutors should treat every overdose death as a homicide and assign homicide detectives to respond to these scenes.").

[241] *See* LASALLE, *supra* note 3, at 40. Recommendations to treat overdoses as crime scenes are sometimes presented as an opportunity to investigate up the drug supply chain, with an immediate emphasis on the decedent's cell phone. *See, e.g.*, NDAA, *supra* note 21, at 9. This raises evidentiary issues that are discussed *infra* Section V.D and *supra* Section VI.A.

[242] *See, e.g.*, Crime and Justice News, *Should Exposing Someone to Fentanyl Be a Crime?*, THE CRIME REPORT (Dec. 17, 2018), https://thecrimereport.org/2018/12/17/should-exposing-someone-to-fentanyl-be-a-crime/; *Man pleads guilty after East Liverpool officer's accidental fentanyl overdose*, ASSOCIATED PRESS (Mar. 13, 2018), https://fox8.com/2018/03/13/man-pleads-guilty-after-east-liverpool-officers-accidental-fentanyl-overdose/; Peter Andrey Smith, *What Can Make a 911 Call a Felony? Fentanyl at the Scene*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/us/fentanyl-police-emt-overdose.html.

family members, romantic partners, and others within the drug user's close social nexus. These prosecutions make it more likely that people will use drugs alone in order to avoid implicating friends in the case of an accidental overdose.[243] If fellow users witnessing an overdose do not have naloxone and do not call 911, then entirely avoidable deaths will inevitably follow.

It is worth noting that some drug users are attempting to counter this problem through a strategy of signing "Do Not Prosecute" documents modeled on "Do Not Resuscitate" directives.[244] While these likely have no normative legal power, they are an instance of drug users trying to embrace the harm reduction practice of not using alone, and they may signal to families and others that they knowingly adopted the risks of opioid use and do not want their friends to come into legal harm—particularly if calling 911 to save their lives was the trigger for that legal harm.

*C. Jail and prison actually **increases** the risk of overdose and death*

Research shows that jail and prison time are tightly correlated with mental health problems, the intensity of opioid use, and overdose death.[245] A recent study in *Lancet Public Health* found that counties with high rates of incarceration have a greater than 50% increase in drug-related deaths compared to those with low incarceration rates. As its authors noted,

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[243] *See* Beletsky, *supra* note 224.

[244] *See* Louise Vincent, *The Rage of Overdose Grief Makes It All Too Easy to Misdirect Blame*, FILTER MAG., Dec. 5, 2018, at https://filtermag.org/the-rage-of-overdose-grief-makes-it-all-too-easy-to-misdirect-blame/; Lupick, *supra* note 234.

[245] Tyler N.A. Winkelman et al., *Health, Polysubstance Use, and Criminal Justice Involvement Among Adults With Varying Levels of Opioid Use*, 1 JAMA NETWORK OPEN e180558 (2018), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2687053.

> Previous research has shown that mortality rates among former inmates are nearly 13 times higher than that of the general population**,** former inmates are at high risk of mortality during the first 2 weeks post release, and high incarceration rates exert cascading effects spanning generations, local communities, and other networks of current or former incarcerated people. Incarceration is directly associated with stigma, discrimination, poor mental health, and chronic economic hardship, all of which are linked to drug use disorders. Moreover, the interaction between substance abuse and incarceration interferes with treatment and reduces the likelihood of recovery.[246]

From moral, public health, and legal standpoints, DIH enforcement fails to consider the increased degree of harm done to people with substance use disorders. Incarceration generally has a deleterious impact on a person's mental and physical health. For those with substance use disorders, the health risks are especially severe because, due to get-tough federal laws that prevent Medicaid from funding health care in federal and state correctional facilities, very few jails or prisons offer treatment of any kind, let alone evidence-based behavioral therapies or medications.[247]

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[246] Elias Nosrati et al., *Economic decline, incarceration, and mortality from drug use disorders in the USA between 1983 and 2014: an observational analysis*, 4 LANCET PUB. HEALTH e326 (2019), https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(19)30104-5/fulltext.

[247] *See* Leo Beletsky et al., *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 NE. U. L. J. 155, 206 (2015) (citing § 1905 of the Social Security Act) (summarized in Beletsky, *With Massive Prisoner Release, Averting Fatal Reentry*, HUFFINGTON POST (Nov. 3, 2015), https://www.huffpost.com/entry/with-massive-prisoner-rel_b_8462816); NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE, BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION at 43 (2010), https://www.centeronaddiction.org/download/file/fid/487 (correctional facilities that do offer addiction-related services tend to provide only "alcohol and other drug education or low-intensive outpatient counseling sessions rather than evidence-based, intensive treatment").

Indeed, only a fraction of those who require treatment and other health services during their incarceration receive care that remotely resembles modern day standards and practices.[248] One study of people incarcerated in America found that in 2017, only 4.6 percent of people referred to treatment for OUD received pharmacotherapy.[249] Opioid agonist therapy (OAT) is known throughout the medical field as the "gold standard" of care.[250] Indeed, there have been alarming reports of people with OUD dying from dehydration caused by untreated withdrawal symptoms while being incarcerated, often for minor crimes unrelated to drugs.[251]

The vast majority of people suffering from opioid use disorder who are incarcerated are sent to facilities that either offer mere abstinence-based programming or force inmates to go "cold turkey." In these contexts of substandard care, people rapidly lose their accumulated tolerance to

[248] Elizabeth L.C. Merrall et al., *Meta-analysis of Drug-related Deaths Soon After Release from Prison*, 105 ADDICTION 1545, 1549 (2010) (explaining the variation in availability of drug treatment programs inside and outside correctional settings); *see also* Kathryn M. Nowotny, *Race/Ethnic Disparities in the Utilization of Treatment for Drug Dependent Inmates in U.S. State Correctional Facilities*, 40 ADDICTIVE BEHAVIORS 148, 150 (2015) (noting that, of all covered individuals in prison who were diagnosed with substance use disorder using DSM IV criteria, "[f]orty six percent of whites report having received some kind of treatment compared to 43 percent of blacks and 33 percent of Latinos" (p-value omitted) and "of those who received treatment, self-help groups are the most commonly reported with 83 percent receiving that form of treatment, Detox (27%) and drug maintenance programs (35%) are the least reported").

[249] Also called medication for addiction treatment (MAT), medication treatment (MT), opioid maintenance therapy, and drug substitution therapy, this approach includes the well-established use of methadone, buprenorphine, and naltrexone. For a general explanation of the difference between opioid agonists (methadone), partial agonists (buprenorphine), and antagonists (naloxone, naltrexone), *see* the NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), *Medications to Treat Opioid Use Disorder: How do medications to treat opioid use disorder work?* (June 2018), https://www.drugabuse.gov/publications/research-reports/medications-to-treat-opioid-addiction/how-do-medications-to-treat-opioid-addiction-work.

[250] Noa Krawczyk et al., *Only One In Twenty Justice-Referred Adults In Specialty Treatment For Opioid Use Receive Methadone or Buprenorphine*, 36 HEALTH AFF. 2046, 2046 (2017), https://www.ncbi.nlm.nih.gov/pubmed/29200340.

[251] Julia Lurie, *Go to Jail. Die From Drug Withdrawal. Welcome to the Criminal Justice System*, MOTHER JONES (Feb. 5, 2017), https://www.motherjones.com/politics/2017/02/opioid-withdrawal-jail-deaths/. Cutting off pharmacotherapy patients can also trigger withdrawal symptoms, as discussed *supra* Sections V and VI.

opioids,[252] but unfortunately their brain chemistry does not reset to the point of losing cravings. When these individuals reenter society without being provided evidence-based treatment immediately, there is a very high risk that their brain chemistry's cravings—combined with the emotional and social trauma of reentry—will lead them to consume opioids.[253] Without their prior physical tolerance to the drugs, the risk of accidental overdose and death increases astronomically.[254] The present-day heightened potency of heroin and the increased lacing of heroin and other drugs with illicitly-produced fentanyl further increases the risk. Particularly during the critical first weeks after release, overdoses are staggeringly common. The risk of death from heroin overdoses jumps 40 to 130 times higher than for the general public.[255]

Because tolerance is lost so quickly, this is true even of short stints in jail. Opioid overdoses are the most common cause of death within the first six weeks of being released from jail.[256]

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[252] *See* Beletsky, *supra* note 247, at 164 (first citing Ingrid A. Binswanger et al., *Return to Drug Use and Overdose After Release from Prison: A Qualitative Study of Risk and Protective Factors*, 7 ADDICTION SCI. & CLINICAL PRAC. 1, 5 (2012); then citing Michelle McKenzie et al., *Overcoming Obstacles to Implementing Methadone Maintenance for Prisoners: Implications for Policy and Practice*, 5 J. OPIOID MGMT. 219 (2009); and then citing WORLD HEALTH ORG., PREVENTION OF ACUTE DRUG-RELATED MORTALITY IN PRISON POPULATIONS DURING THE IMMEDIATE POST-RELEASE PERIOD, 10–11 (2010)).

[253] *See id.* (citing Binswanger et al., *supra* note 252, at 7).

[254] *See id.* (first citing Binswanger et al., *supra* note 252, at 5; then citing McKenzie et al., *supra* note 252, at 219; and then citing WORLD HEALTH ORG., *supra* note 159, at 10–11).

[255] *See id.* at 150 (footnote omitted); Ranapurwala, *supra* note 26. For example, a Massachusetts study found that newly-released inmates are 120 times more likely to overdose and die during the first month after re-entry than the general population. MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, AN ASSESSMENT OF FATAL AND NONFATAL OPIOID OVERDOSES IN MASSACHUSETTS 2011-2015 at 50 (2017), https://www.mass.gov/files/documents/2017/08/31/legislative-report-chapter-55-aug-2017.pdf.

[256] Byron Alex et al., *Death After Jail Release: Matching to Improve Care Delivery*, 23 J. OF CORRECTIONAL HEALTH CARE 83 (Jan. 1, 2017),

This lack of standard-of-care treatment followed by "fatal re-entry" is a tragic downstream policy problem with DIH enforcement.[257] This is yet another reason why it is extremely important not to accidentally scoop users into a net intended for big fish. DIH laws were passed to target dealers, not users. In these cases, there has already been a tragic accidental death. There is no reason to risk another by prosecuting a co-user suffering OUD and directly raising the risk of another overdose death. Depending on the availability of care in your state's correctional system, it might be an issue to raise in mitigation and sentence location.

D. DIH prosecutions hinder law enforcement efforts to connect users with treatment

Many criminal justice agencies are attempting to recast themselves as embracing a "public health approach" to the overdose crisis. Programs such as the Police-Assisted Addiction and Recovery Initiative (PAARI) and Law Enforcement Assisted Diversion (LEAD) depend upon users feeling comfortable working with police and prosecutors for help accessing support resources. They are significantly more likely to reduce accidental overdose deaths than DIH prosecutions. Creative efforts like these—as well as others—require citizens to open their doors and find them credible, and are thereby undermined by aggressive DIH enforcement.

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https://journals.sagepub.com/doi/abs/10.1177/1078345816685311?journalCode=jcxa (based upon electronic health records from people incarcerated in New York City jails between 2011 and 2012).

[257] The (slow) expansion of medical treatment for OUD in carceral settings, with its proven reductions in fatal overdoses upon reentry, should not, however, be seen as legitimizing DIH as a response to the opioid crisis. *See e.g.*, NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), *Medication in Prison Associated with Reductions in Fatal Opioid Overdoses After Release* (Feb. 14, 2018), https://www.drugabuse.gov/news-events/news-releases/2018/02/medication-in-prison-associated-reductions-in-fatal-opioid-overdoses-after-release (discussing Rhode Island's successful program).

Considering that these programs also require police to work in partnership with public health and other sectors, they might undermine the credibility of those other sectors among those individuals with a history of individual or community trauma involving the criminal legal system.

E. DIH prosecutions do not reduce drug use or drug crime

Proponents of DIH enforcement contend that "it can be a helpful tool in identifying and prosecuting dealers and distributors in an effort to create a deterrent and turn the tide of opioids flowing through communities."[258] However, their contentions are never supported by citations because the evidence consistently demonstrates that drug prosecutions do not create a deterrent to drug trafficking or drug use. Quite the opposite: There is a broad consensus among scholars and policy analysts that the threat of legal sanction does not reduce drug dealing or drug use, even when the threatened punishments are increased.[259]

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[258] NDAA, *supra* note 21, at 10. *See* William J. Ihlenfeld II, *"Death Results" Prosecutions Remain Effective Tool Post*-Burrage, U.S. ATT'YS' BULL. (Sep. 2016) at 45 (claiming effectiveness due to the continuing ability for prosecutors to secure convictions rather than any downstream reduction in overdose); Sam Adam Meinero, *Danger in Milligrams and Micrograms: United States Attorneys' Offices Confront Illicit Fentanyls*, U.S. ATT'YS' BULL. (Jul. 2018), at 5 (citing three convictions, including one "trafficking ring" and one online distribution network, but offering no evidence as to downstream benefits); and Rod Rosenstein, *Fight Drug Abuse, Don't Subsidize It*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html (contending without evidence that the rise in overdose deaths was related to a decline in federal drug prosecutions during the Obama Administration).

[259] *See* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUSTICE 65 (2009), https://scholarship.law.umn.edu/faculty_articles/501.

Historically, drug law enforcement has not led to reductions in drug-related crime, overdose, or other drug-related harms. According to publicly available data from law enforcement, corrections, and health agencies, there is no statistically significant relationship between a state's imprisonment rate for drug crimes and three measures of state drug problems: rates of illicit drug use, drug overdose deaths, and drug arrests.[260] Similarly, research has found no public safety benefits to increasing sentence length; even as more people were convicted to longer federal sentences for drug crimes between 1980 and 2010, "self-reported use of illegal drugs has increased over the long term as drug prices have fallen and purity has risen."[261] "[T]he results show there is no statistically significant basis for believing that increasing prison admissions for drug offenses deters drug use."[262]

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[260] *See Pew Analysis Finds No Relationship Between Drug Imprisonment and Drug Problems*, PEW CHARITABLE TRUSTS (Jun. 19, 2017), https://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2017/06/pew-analysis-finds-no-relationship-between-drug-imprisonment-and-drug-problems (including all drugs and all levels of drug offenses, from possession to trafficking).

[261] *Federal Drug Sentencing Laws Bring High Cost, Low Return*, PEW CHARITABLE TRUSTS, at 1 (Aug. 2015), https://www.pewtrusts.org/-/media/assets/2015/08/federal_drug_sentencing_laws_bring_high_cost_low_return.pdf.

[262] Vincent Schiraldi & Jason Ziedenberg, *Costs and Benefits? The Impact of Drug Imprisonment in New Jersey* at 27 (2003), https://www.drugpolicy.org/sites/default/files/jpi_njreport.pdf. *See also* Friedman et al., *Drug Arrests and Injection Drug Deterrence*, 101 AM. J. PUB. HEALTH 344 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020200/ (finding that the rate of arrest for possession of "hard" drugs has no correlation with injection drug use); DeBeck et al., *Incarceration and Drug Use Patterns Among a Cohort of Injection Drug Users*, 104 ADDICTION 69 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3731940/ (finding that incarceration for any cause does not reduce injection drug use, and actually interfered with the goal of reducing injection drug use insofar as it deprived the people who were incarcerated from access to effective treatment); and Friedman et al., *Relationships of Deterrence and Law Enforcement to Drug-Related Harms Among Drug Injectors in U.S. Metropolitan Areas*, 20 AIDS 93 (2006), https://www.ncbi.nlm.nih.gov/pubmed/16327324 (finding that the number of police employees or the amount of corrections spending per capita does not reduce injection drug use, but that, conversely, increases in "hard" drug possession arrests, police employees, and corrections expenditures correlated with an increase in the spread of bloodborne diseases).

The failure of punitive measures to suppress demand stems from the very nature of addiction. The National Institute on Drug Abuse (NIDA) as: "A chronic, relapsing disorder characterized by compulsive drug seeking and use despite adverse consequences."[263] Substance use disorders change the neurochemistry of the brain. When it comes to addiction, one of the foundational elements of the disease is that it alters brain neurochemistry such that it compels a person to satisfy cravings *despite recognized negative consequences*.

In addition to cravings, another source of compulsive use despite adverse consequences is the intense drive to avoid the physical and psychological pain of withdrawal. In this context, ratcheting up criminal consequences to deter behavior that is tied to an individual's addiction is bound to fail because it misses the very essence of this disease.[264]

Further, there is evidence suggesting that drug enforcement activities actually lead to *increases* in *violent* crime. So long as demand for illegal drugs exists, attempts to constrict the drug supply and disrupting markets by incarcerating traffickers will continue to lead to the "replacement effect," whereby individuals or organizations quickly fill the void created by enforcement activities. This replacement effect further disrupts drug markets, but instead of

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[263] National Institute on Drug Abuse, *Media Guide: The Science of Drug Use and Addiction: The Basics* (July 2018), https://www.drugabuse.gov/publications/media-guide/science-drug-use-addiction-basics. *See* Steve Sussman & Alan N. Sussman, *Considering the Definition of Addiction*, 10 INT'L J. ENVTL. RES. & PUB. HEALTH 4025 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210595/; *and* AMERICAN SOCIETY OF ADDICTION MEDICINE, *Definition of Addiction* (Apr. 12, 2011), https://www.asam.org/resources/definition-of-addiction.

[264] *See* Roger K. Przybylsk; RKC Group, *Correctional and Sentencing Reform for Drug Offenders* at 14-16 (Sep. 2009), http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf (summarizing research).

suppressing supply, the disruption predictably prompts an *increase* in violent crime.[265] A comprehensive review of studies analyzing the relationship between drug enforcement and drug violence found that "the existing scientific evidence suggests drug law enforcement contributes to gun violence and high homicide rates and that increasingly sophisticated methods of disrupting organizations involved in drug distribution could paradoxically increase violence."[266]

Indeed, the supply-side focus of American drug enforcement bears some of the blame for the current opioid overdose crisis. By cracking down on prescribers and dispensers of pharmaceutical opioids, thousands of legitimate pain patients—who were reliant upon opioid analgesics to maintain their quality of life—were forced to buy medications on the black market.[267] Accordingly, rather than being able to legally purchase drugs that came from a regulated supply chain, they were now forced to illegally purchase pain relievers that came from an unregulated supply chain. Tragically, patients who resorted to the black market discovered that diverted painkillers were prohibitively expensive but heroin was historically cheap, on the order of $80 per pill versus $8 per bag. And then synthetic fentanyl and its analogs began hitting

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[265] *See id*. at 17-19 (summarizing research).

[266] Dan Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, 22 Int'l J. DRUG POL'Y 87 (2011), https://www.sciencedirect.com/science/article/pii/S0955395911000223.

[267] *See generally*, Leo Beletsky & Jeremiah Goulka, *The Opioid Crisis: A Failure of Regulatory Design and Action*, CRIM. JUST. MAG. (2019) https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/summer/opioid-crisis/; Leo Beletsky & Jeremiah Goulka, *The Federal Agency that Fuels the Opioid Crisis*, N.Y. TIMES (Sep. 17, 2018), https://www.nytimes.com/2018/09/17/opinion/drugs-dea-defund-heroin.html.

the market—which was itself a response to the economics of supply-side enforcement—and poisoning the supply.[268]

F. The questionable strict liability approach

DIH enforcement legally transforms accidents involving possibly risky behavior into homicide. While the strict liability approach may make perfect sense in regulating (particularly in the civil law context) environmental and other issues involving things that are *always* inherently dangerous (such as the use of explosives), deploying harsh criminal penalties in retribution for unintended consequences raises normative and constitutional questions. In many ways, DIH is like felony murder, and there is a nearly unanimous scholarly consensus that felony murder and analogous strict liability provisions are both bad law and counterproductive criminal justice policy.[269] The American Law Institute accordingly excludes the felony murder rule from its Model Penal Code,[270] as well as several states.[271]

Take the example of Massachusetts, which abandoned felony murder in a 2017 decision by the Commonwealth's Supreme Judicial Court. The chief justice criticized how the felony murder

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[268] *See* Leo Beletsky & Corey Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. OF DRUG POLICY 156 (2017), https://www.ncbi.nlm.nih.gov/pubmed/28735773.

[269] Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008) (providing a comprehensive overview of the empirical and doctrinal scholarship on felony murder).

[270] *See* Paul H. Robinson & Tyler Scot Williams, *Mapping American Criminal Law Variations Across the States: Ch. 5 Felony-Murder Rule*, PENN. LAW LEGAL SCHOLARSHIP REPOSITORY No. 1719 at 3 (2017).

[271] Jason Tashea, *California considering end to felony murder rule*, AM. B. ASS'N J. (Jul. 5, 2018) http://www.abajournal.com/news/article/california_considering_end_to_felony_murder_rule/ ("Hawaii, Kentucky, Massachusetts and Michigan have abolished the rule by either legislation or through the courts").

rule amplified the legal consequences of an illegal act absent an inquiry into the perpetrator's state of mind:

> punish[ing] all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator's state of mind to the homicide, *violates the most fundamental principle of the criminal law* -- "criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result."[272]

To treat accidental overdoses as homicides would exponentially raise the homicide "rate" exponentially. In 2017, police in Massachusetts reported a statewide total of 173 murders and non-negligent homicides;[273] whereas more than 2,000 people died from accidental overdoses that year.[274] Many of these accidental deaths involved a fact pattern where friends and co-users played an inadvertent role. Yet under the strict liability theory, each one of these individuals could face prosecution and a lengthy prison sentence—an ethically dubious leap that perverts legislative intent and could flood the system.

Massachusetts provides an example of why it is worth raising these types of arguments. In a DIH-type involuntary manslaughter prosecution on appeal to the Supreme Judicial Court, the Health in Justice Action Lab and amici submitted an amicus curiae brief raising these points,

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[272] Commonwealth v. Brown, 477 Mass. 805, 831 (2017) (Gants, CJ, concurring) (emphasis added), *quoting* Commonwealth v. Matchett, 386 Mass. 492, 506-507 (1982).

[273] *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2017, TABLE 5 (2018), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-5.

[274] NATIONAL CENTER FOR HEALTH STATISTICS, DRUG OVERDOSE MORTALITY BY STATE (2018), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm.

noting that the legislature had considered but not passed a strict liability DIH statute.[275] The court appeared to take note of the problems with strict liability statutes as well as of other states that refused to implicitly create strict liability crimes through judicial decisions rather than legislation.[276] The result was to vacate the defendant's conviction for involuntary manslaughter.

Of course, the most sensible approach would be to avoid the convoluted arguments about what sorts of behaviors count as "reckless" and to instead bring the illicit drug supply into the regulatory system.

G. Better approaches to the overdose crisis

District attorneys are under intense pressure to demonstrate that they are "doing something" about the overdose crisis. There are much more effective approaches to solving the crisis than these counterproductive enforcement efforts, and they are far more cost-effective than DIH enforcement. Numerous cost-benefit analyses have found that treatment outperforms punitive measures; it reduces demand.[277] Yet only around one in ten people with substance use disorder

[275] Brief for the Committee for Public Counsel Services, the Health in Justice Action Lab at Northeastern School of Law, et al. as Amici Curiae Supporting Appellant, Commonwealth v. Carrillo (argued Feb. 4, 2019) (No. SJC-12617), https://docs.wixstatic.com/ugd/dc612a_c862345af8c14e9caa48e85bd052068f.pdf (on which this section is based).

[276] Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. at 26-32 (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf. See also *supra* Section II.A.2.

[277] For example, a 1997 study found that treatment was 15 times more effective at reducing drug-related violent crimes than incarceration; and a 2006 study found that Wisconsin could reduce prison expenditures by $3 to $4 per additional dollar spent on treatment. *See* Przybylsk, *supra* note 264, at 29-32 (describing studies).

receive any type of appropriate evidence-based treatment,[278] and only one in twenty within the criminal justice system.[279] This presents a huge opportunity, and some law enforcement and prosecution leaders are already making a difference by choosing to advocate for increasing the availability of evidence-based treatment in the community to close the "care gap."[280] Prosecutors and law enforcement should be encouraged to use their "bully pulpit" to advocate for increased funding and access to evidence-based treatment, bravely citing evidence to show that it will deter drug crime far better than counterproductive efforts like DIH enforcement. Considering that many public health agencies, treatment facilities, and nonprofits are already operating in an environment of extreme scarcity, and that the price of naloxone is rising, this sort of advocacy by prosecutors and law enforcement should be encouraged and lauded. It is true that there is widespread pressure to "do something" about the overdose crisis, but law enforcement and prosecutors would do well to stick to what they are good at—investigating and prosecuting *actual* crime—and be brave in announcing that that is just what they are going to do. The truly brave might even advocate for ending the War on Drugs through decriminalization or legalization and/or by adopting policies of not pursuing investigations or prosecutions.

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[278] *See* Marc R. Larochelle et al., *Medication for Opioid Use Disorder After Nonfatal Opioid Overdose and Association With Mortality: A Cohort Study*, 169 ANNALS INTERNAL MED. 137 (2018), http://annals.org/aim/article-abstract/2684924/medication-opioid-use-disorder-after-nonfatal-opioid-overdose-association-mortality#. *See also* U.S. SURGEON GENERAL, FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf.

[279] Krawczyk, *supra* note 250.

[280] *See Policing and the Opioid Crisis: Standards of Care*, BLOOMBERG AMERICAN HEALTH INITIATIVE (2018), http://americanhealth.jhu.edu/sites/default/files/inline-files/PolicingOpioidCrisis_LONG_final_0.pdf.

VII. FINAL THOUGHTS: USE PERSON-AFFIRMING LANGUAGE

As with much of the rest of criminal justice and social issues more generally, it is important to use person-first language. The terminology that is commonly used tends to stigmatize and paint defendants and drug users (and others) as guilty, immoral, lesser, and deserving of punishment. Positive language that presents human beings as human beings, albeit flawed (as human beings tend to be), is not just more accurate, fair, inclusive, and equitable, but also strategically useful in the defense setting.

The Health in Justice Action Lab is a leading partner in an effort to improve the language used by journalists when discussing the overdose crisis and addiction more generally. Called Changing the Narrative, this initiative provides web resources and contact information for subject matter experts to help journalists and other interested people avoid stigmatizing language, learn why that language is stigmatizing, and dig deeper into effective solutions rather than false ones.[281]

According to this approach, terms to avoid include *addict*, *alcoholic*, *substance abuser.* Instead use terms like person with a *substance use disorder* or *opioid use disorder* or *alcohol use disorder*.[282] Instead of substance *abuse*, say *misuse.* Instead of *felon* say *justice-involved* or

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[281] *See generally Changing the Narrative*, HEALTH IN JUSTICE ACTION LAB (2019), https://www.changingthenarrative.news/.

[282] *See Changing the Narrative: Words Matter*, HEALTH IN JUSTICE ACTION LAB (2019), https://www.changingthenarrative.news/stigmatizing-language.

returning citizen or *formerly incarcerated*; instead of *inmate* say *prisoner*, and so on.[283] For more guidance on language, consult the Changing the Narrative website and explore its various topics and resources.

Similarly, defenders may be well advised to learn more about the science and psychology of addiction to help humanize defendants and SUDs.[284] This type of knowledge may also improve the ability of defenders to represent and communicate with clients suffering SUDs.

Additional fact-based rhetorical considerations are: (1) fentanyl is *poisoning* the nation's illicit drug supply;[285] (2) while we should not necessarily celebrate the use of recreational use addictive or illegal drugs, psychoactive substances have been a part of human life as long as civilization has existed, and so there will always be people who use them, and accordingly society should recognize that and try to reduce rather than increase the risks of harm; (3) prosecutors who are trying to "send a message" to kingpins are actually sending a message to users to prompt them to use drugs alone, *increasing* their risk of death from overdose; (4) drug users understand the risks, and to label decedents as homicide victims is to demean their memory; (5) where the defendant is a mere co-user (rather than a major trafficker), consider

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[283] *Id*. *See also* Eddie Ellis, *Open Letter on Language* (last visited Oct. 2, 2019), http://prisonstudiesproject.org/language/; *and* Blair Hickman, *Inmate. Prisoner. Other. Discussed.* (Apr. 3, 2016), https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed.

[284] For examples of how defenders might explain this type of knowledge in a briefing context, see generally the briefs drafted by Lisa Newman-Polk in Commonwealth v. Julie Eldred, SJC-12279, including the Brief for the Probationer on a Reported Question (June 2017) and Reply Brief of the Probationer (Sep. 2017).

[285] Bryce Pardo et al., *Treat the fentanyl crisis like a poisoning outbreak*, LA TIMES (Sep. 1, 2019), https://www.latimes.com/opinion/story/2019-08-30/fentanyl-opioids-overdose-deaths-treatment-sales.

using redemption- and rehabilitation-oriented language to offset the prosecution's use of the emotional appeal of "righteous" punishment.

VIII. CONCLUSION

The number of drug-induced homicide prosecutions continues to rise. This Toolkit is our effort to empower the defense to challenge these charges: as baseless in alleging distribution, as unsubstantiated but-for causes of death, as damaging to public safety, and as heightening the harm of the current opioid crisis. Our hope is to turn away from prosecutions to solve the crisis, and turn toward public health solutions.

IX. ADDITIONAL RESOURCES

A. Allies

Partnerships are critical in responding to the overdose crisis and counterproductive policy responses. Here is a sample of groups that are currently active. (Please contact us if you would like to be added to this list or connected with any of these groups.)

- National Association of Criminal Defense Lawyers
- Drug Policy Alliance
- Health in Justice Action Lab
- Legal Action Center
- Justice Collaborative
- Fair and Just Prosecution
- American Civil Liberties Union
- Harm Reduction groups, including the Harm Reduction Coalition
- Open Societies Foundation
- Drug user unions, such as the Urban Survivor Union and its #ReframeTheBlame campaign

B. General Resources

For repositories of reports, white papers, and other useful resources, see:

- Health in Justice Action Lab (https://www.healthinjustice.org/resources)
- Drug Policy Alliance (http://www.drugpolicy.org/resources)
- Harm Reduction Coalition (https://harmreduction.org/our-resources/)
- RAND Corporation Drug Policy Research Center (https://www.rand.org/well-being/justice-policy/centers/dprc.html)

For media coverage, see:

- *Filter* (https://filtermag.org/)
- *The Appeal* (https://theappeal.org/)
- *The New York Times* (https://www.nytimes.com/)

For up-to-date guidance on appropriate language, see:

- Changing the Narrative (https://www.changingthenarrative.news/)

C. News Articles

- Rosa Goldensohn, *You're Not a Drug Dealer? Here's Why the Police Might Disagree*, N.Y. TIMES (May 25, 2018), at https://www.nytimes.com/2018/05/25/us/overdoses-murder-crime-police.html.

- Rosa Goldensohn, *They Shared Drugs. Someone Died. Does that Make Them Killers?*, N.Y. TIMES (May 25, 2018), at https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html.

- Zachary Siegel, *You Want to Get Them While the Teardrops are Warm*, THE APPEAL (Nov. 21, 2017), at https://theappeal.org/you-want-to-get-them-while-the-teardrops-are-warm-prosecutors-swap-strategies-for-turning-942a783ae87c/.

- Zachary Siegel, *Despite Public Health Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides*, THE APPEAL (Nov. 8, 2017), at https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7/

- Leo Beletsky & Jeremiah Goulka, *The Opioid Crisis: A Failure of Regulatory Design and Action*, CRIM. JUST. MAG. (Jul. 15 2019), at

https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/summer/opioid-crisis/.

- Leo Beletsky & Jeremiah Goulka, *The Federal Agency that Fuels the Opioid Crisis*, N.Y. TIMES (Sep. 17, 2018), at https://www.nytimes.com/2018/09/17/opinion/drugs-dea-defund-heroin.html.

- Daniel Denvir, *The Opioid Crisis Is Blurring the Legal Lines Between Victim and Perpetrator*, SLATE (Jan. 15, 2018), at https://slate.com/news-and-politics/2018/01/the-opioid-crisis-is-blurring-the-legal-lines-between-victim-and-perpetrator.html.

- Louise Vincent, *The Rage of Overdose Grief Makes It All Too Easy to Misdirect Blame*, FILTER MAG. (Dec. 5, 2018), at https://filtermag.org/the-rage-of-overdose-grief-makes-it-all-too-easy-to-misdirect-blame/.

- Jack Shuler, *Overdose and Punishment*, THE NEW REPUBLIC (Sep. 10, 2018), at https://newrepublic.com/article/150465/prosecutors-reviving-reagan-era-drug-induced-homicide-laws.

- James Buikema, *Punishing the Wrong Criminal for Over Three Decades: Illinois' Drug-Induced Homicide Statute* (April 15, 2015), at https://ssrn.com/abstract=2662312 or http://dx.doi.org/10.2139/ssrn.2662312

D. Law Review Articles

- Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide, Fatal Overdose, and the Public's Health*, 4 UTAH L. REV. 833 (2019), https://dc.law.utah.edu/ulr/vol2019/iss4/4/.

- Leo Beletsky et al., *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 NE. U. L. J. 155 (2015).

- Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3176552.

- Amanda Latimore & Rachel Bergstein, *"Caught with a Body," Yet Protected by Law? Calling 911 for opioid overdose in the context of the Good Samaritan Law,* 50 INT'L J. DRUG POL. 82 (2017), https://www.sciencedirect.com/science/article/abs/pii/S0955395917302888.

- Mark Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*, 3 NAT'L ATT'YS GEN. TRAINING & RES. INST. J. 26 (Feb. 2018), https://www.naag.org/publications/nagtri-journal/volume-3-number-1/prosecuting-drug-overdose-cases-a-paradigm-shift.php

- Commonwealth v. Eldred*: Massachusetts Supreme Judicial Court Holds Drug-Free Probation Requirement Enforceable for Defendant with Substance Use Disorder*, 132 HARV. L. REV. 2074 (May 2019), https://harvardlawreview.org/2019/05/commonwealth-v-eldred/ (see also the briefs in this case, particularly the probationer's reply brief).

E. Reports, Briefs, & Other Articles

- LINDSAY LASALLE; DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf

- Legal Action Center, *Substance Use: Medication Assisted Treatment Resources*, https://lac.org/resources/substance-use-resources/medication-assisted-treatment-resources/.

- Bryce Pardo et al., *The Future of Fentanyl and Other Synthetic Opioids*, RAND CORP. RR3117 (2019), https://www.rand.org/pubs/research_reports/RR3117.html.

- Beau Kilmer et al., *Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States*, RAND CORP. RR2693 (2018), https://www.rand.org/pubs/research_reports/RR2693.html.

- Sean E. Goodison, *Law Enforcement Efforts to Fight the Opioid Crisis*, RAND CORP. RR3064 (2019), https://www.rand.org/pubs/research_reports/RR3064.html.

- Amy Hawes and Denise Martin, *A Dose of Reality: Drug Death Investigations and the Criminal Justice System*, THE CHAMPION (June 2019), at 14, https://www.nacdl.org/Article/June2019-ADoseofRealityDrugDeathInvestigations

- Kevin Martone, Francine Arienti, Sherry Lerch, *Olmstead at 20: Using the Vision of* Olmstead *to Decriminalize Mental Illness,* Technical Assistance Collaborative (Sept. 4, 2019), http://www.tacinc.org/media/90807/olmstead-at-twenty_09-04-2018.pdf.

- National District Attorneys Association (NDAA), *The Opioid Epidemic: A State and Local Prosecutor Response* (Oct. 12, 2018), https://ndaa.org/wp-content/uploads/NDAA-Opioid-White-Paper.pdf.

- Andrea Harris, Lisa Lorish, *Litigation Strategies in Opioid Overdose Cases*, Federal Criminal Practice Seminar – Spring 2018 (Apr. 13, 2018), https://nce.fd.org/sites/nce.fd.org/files/pdfs/LItigation%20Strategies%20in%20Opioid%20Overdose%20Cases.pdf.

- Network for Public Health Law, Legal Interventions To Reduce Overdose Mortality: Naloxone Access and Overdose Good Samaritan Laws (Dec. 2018), https://www.networkforphl.org/_asset/qz5pvn/network-naloxone-10-4.pdf.

- "Fentanyl and Related Threats" (dedicated issue), 66 United States Attorneys' Bulletin (July 2018)

- "Addressing the Heroin and Opioid Crisis" (dedicated issue), 64 United States Attorneys' Bulletin (Sep. 2016)

- Rachel L. Rothberg and Kate Stith, The Opioid Crisis and Federal Criminal Prosecution, 46 J. of Law, Medicine & Ethics 292 (2018), https://www.ncbi.nlm.nih.gov/pubmed/30147006.

- Sample direct and cross examination of a medical examiner in federal court (transcript).

- Brief for the Committee for Public Counsel Services, the Health in Justice Action Lab at Northeastern School of Law, et al. as Amici Curiae Supporting Appellant, Commonwealth v. Carrillo (argued Feb. 4, 2019) (No. SJC-12617) https://docs.wixstatic.com/ugd/dc612a_c862345af8c14e9caa48e85bd052068f.pdf.

- Brief for the Probationer on a Reported Question and on Appeal from a Finding of Probation Violation from the Concord Division of the District Court Department, Commonwealth v. Julie Eldred, SJC-12279 (June 2017), https://www.dropbox.com/s/z0lqqf4zch60fbz/Eldred%20Probationer's%20Brief%20(redacted).pdf?dl=0.

- Reply Brief of the Probationer, Commonwealth v. Julie Eldred, SJC-12279 (Sep. 2017), https://www.dropbox.com/sh/iu9uy3hk57jhsx4/AAA4UJLz_JPPbR0p1GoDa46Va?dl=0&preview=Eldred+Reply+Brief.pdf.

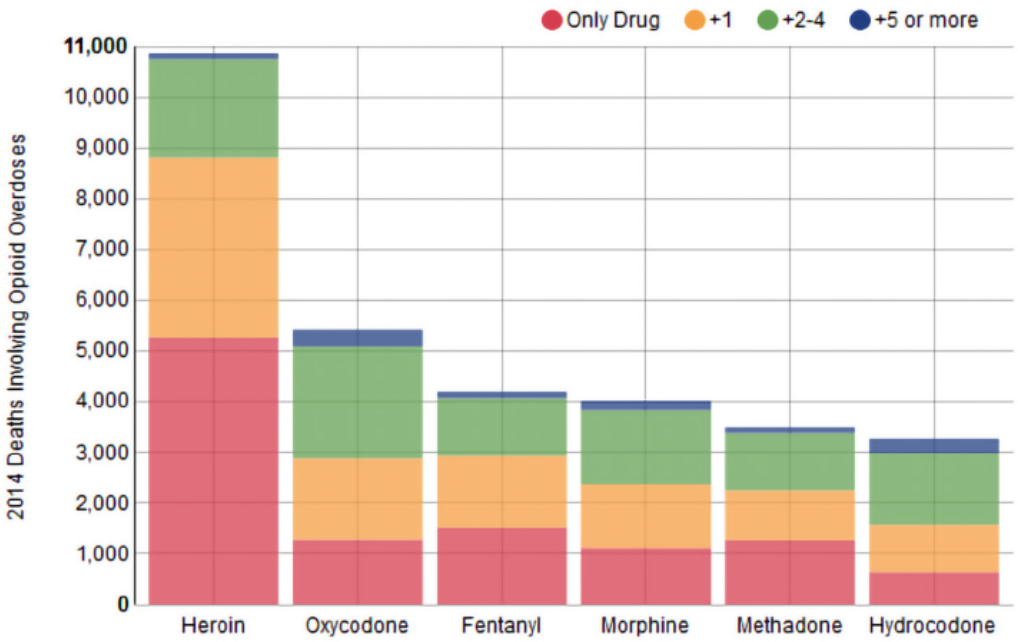
F. Datasets

- Health in Justice Action Lab & Legal Science, Drug Induced Homicide Laws (last updated Jan. 1, 2019), http://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032.

- Legal Science, Good Samaritan Overdose Prevention Laws (last updated Jul. 1, 2018), http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153

G. Visuals

Figure 9. Opioid Overdose Deaths by Number of Drugs Involved, 2014



Source: CDC, National Vital Statistics Reports, Vol. 65, No. 10, December 20, 2016, Table 5 (https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_10.pdf). Includes all deaths, unintended or otherwise.

X. CONTACT US

Please alert us to any updates this Toolkit should include, any errors in the Toolkit, and any suggested resources, allies, or other topics this Toolkit should include.

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

HAMPSHIRE COUNTY NO. SJC-12617

COMMONWEALTH

v.

JESSE CARRILLO

BRIEF OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES
AND
THE HEALTH IN JUSTICE ACTION LAB AT
NORTHEASTERN UNIVERSITY SCHOOL OF LAW
JOINED BY
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTRODUCTION

Jesse Carrillo and Eric Sinacori were students at the University of Massachusetts, Amherst. Both men were experienced intravenous heroin users who suffered from opiate addictions (Tr. 4:131-134). On October 3, 2013, the two men agreed on a plan -- that Mr. Carrillo would drive to his longtime dealer to purchase heroin with their collective money and, upon his return, they would divide the product for their personal use (Tr. 4:136-137). Mr. Sinacori tracked Mr. Carrillo's drive, regularly checking on his whereabouts and expected arrival time by sending text messages (Tr. 4:138-139). Upon Mr. Carrillo's return, the two men got together, divided the heroin, and used their own portions (Tr. 4:137). Later that night, Mr. Sinacori died of an accidental, drug-related overdose (Tr: 4:141).

Based on the events leading up to Mr. Sinacori's accidental death, the Commonwealth charged Mr. Carrillo with drug distribution and involuntary manslaughter, arguing that he was criminally liable for the accidental overdose. The judge declined to instruct the jury on the lesser included offense of simple drug possession by joint venture. The jury subsequently convicted Mr. Carrillo on the two charged counts.

For the reasons discussed in this brief, the convictions should be reversed, and Mr. Carrillo

granted a new trial. First, based on all of the circumstances, including Mr. Carrillo's personal experience with heroin addiction and what he knew of Mr. Sinacori's drug use, his conduct was not wanton or reckless and therefore fails to substantiate an involuntary manslaughter conviction. Second, both Mr. Carrillo and Mr. Sinacori were criminally liable for joint venture possession based on the mutually planned drug transaction carried out by Mr. Carrillo with their collective money. The judge therefore erred in not instructing the jury on the lesser included offense of simple drug possession. Third, prosecutions of individuals like Mr. Carrillo, who purchase drugs on behalf of themselves and co-users, undermine life-saving public health initiatives, such as naloxone distribution and Good Samaritan laws, putting *more* rather fewer lives at risk.

In passing G.L. c. 94C, §32, the Legislature intended to target "dealers" and "traffickers," *not* people like Mr. Carrillo who suffer from addiction and purchase drugs on behalf of themselves and friends for personal use. This Court should hold that the sharing of drugs between two individuals suffering from severe substance use disorder does not rise to the level of wanton or reckless conduct. The result of holding that heroin, in and of itself, automatically creates a high degree of likelihood that substantial harm will result is to transform the law of involuntary manslaughter

into a strict liability crime. Considering that the Legislature has thus far rejected a felony drug-induced homicide law, see S. 2158 (2017), this Court should avoid establishing a *de facto* drug-induced homicide provision. Moreover, in the context of the current opioid crisis, allowing each accidental overdose to be prosecuted as a potentially strict liability crime has consequences that reach far beyond the scope of the case at bar, putting *more* lives at risk rather than fewer.

ISSUES PRESENTED

1. Whether the evidence warranted a finding that the defendant's distribution of heroin to the deceased was wanton or reckless in the circumstances of this case, thus justifying the defendant's conviction of involuntary manslaughter.

2. Where it was alleged that the defendant procured heroin for the deceased, a college classmate, and the defendant was charged on that basis with distributing the heroin to the victim, whether the judge erred in declining to instruct the jury on the lesser offense of simple possession for personal use based on a joint venture.

INTERESTS OF AMICI

The **Committee for Public Counsel Services (CPCS)**, Massachusetts's public defender agency, is statutorily mandated to provide counsel to indigent persons in criminal proceedings. G.L. c.211D, §5. CPCS submits

this brief as amicus curiae in order to assist in the resolution of the above questions. It is in the interest of CPCS's clients, and the fair administration of justice, that CPCS's views be presented in order to contribute to this Court's full consideration of the important issues raised in this case.

The **Health in Justice Action Lab at Northeastern University School of Law** advances criminal justice reform through a public health lens. Its research and analysis address the role of criminal justice in opioid crisis response, with special focus on drug-induced homicide and similar prosecutions that result from accidental overdose events. It therefore has a policy interest in the issues raised in this appeal.

The **Massachusetts Association of Criminal Defense Lawyers (MACDL)** is an incorporated association of experienced trial and appellate lawyers dedicated to protecting the rights of the citizens of the Commonwealth, guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL devotes much of its energy to identifying and correcting problems in the criminal justice system. It files amicus curiae briefs in cases, like the one here, that raise questions of importance to the administration of justice.

ARGUMENT

I. Mr. Carrillo's purchase of heroin from his usual supplier for a fellow heroin user was not "wanton or reckless"; moreover, holding that sharing heroin automatically creates a high degree of likelihood that substantial harm will result has the effect of unjustly creating a strict liability crime where the Legislature has declined to adopt such a law.

The Commonwealth prosecuted Mr. Carrillo for involuntary manslaughter on the theory that he had unintentionally, but wantonly or recklessly, caused Mr. Sinacori's death. The question is whether Mr. Carrillo's act of purchasing heroin for the opioid-addicted Mr. Sinacori was wanton or reckless under the law. In view of the circumstances of this case, it was not.

"Wanton or reckless conduct is conduct that creates *a high degree of likelihood* that substantial harm will result to another." Model Jury Instructions on Homicide §VII.A (2013) (Model Jury Instruction on Homicide) (emphasis added), citing Commonwealth v. Welansky, 396 Mass. 383, 399 (1944). Stated another way, the "act causing death must be undertaken in disregard of *probable* harm to others in circumstances where there is a *high likelihood that such harm will result*." Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010), citing Welansky, 396 Mass. at 397, 399 (emphasis added). "Whether conduct is wanton or reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew." Model Jury Instruc-

tion on Homicide. The standard, in other words, "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable [person] to know that a danger of serious harm exists." Commonwealth v. Godin, 374 Mass. 120, 129 (1977). "Such knowledge" must take into consideration a defendant's "experience." Id.

Applying this standard to the facts of this case, Mr. Carrillo's purchase of heroin for himself and Mr. Sinacori was not wanton or reckless. People who suffer from the illness of severe substance use disorder (commonly called addiction), experience brain changes and a physical tolerance that drive them to use the drug of addiction as if life depends upon it, see U.S. Department of Health and Human Services, Office of the Surgeon General, Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health, ch. 2 (2016) (Surgeon General's Report),[1] and typically ingest multiple times daily in a desperate effort to feel normal and stave off withdrawal (Tr. 5:19). In view of Mr. Carrillo's own experience with addiction and knowledge of Mr. Sinacori as a fellow heroin user (Tr. 4:133-135), his purchase of heroin for Mr. Sinacori from his usual supplier whose product had never caused him an overdose (Tr. 4:115), was a reasonable act by one addicted person for another to

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[1] https://addiction.surgeongeneral.gov/sites/default/files/chapter-2-neurobiology.pdf

manage the illness.

Importantly, this Court recently held In Re Matter of G.P., 473 Mass. 112 (2015), that when construing civil commitment law as it relates to substance use, daily heroin consumption by an addicted person does not create *per se* "a likelihood [that] serious harm [will] result." G.L. c. 123, §35. It therefore follows that purchasing heroin for an addicted person does not create a *high degree of likelihood* that substantial harm will result. Moreover, to hold, as previous cases have,[2] that the sharing of heroin automatically constitutes wanton or reckless conduct in the event of an accidental overdose effectively creates a strict liability crime -- a *de facto* drug-induced homicide provision -- something the Legislature has considered and thus far rejected. See 2017 Senate Doc. No. 2158.[3]

A. Mr. Carrillo's purchase of heroin from his usual supplier at Mr. Sinacori's request was not "wanton or reckless" conduct given his experience with opioid addiction and the necessary relief heroin provides.

Applying the combined subjective and objective standard for "wanton or reckless" behavior to the circumstances here, Mr. Carrillo's conduct as an

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[2] Commonwealth v. Perry, 416 Mass. 1003, 1004 (1993) ("all heroin of unknown strength is inherently dangerous and carries a 'high probability that death will occur'"), citing Commonwealth v. Catalina, 407 Mass. 779, 791 (1990), quoting from People v. Cruciani, 70 Misc. 2d 528, 536 (N.Y. 1972).

[3] https://malegislature.gov/Bills/190/S2158

addicted person who purchased heroin from a known supplier for himself and Mr. Sinacori, who was also addicted, falls short of the legal requirement for conviction, as it was not *probable* that Mr. Sinacori would experience an accidental overdose given Mr. Carrillo's experience with addiction, his knowledge of Mr. Sinacori's heroin use, and his experience ingesting the same "Tropicana" product for approximately ten months (Tr. 4:105, 114).

i. Severe substance use disorder is a chronic illness in which changes in brain circuitry and physical tolerance to the drug drive a person to daily, compulsive use as if life depends upon it.

Neurochemical and functional changes in the brain associated with severe substance use disorders help explain why it is not wanton or reckless conduct for an addicted person to purchase heroin for another addicted heroin user. Medical and clinical experts define substance use disorder as "an underlying change in brain circuits," leading to "a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 483 (5th ed. 2013) (DSM-5).[4]

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[4] The DSM-5 is a comprehensive, authoritative volume that defines and classifies mental disorders based on the work of hundreds of international experts in all aspects of mental health.

Similarly, in 1998, this Court issued Standards on Substance Abuse, defining "substance abuse"[5] as "a chronic, relapsing disorder," where a person has "lost the power of self-control over the use of drugs or alcohol." Supreme Judicial Court Standing Committee on Substance Abuse, Standards on Substance Abuse, Introduction (Apr. 28, 1998). Thus, while addiction was "once viewed largely as a moral failing or character flaw," Surgeon General's Report, at 2-1,[6] it is now recognized internationally as "a disorder of the brain," similar to "any other neurological or psychiatric illness," and is considered a chronic, but treatable disease. World Health Organization, Neuroscience of Psychoactive Substance Use and Dependence Summary 14

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[5] The Standards on Substance Abuse were presumably based on the previous edition of the manual (DSM-4), which included two diagnostic categories: (1) *substance abuse;* and (2) *substance dependence*. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 192-199 (4th ed. 1994) (emphasis added). The current edition of the DSM, issued in 2013, includes a single spectrum disorder of "substance use disorder," categorized by severity (mild, moderate, or severe). DSM-5, at 484-484. The term "substance *abuse*" is disfavored because it is clinically inaccurate and because of the stigma associated with the term "abuse," which is associated with physical, verbal, emotional, and sexual abuses. Instead, preferred terminology includes "substance use disorder," "substance use," and "substance misuse." See Maia Szalavitz, Why We Should Say Someone is a 'Person with an Addiction,' Not an Addict, NPR, June 11, 2017. https://www.npr.org/sections/health-shots/2017/06/11/531931490/change-from-addict-to-person-with-an-addiction-is-long-overdue

[6] https://addiction.surgeongeneral.gov/sites/default/files/chapter-2-neurobiology.pdf

(2004).[7] See generally Drug Facts: Treatment Approaches for Drug Addiction, National Institute of Drug Abuse (Jan. 2018).[8] See also AMA Applauds Surgeon General Report on Substance Use Disorders (Nov. 16, 2016) ("addiction is a chronic disease and must be treated as such").[9]

When a person is ill with severe substance use disorder, the brain's neural circuitry changes, resulting in a behavioral disorder. Surgeon General's Report, at 2-5. These disruptions in the brain impair executive function, triggering dysfunction in a person's "ability to organize thoughts and activities, prioritize tasks, manage time, make decisions, and regulate one's own actions, emotions, and impulses." Id. at 2-16. Additionally, a hallmark of the illness is the development of a tolerance "where higher doses of the drug are needed to produce the same effect." National Institute of Drug Abuse Impacts of Drugs on Transmission (March 9, 2017).[10] Heroin, in particular, produces profound degrees of tolerance. National Institute on Drug Abuse, Heroin 9 (June 2018). In

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[7] https://www.who.int/substance_abuse/publications/en/Neuroscience_E.pdf

[8] https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/drugfacts-treatmentapproaches.pdf

[9] https://www.ama-assn.org/press-center/statement/ama-applauds-surgeon-general-report-substance-use-disorders

[10] https://www.drugabuse.gov/news-events/nida-notes/2017/03/impacts-drugs-neurotransmission

response to the body's tolerance, drug use escalates, and abstention leads to withdrawal, which can occur as soon as a few hours after last use. Id. In addition to causing extreme "physical symptoms, such as bodily discomfort, pain, sweating, and intestinal distress, and in the most severe cases, seizures," withdrawal also triggers severe anxiety and excruciating negative emotions. Surgeon General's Report, at 2-19 to 2-20.

As the addiction expert described at trial, people in the throes of heroin withdrawal feel "like they're going to die" (Tr. 5:21). The experience is like torture; being forced to abstain from drugs and suffer through withdrawal can feel like prohibiting a person who is starving to death from having food (Tr. 5:19-21). In addition to severe physical pain, a person's mental state is dominated by feelings of anxiety, loss, grief, and the horrific fear that all happiness has been forever drained from the world. People "can't do anything" to stop the excruciating physical and emotional pain other than "get more of the drug," which "melts away" the pain "within seconds to minutes" after use (Tr. 5:21-22).

The acute mental and physical agony experienced during withdrawal triggers intense cravings and obsessive thinking about the drug that will provide relief. Surgeon General's Report, at 2-19 to 2-20. Indeed, "active recruitment of stress systems" causes a person suffering from addiction to endure "intolerable distress when without the drug." From Reward to Relief:

The Complex Neuroadaptations Underlying Addiction, 31 American Academy of Addiction Psychiatry News 5 (Summer 2015). Consequently, "addicted individuals, for whom [the brain's] motivational system is dysregulated, are driven to escape intolerable stress . . . [such that] the drug is often not even experienced as pleasurable, [but] merely as relief." Id.

Thus, as the expert in this case testified at trial, a person suffering from addiction, like Mr. Carrillo, can recognize that life has spiraled out of control, and yet continue using because the brain believes the drug of addiction is necessary for survival (Tr. 5:20). "[P]eople are trapped in this terrible cycle where literally they can't feel normal, they can't function, they can't go to work, they can't have relationships unless they're using multiple times during the day" (Tr. 5:19). An individual in this dysfunctional cycle may "want to stop using drugs, and yet [he] can't" (Tr. 5:19-20, 23-25). Instead, using the drug becomes a normal part of everyday life to function; as Mr. Carrillo explained, he used heroin daily and "would still make [himself] food, go to class, go to the library, and check out books for a research project" (Tr. 4:117).

ii. Mr. Carrillo and Mr. Sinacori both suffered from heroin addiction, and thus Mr. Carrillo's purchase of heroin from his known supplier for Mr. Sinacori was not "wanton or reckless," but rather an act to manage the illness.

Mr. Carrillo described heroin as "dominat[ing] [his] thoughts" (Tr. 4:117), and his addiction

generally as

> a state of complete insanity when it comes down to that mental obsession. It's an intrusive and pervasive way of thinking that blocks out everything else that's in your life. Family falls by the wayside, relationships fall by the wayside. Your next and only goal is when you're going to stick the needle in your arm again.

(Tr. 4:118). This was Mr. Carrillo's experience in October 2013. He was managing "a full-blown addiction where if [he] didn't have heroin, [he] would enter withdrawals" (Tr. 4:116), which he described as a "shock" to his "body" (Tr. 4:119). He therefore would "shoot anywhere between 13 and 17 bags right when [he] woke up" and similar amounts throughout the day (Tr. 4:115, 118). As noted above, provided he had access to the opioid, he was able to function (Tr. 4:116-117). Without heroin, however, he would enter acute withdrawal and the accompanying torturous physical and mental sickness (Tr. 4:118-120). Notably, over the course of approximately ten months using heroin, *he had never once overdosed* (Tr. 4:105, 114-115).

The evidence at trial indicates that Mr. Sinacori was also suffering from opioid addiction and withdrawal in the hours before Mr. Carrillo returned from his usual drug dealer with heroin for himself and Mr. Sinacori, at the latter's request. In text messages, Mr. Sinacori conveyed increasing anxiety, telling Mr. Carrillo that "his veins were screaming or on fire" (Tr. 4:138-139). Having experienced this type of

unbearable suffering, Mr. Carrillo tried to console Mr. Sinacori by telling him: "I know you're hurting but you will very soon be in the loving comforting arms of Ms. [Heroin]" (Tr. 4:139-140). For both men, heroin had become a primal necessity.

Drawing on the scientific understanding of substance use disorder, including brain changes, physical tolerance, and the excruciating agony experienced during withdrawal, Mr. Carrillo's act of purchasing heroin for Mr. Sinacori was not wanton or reckless. Indeed, under the circumstances where both men were addicted, this action was understandable and even reasonable. These men in the throes of heroin addiction were managing an illness that requires consistent opioid usage to stave off withdrawal. The judge even noted during sentencing that Mr. Carrillo was not a drug dealer but rather a person, like Mr. Sinacori, who was suffering from a severe addiction (Tr. 7:8) ("I see this as one addict to another helping each other in the perverted sense").

It thus makes sense that Mr. Carrillo understood that purchasing heroin for Mr. Sinacori, as he requested, would not result in harm, especially from his known supplier. Mr. Carrillo had used thousands of bags of the "Tropicana" heroin from the same dealer without ever overdosing (Tr. 4:115). He also knew that Mr. Sinacori was an experienced heroin user who had used the same product without incident two nights

earlier (Tr. 4:131-135). In these circumstances, Mr. Carrillo's purchase of heroin for Mr. Sinacori was not "wanton or reckless" conduct, as it was not "undertaken in disregard of probable harm" to Mr. Sinacori, and did not, either subjectively or objectively, create a "high likelihood" that an accidental overdose would result. Life Care Ctrs. of Am., Inc., 456 Mass. at 832, citing Welansky, 396 Mass. at 399.

B. Consistent with this Court's holding that drug use alone is insufficient to establish a "likelihood of serious harm" in the civil commitment context, purchasing heroin for an opioid-addicted individual is insufficient to establish a high degree of likelihood that substantial harm will result.

This Court's recent case law addressing the evidence required to civilly commit a drug-addicted person pursuant to G.L. c. 123, §35, is highly relevant in demonstrating that Mr. Carrillo's act of purchasing heroin for Mr. Sinacori did not "create[] a high degree of likelihood that substantial harm will result." Model Jury Instruction on Homicide. In order to impose civil commitment, a judge must find that a person has a substance use disorder *and* that "there is a likelihood of serious harm that will result." G.L. c. 123, §35. In Chapter 123, the Legislature defined the term "[l]ikelihood of serious harm" as:

> (1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other

> violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

G.L. c. 123, §1. Notably, this definition does not include mere drug use.

In applying the above definition, this Court held In the Matter of G.P., 473 Mass. 112 (2015), that daily heroin use -- *even a desire to overdose on heroin* -- is not enough to establish a likelihood that serious harm will result. In G.P., the petitioner sought to civilly commit her daughter, G.P., because G.P. was using up to two grams of heroin per day, G.P. stated that she would kill herself with heroin if she could obtain enough to do so, and she was refusing to eat because she wanted to die. Id. at 114. This Court held that "[a]s unfortunate as G.P.'s condition was," her continued drug use did not substantiate a finding that a likelihood of serious harm would result. Id. at 130 ("The essential basis of the judge's order appears to have been that G.P. was addicted to heroin and had not been able successfully to control the addiction. As unfortunate as G.P.'s condition was, the evidence presented did not appear to satisfy the requirements of §35 for an order of commitment").

If daily heroin use by a drug-addicted person does

not establish a "likelihood of serious harm" in the context of civil commitment, it makes sense that purchasing heroin for a drug-addicted person does not establish the requisite "high degree of likelihood of substantial harm" in the criminal context. This is especially so where the standard of proof involved in §35 commitments is "clear and convincing," id. at 120, a lesser degree of proof than the "beyond a reasonable doubt" standard required at a criminal trial.

In the circumstances presented here, Mr. Sinacori, who was severely addicted to opioids, would not have been eligible for civil commitment under G.P., because active addiction and drug use do not create a likelihood that serious harm will result. In the Matter of G.P., 473 Mass. at 130. It logically follows that Mr. Carrillo's purchase of heroin at the request of Mr. Sinacori, who was already addicted to heroin, also did not create a likelihood that serious harm would result -- much less create a *high degree* of likelihood. The conviction thus requires reversal.

C. To hold that providing any heroin automatically creates a high degree of likelihood that substantial harm will result to another unjustly creates a strict liability crime.

To hold that providing any heroin automatically creates a high degree of likelihood that substantial harm will result to another markedly transforms the law of manslaughter into a strict liability crime. Considering that the Legislature has thus far rejected

a felony drug-induced homicide law, see 2017 Senate Doc. No. 2158, this Court should avoid establishing a *de facto* drug-induced homicide provision.

In light of the opioid crisis, this is particularly important. Cases like this were exceedingly rare prior to 2008, with only about 168 charges filed nationally between 1990 and 2008. See Health in Justice Action Lab, Data Dashboard: Drug-Induced Homicide Charges (2019).[11] They have rapidly surged since then, with at least 2,210 people charged between 2009 and 2017. Id. National and state law enforcement leaders, such as the National District Attorney's Association and the National Heroin Task Force, are advocating for even more such prosecutions, and indeed to treat all overdose sites as crime scenes. See National District Attorneys Association, The Opioid Epidemic: A State and Local Prosecutor Response at 9-10 (Oct. 12, 2018); U.S. Department of Justice, National Heroin Task Force: Final Recommendations at 12 (2015).[12] More than 2,000 people died from accidental overdoses in Massachusetts in 2017. National Center for Health Statistics, Drug Overdose Mortality by State

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[11] https://www.healthinjustice.org/drug-induced-homicide. This figure is based upon an analysis of mentions of such charges and prosecutions in the media.

[12] https://ndaa.org/wp-content/uploads/NDAA-Opioid-White-Paper.pdf, and https://www.justice.gov/file/822231/download

(2018).[13] Many of these accidental deaths involve a fact pattern where friends and co-users -- individuals just like Mr. Carrillo -- play an inadvertent role. Under the strict liability theory advanced by the Commonwealth, each one of these individuals could face prosecution and a lengthy prison sentence. By stark contrast, police statewide reported a total of 173 murders and non-negligent homicides in 2017. See Federal Bureau of Investigation, Crime in the United States 2017, Table 5 (2018).[14] In other words, allowing prosecutions like the one here would flood the system and pervert legislative intent.

Deploying harsh criminal penalties in retribution for unintended consequences raises normative and constitutional issues. Those questions have been explored elsewhere by expert scholars in history, epistemology, and theory of criminal law. See Binder, The Culpability of Felony Murder, 83 Notre Dame L. Rev. 965 (2008) (providing a comprehensive overview of the empirical and doctrinal scholarship on felony murder).[15] For instance, there is a nearly unanimous scholarly consensus that felony murder and analogous strict liability provisions are both bad law and

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[13] https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm

[14] https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-5

[15] https://scholarship.law.nd.edu/ndlr/vol83/iss3/2/

counterproductive criminal justice policy. Id., at 966 ("Legal scholars are almost unanimous in condemning felony murder as a morally indefensible form of strict liability"). The American Law Institute accordingly excludes the felony murder rule from its Model Penal Code. See Robinson & Williams, Mapping American Criminal Law: Variations Across the States, Chapter 5 Felony-Murder Rule, Penn Law Legal Scholarship Repository No. 1719 at 3 (2017).[16]

In this Court's decision abolishing the felony murder rule in Massachusetts, the Chief Justice criticized the rule's amplification of the legal consequences of an illegal act absent an inquiry into the perpetrator's state of mind. Quoting this Court's ruling in Commonwealth v. Matchett, 386 Mass. 492, 506-507 (1982), he wrote:

> punish[ing] all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator's state of mind to the homicide, *violates the most fundamental principle of the criminal law* -- "criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result."

Commonwealth v. Brown, 477 Mass. 805, 831 (2017) (Gants, CJ, concurring) (emphasis added).

In applying this sound analysis, this Court should reject the notion that the act of procuring drugs on

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[16] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2721&context=faculty_scholarship

behalf of one's self and another for personal use ipso facto rises to the level of wanton or reckless conduct. Such a rule effectively eliminates any culpable mental state, which is "the most fundamental principle of the criminal law." Id. To uphold the conviction in this case is to impose a strict liability standard for accidental overdose deaths, a standard that the Legislature has to date rejected.

II. Consistent with legislative intent, Mr. Sinacori engaged in joint venture possession by having Mr. Carrillo purchase heroin for him with their collective money; therefore, it was error for the judge not to instruct the jury on the lesser included offense of simple possession.

The purpose of the drug distribution statute, G.L. c. 94C, §32, is to stop dealers and traffickers from profiting off the illegal sale of unauthorized drugs. Commonwealth v. Jackson, 464 Mass. 758, 764 (2013). The evidence indicates that Mr. Carrillo was not selling drugs, but rather, like Mr. Sinacori, was struggling with an opioid addiction and travelled to New York to purchase heroin with their collective money for their joint personal use. As the trial judge noted at sentencing, "I don't see this as a drug dealer taking advantage for financial gain" (Tr. 7:8). The Legislature did not intend the law to target as dealers, people in Mr. Carrillo's circumstances who are engaged in joint venture drug possession with another. The judge therefore erred in not instructing the jury on the lesser included offense of simple drug possession.

In declining to give the instruction, the judge

relied on Commonwealth v. Johnson, 413 Mass. 598 (1992) and its progeny (Tr. 5:40 and 5:44), which hold that when two or more persons "acquire possession of a drug for their own use intending only to share it together, their only crime is simple joint possession," *but only* when the drugs are acquired "simultaneously and jointly…at the outset." Id., 413 Mass. at 604. A literal interpretation of this rule requiring physical *simultaneous and joint acquisition at the outset* to establish joint possession conflicts with legislative intent and also joint venture criminal liability, which does not require physical presence at the scene of an offense. Commonwealth v. Brown, 477 Mass. at 813 (citation omitted).

A. The Legislature intended to target drug dealers and drug traffickers, not a person like Mr. Carrillo, who is drug addicted and purchased drugs with collective money on behalf of himself and another.

General Law Chapter 94C, section 32, prohibits the knowing or intentional manufacture, distribution, or dispensing of unauthorized substances.[17] The statute's legislative history provides important evidence for interpreting its intent and limitations. See Jackson,

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[17] Mr. Carrillo was convicted under G.L. c. 94C, §32(a), which states: "No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter."

464 Mass. at 764 (holding that prosecuting the social use of marijuana as drug distribution conflicts with "the statute's original purpose ... to target those in the drug business") (citation omitted).

The law enacted in 1980, entitled "An Act Providing Mandatory Terms of Imprisonment for Major Drug Traffickers, Habitual Drug Violators, and Distributors of Dangerous Drugs to Minors," was part of an aggressive nationwide crackdown on the illegal drug market. See Drug Enforcement Administration (DEA), History: 1975-1980, at 47 ("anti-drug campaigns and concerted efforts were launched by governments and communities across the nation aimed at decreasing teen drug use").[18] In proposing enhanced penalties for drug distribution, the Governor explained in a letter to the Legislature that the law was needed to combat the "*[o]rganized crime* ... now moving in on a large scale to capture the drug distribution market." 1980 House Doc. No. 6652, at 1 (emphasis added).[19] "The time has come," the Governor wrote, "to launch a new, more aggressive campaign against those who *operate and profit* from the death-dealing *traffic in drugs*... We need major changes in the way our criminal system deals with these *dealers in drugs*." Id. (emphasis added). See Jackson, 464 Mass.

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[18] https://www.dea.gov/sites/default/files/2018-07/1975-1980%20p%2039-49.pdf

[19] https://archives.lib.state.ma.us/bitstream/handle/2452/780906/ocm39986872-1980-HB-6652.pdf?sequence=1&isAllowed=y

at 764 (emphasizing this same language in concluding that the "the distribution statute's original purpose…was to target those in the drug business").

In his letter to the Legislature, the Governor expressly contrasted "drug traffickers" with "drug addicts," urging that the law was needed to deter and punish the former from "prey[ing]" on drug addicted "victims in our society." Id. "For every youngster who dies of a drug overdose," he wrote, "thousands more give up any purpose in life and become living victims of their addiction. They simply go through the motions of living, they sit in classrooms without learning, and they grow more and more isolated from their families and friends." Id.

Mr. Carrillo resembles the Governor's description of the drug addicted "victim[] in our society," and bears no resemblance to the "organized" criminal "drug dealer" whom the law intended to deter and punish. Id. At the time of the offense, Mr. Carrillo was a graduate student struggling to maintain his studies while keeping his heroin addiction secret from loved ones (Tr. 4:117, 120). The record shows that Mr. Carrillo received no benefit -- financial or otherwise -- by making the time-consuming trip to meet with a known supplier on behalf of both of them. Mr. Sinacori did not financially compensate Mr. Carrillo for his time or travel expenses incurred driving seven hours to and from New York City. The record does not suggest that Mr. Carrillo charged Mr. Sinacori any markup for the

heroin he bought from the *actual* drug dealer. In short, Mr. Carrillo's actions were categorically distinguishable from what the Legislature contemplated when passing G.L. c. 94C, §32. See Commonwealth v. Brown, 481 Mass. at 81 ("We cannot interpret statutory language in a vacuum, ignoring the Legislature's purpose in enacting the statute") (internal citations and quotations omitted).

Additionally, the severity of the penalty -- a maximum ten-year state prison sentence for a first-offense drug distribution conviction -- "provides further support that the statute is directed at [a] serious crime," id. at 83, not the purchase of drugs for joint personal use. The Legislature clearly intended to protect those who *use* drugs as the result of their addiction by harshly penalizing those who *sell* them. First time drug possession, G.L. c. 94C, §34, carries a maximum sentence of two years in the house of correction and allows for diversion to drug treatment and dismissal of the charge upon treatment completion. See G.L. c. 111E, §10 ("if the defendant completes the treatment ordered by the court, the court shall dismiss the charges pending"). Importantly, G.L. c. 111E, §10 only applies to defendants "charged for the first time with a drug offense *not involving the sale* or *manufacture* of dependency related drugs," indicating the Legislature's view that *profiting* is the defining difference between drug possession and drug distribution. Id (emphasis added).

This Court's analysis of the so-called "pimping" statute, G.L. c. 272, §7, in Commonwealth v. Brown, is instructive. The defendant in Brown argued that his conduct in accompanying a woman to a prostitution transaction and holding the money she earned in his shoe did not qualify as pimping. 481 Mass. at 78-83. After a thorough review of the statutory language, legislative history, and severe penalty provisions, this Court construed the law to "target those who ... *profit from prostitution*," concluding that the defendant's actions -- where he had taken hold of the money the woman was paid -- met the legal standard because he appeared to have profited from the prostitution transaction. Id. at 78. At the same time, this Court reinforced the correctness of an Appeals Court decision that held the statutory requirement for pimping had not been met where the defendant "occasionally receiv[ed] small amounts of money from [a] friend in exchange for driving [the] friend to prostitution activities." Id. at 83, citing Commonwealth v. Thetonia, 27 Mass. App. Ct. 783, 786-787 (1989).

In short, the intent of G.L. c. 94C, §32 was not to prosecute and convict someone like Mr. Carrillo who was struggling with addiction and purchased drugs for himself and a peer with collective money for joint personal use. The irony of this case is that the very law used to charge and incarcerate Mr. Carrillo was, in fact, meant to protect him (an addicted "victim[] in

our society") from "known drug dealers" like the one who sold him and Mr. Sinacori heroin. 1980 House Doc. No. 6652, at 1.

B. Mr. Sinacori and Mr. Carrillo were both criminally liable for joint venture drug possession at the moment Mr. Carrillo purchased and received heroin from the drug dealer.

On October 3, 2013, Mr. Sinacori reached out to Mr. Carrillo by text message to ask if he would be taking a "run" to buy heroin for himself (Tr. 4:135). Mr. Carrillo communicated that he would be, at which time Mr. Sinacori affirmatively asked if Mr. Carrillo would buy heroin for him as part of the transaction (Tr. 4:135). Mr. Carrillo agreed. The two men got together, at which time Mr. Sinacori gave Mr. Carrillo money to purchase heroin on his behalf while Mr. Carrillo used his own money to buy himself heroin (Tr. 4:136). Mr. Carrillo drove to New York and bought heroin for both of them. On his drive back to Massachusetts, Mr. Sinacori repeatedly texted Mr. Carrillo to check up on his whereabouts (Tr. 4:138-139). Surely, if Mr. Carrillo had returned from New York and refused to hand over to Mr. Sinacori his portion of the heroin, Mr. Sinacori would have rightfully claimed that Mr. Carrillo had stolen *his* drugs.

"When there is evidence that more than one person may have participated in the commission of a crime ... the defendant is guilty if the Commonwealth has proved beyond a reasonable doubt that the defendant *knowingly*

participated in the commission of the crime charged, alone or with others, *with the intent required* for that offense." Commonwealth v. Zanetti, 454 Mass. 449, 467-468 (2009) (emphasis added). Here, Mr. Carrillo conducted the actual purchase, and Mr. Sinacori "knowingly participated" by agreeing on a plan with Mr. Carrillo, contributing money to buy the drugs, and then continuously checking to see when Mr. Carrillo would return with the heroin. See Commonwealth v. Brown, 477 Mass. at 812-813, quoting Commonwealth v. Zanetti, 454 Mass. at 470 ("Knowing participation in a criminal offense 'may take any of several forms' and includes providing 'aid or assistance in committing the crime.'") That Mr. Sinacori was not "physically present" for the drug buy is inconsequential to his criminal liability as a joint venturer. See Brown, 477 Mass. at 813 ("To establish guilt on a theory of accomplice liability, the Commonwealth is not required to prove that the defendant was physically present at the scene of the offense"). Indeed, had Mr. Sinacori remained alive, he could have been criminally liable for this act.

Thus, at the moment Mr. Carrillo received the heroin paid for with their collective money and according to their agreed upon plan, he and Mr. Sinacori were both criminally liable for joint venture drug possession in violation of G.L. c. 94C, §34. The judge therefore erred in declining to instruct the jury on the lesser included offense of simple possession.

C. The application of the Johnson instruction only to those physically present for the drug transaction conflicts with legislative intent and joint venture criminal liability, and instead should apply more broadly to include individuals like Mr. Carrillo who purchase drugs with pooled money for themselves and another.

This Court held in Johnson, 413 Mass. at 604, that it is appropriate to instruct the jury that "where two or more persons simultaneously and jointly acquire possession of a drug for their own use intending to share it together," the only crime is simple possession. However, the Johnson instruction has been "limited to the situation where the persons *acquire the drug simultaneously at the outset*, when the persons are there at the acquisition together and simultaneously acquire." Id. at 604 (emphasis added). Relying on Johnson and its progeny (Tr. 5:39-5:44),[20] the judge declined to instruct the jury on the lesser included offense of simple possession, explaining:

> I think in order to bring this defense and have the lesser included, Massachusetts has made it very clear that the person has to participate right there with the transaction and that was not the evidence in this case. So I am not going to be instructing with respect to the lesser included charge.

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[20] See Commonwealth v. DePalma, 41 Mass. App. Ct. 798, 804 (1996); Commonwealth v. Mitchell, 47 Mass. App. Ct. 178, 181 (1999); and Commonwealth v. Rodriguez, 456 Mass. 578, 584 n.8 (2010), all citing Johnson for the proposition that a simple drug possession instruction is limited to situations where two or more persons simultaneously and jointly acquire possession of a drug for personal use.

(Tr. 5:40). The problem here is that while the judge correctly stated the Johnson line of cases, the Johnson rule nonetheless conflicts with the subsequent Zanetti rule of joint venture criminal liability, as well as the Legislature's intent in passing the drug distribution statute. This case illustrates the conflict.

The Johnson instruction is based on the Second Circuit decision in United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977). See Commonwealth v. DePalma, 41 Mass. App. Ct. 798, 803-804 (1996). In Swiderski, two defendants were convicted of possession with intent to distribute after together buying cocaine from undercover officers. Although there was some evidence presented that the defendant intended to sell the cocaine to a third party, the trial judge instructed the jury *that even if the defendant only intended to give it to his fiancé or a friend, "that is distribution."* Id. at 449 (emphasis added). The Second Circuit vacated the defendant's conviction, concluding the trial judge committed harmful error by instructing the jury "that an intent to distribute could be inferred from the mere giving of the drug 'to a friend of yours or even to your fiancé.'" Id. at 452. To reach its decision, the court thoroughly analyzed the federal drug distribution statute (part of the Comprehensive Drug Abuse Prevention and Control Act of 1970), particularly noting that the Act created "stringent measures against the evils of drug traffic and

rehabilitation rather than retribution in the case of personal drug abuse." Id. at 450. It therefore follows, the court reasoned, that "where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse -- simple joint possession, *without any intent to distribute the drug further.*" Id. at 450 (emphasis added). This language was subsequently adopted into our common law as the Johnson instruction.

More recently, the Seventh Circuit, referencing Swiderski, observed that it makes little sense to describe one person who purchases drugs for himself and others with pooled money as a drug distributor. Weldon v. United States, 840 F.3d 865, 866 (7th Cir. 2016). In Weldon, the defendant, his girlfriend, and a friend, "pooled [money] to buy heroin from [the defendant's] drug dealer." Id. The defendant made the drug transaction while the other two waited in a car. Id. The defendant then returned to his girlfriend and friend, and the three divided the heroin for their own personal use. Id. The friend subsequently died of an overdose, and the defendant was convicted of distribution of an illegal drug, resulting in death. Id. The Seventh Circuit rejected the government's argument that Swiderski did not apply because the defendant was the only one to make the hand-to-hand buy with the drug dealer. In vacating the conviction, the Weldon court

illustrated why the circumstances fairly represented joint possession, not distribution:

> Suppose you have lunch with a friend, order two hamburgers, and when your hamburgers are ready you pick them up at the food counter and bring them back to the table and he eats one and you eat the other. It would be very odd to describe what you had done as "distributing" the food to him. It is similarly odd to describe what either [the defendant] or [his co-defendant] did as distribution.

Id. The court further explained that while "[i]t's true that only [the defendant] transferred the money for the drug to the dealer," it was "pooled money" and "it would have been absurd for all three to have gone up to the dealer and each pay him separately." Id.

The general circumstances are similar here. Although Mr. Sinacori waited in his apartment rather than a car while Mr. Carrillo bought the heroin from the dealer, the Weldon logic applies. After Mr. Sinacori independently requested assistance in procuring the drug, the two men agreed they were going to buy heroin and they both contributed money towards the purchase. Mr. Carrillo merely picked up the heroin and paid for it on behalf of both parties. To extend the Weldon illustration, if two friends order takeout together from a restaurant and one friend drives to pick up the food and pays for it with their collective money, "[i]t would be very odd to describe what [the friend who drove to get the takeout] did as 'distributing' the food." Id. Accordingly, it makes

sense for the Johnson instruction to apply more broadly to a defendant like Mr. Carrillo who pays for drugs on behalf of himself and a friend.

While the Commonwealth asserts that Mr. Carrillo "acted as a *middleman* between a large drug dealer and a drug user," this mischaracterizes the evidence (C.B. at 25) (emphasis added). Purchasing drugs with pooled money for oneself and co-users is categorically distinguishable from the term "middleman." This term refers to an individual who receives compensation in exchange for his services. See Commonwealth v. Fluellen, 456 Mass. 517, 525 (2010) ("It was reasonable for the jury to infer that the defendant's hopes for compensation were analogous to the expectation of any *middleman* in any transaction, *that his efforts will be rewarded*) (emphasis added).

In conclusion, the trial evidence indicated that Mr. Carrillo was not a trafficker, distributor, or middleman. The judge's refusal to instruct the jury on the lesser included offense of simple possession improperly prohibited the jury from reaching such a conclusion under the law.

III. In public health terms, prosecuting opioid users for accidental overdose deaths actually *increases* the risk of future fatalities, undermining the Commonwealth's prevention efforts.

Massachusetts has invested substantial planning and resources into stemming the overdose crisis and preventing overdoses from turning fatal. See Governor's

Press Office, Press Release: Baker-Polito Administration Announces More Reforms to Combat the Opioid and Heroin Epidemic: Comprehensive Plan Includes Combating Addiction, Accessing Treatment, Reducing Prescriptions and Enhancing Prevention (Nov. 14, 2017).[21] These efforts include broad deployment of overdose education and naloxone programs, the 911 Good Samaritan Law, and initiatives to counter the impact of the increasing adulteration of the street drug supply with fentanyl. Id. Broadly, these efforts are designed to inform and equip members of the community to provide life-saving help to those experiencing an overdose and to encourage help-seeking among witnesses.

These prosecutions work at cross-purposes with these important efforts. In so doing, such cases demonstrably aggravate the problems they purport to address.

A. Prosecutions of individuals like Mr. Carrillo are in direct conflict with Massachusetts efforts to deploy lifesaving interventions to reverse accidental overdoses and instead increase the likelihood of accidental deaths.

Among the Commonwealth's current efforts, three interrelated public health initiatives will be particularly harmed by prosecutions like the one at issue: (1) the timely administration of naloxone to reverse overdoses; (2) public education and harm reduction efforts to reduce isolation among those who

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[21] https://www.mass.gov/news/baker-polito-administration-announces-more-reforms-to-combat-the-opioid-and-heroin-epidemic

use opioids; and (3) the 911 Good Samaritan law designed to incentivize help-seeking behavior among overdose witnesses.

Massachusetts has been a national pioneer in developing, deploying, and legally codifying overdose education and naloxone distribution (OEND) programs. These programs are effective at improving the ability of both professional and lay responders to recognize and reverse overdose events to prevent fatal outcomes. See Walley, et al., Opioid Overdose Rates and Implementation of Overdose Education and Nasal Naloxone Distribution in Massachusetts: Interrupted Time Series Analysis, 346 BMJ f174 (2013).[22]

As a programmatic illustration of this broader effort, the First Responder Naloxone grant program in Massachusetts has invested several million dollars to provide nasal naloxone to state and local police and fire departments, with over 7,400 overdose rescues by first responders reported to the Department of Public Health since the program began in 2015. See Governor's Press Office, Press Release: Baker-Polito Administration Awards Nearly $1 Million in First Responder Naloxone Grants (June 28, 2018).[23] The State Police and more than 200 local police and fire departments have

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[22] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4688551/

[23] https://www.mass.gov/news/baker-polito-administration-awards-nearly-1-million-in-first-responder-naloxone-grants

also purchased naloxone at a negotiated discount rate through the Office of State Pharmacy since it started offering the program in December 2015. Id.

In order to be effective, these investments must be triggered by members of the public who call 911 in time. Accordingly, the second intervention is a public health education campaign targeted to people who use drugs encouraging them not to use drugs alone, but rather with others. Particularly in the current context of potent synthetics adulterating the illicit opioid drug supply, using heroin alone places individuals at far greater risk of death than using with others. Ensuring that someone else is present who can cause naloxone to be administered is critical to preventing accidental overdoses from turning fatal. See Travis Lupick, If They Die of an Overdose, Drug Users Have a Last Request, Yes! Magazine (Aug. 25, 2018) ("In public health messaging, the first thing that's said is, 'Don't use alone.' You want people to be using with someone or with a group of people[.]").[24]

Significantly, prosecutions such as the one here run at cross purposes to a third area of public health intervention: the 911 Good Samaritan law (G.L. c. 94C,

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[24] https://www.yesmagazine.org/people-power/if-they-die-of-an-overdose-drug-users-have-a-last-request-20180830. To make naloxone nasal spray more accessible, it can now be purchased without a prescription. Mary Markos, "Prescription No Longer Needed to Buy Naloxone in Massachusetts," October 19, 2018, https://www.bostonherald.com/2018/10/19/prescription-no-longer-needed-to-buy-naloxone-in-massachusetts/

§34A). This statute is designed to incentivize help-seeking by carving out limited criminal amnesty for overdose victims and witnesses who call for help. It also draws on the considerations outlined above to minimize isolation, thereby maximizing the chance that overdoses can be reversed in time. See Network for Public Health Law, Legal Interventions To Reduce Overdose Mortality: Naloxone Access and Overdose Good Samaritan Laws (July 2017).[25]

Research shows that witnesses to overdose events are often reluctant to call 911 because they fear legal consequences ranging from being prosecuted for a drug-related crime to losing housing or shelter. According to several studies, many people refuse to call 911 for fear of police involvement (ranging from one-third to one-half); for those who did call 911, many delayed making the call for several critical minutes while they faced those fears. See Latimore & Bergstein, "Caught With A Body" Yet Protected By Law? Calling 911 For Opioid Overdose In The Context Of The Good Samaritan Law, 50 Int'l J. of Drug Policy 82 (2017).[26] See also LaSalle, An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane at 40 (2018) (An Overdose Death Is Not Murder)

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[25] https://www.networkforphl.org/_asset/qz5pvn/legal-interventions-to-reduce-overdose.pdf

[26] http://www.sciencedirect.com/science/article/pii/S0955395917302888?via%3Dihub

(summarizing studies).[27] In the context of increasingly rapid onset of overdose symptoms linked to the potent opioid fentanyl, timely response is more critical than ever.

Tragically, knowledge and understanding of 911 Good Samaritan laws is limited, while awareness of drug-induced homicide prosecutions is growing. See Green, Beletsky, et al., Police Officers' and Paramedics' Experiences With Overdose and Their Knowledge and Opinions Of Washington State's Drug Overdose-Naloxone-Good Samaritan Law, 90 J. Urban Health 1102 (2013).[28] In an effort to "send a message" to deter illegal drug sales, law enforcement often seeks -- and receives -- press coverage when bringing charges or securing a conviction. Nationally, media mentions of drug-induced charges or prosecutions have surged by 300% since 2010. See An Overdose Death Is Not Murder at 2. Additionally, as mentioned above, an increasing number of prosecutors and law enforcement leaders are calling for all overdose sites to be treated as crime scenes, which itself receives media coverage. See Bobby Allyn, Bystanders To Fatal Overdoses Increasingly Becoming Criminal Defendants,

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[27] http://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf

[28] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3853169/

NPR Morning Edition (July 2, 2018).[29]

To make matters worse, investigating, arresting, and prosecuting overdose witnesses and other users for homicide under the banner of overdose prevention sends the wrong message to the wrong people. As the next section demonstrates, these criminal justice efforts target the very people who are best positioned to summon life-saving help during overdose events: friends, family members, romantic partners, and others within the drug user's close social nexus. These prosecutions make it more likely that people will use drugs alone in order to avoid implicating friends in the case of an accidental overdose. See Beletsky, America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis, Utah Law Rev. (forthcoming 2019) (America's Favorite Antidote).[30]

Indeed, these very people are often best positioned to deliver life-saving help *themselves*. Thanks to the OEND efforts of government and community partners in Massachusetts like Learn to Cope -- the first set of interventions -- today, more people are trained and equipped to respond to overdose events than ever before. Combine this with the second initiative -- the public health education intervention to encourage

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[29] https://www.npr.org/2018/07/02/623327129/bystanders-to-fatal-overdoses-increasingly-becoming-criminal-defendants

[30] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3185180

people not to use alone -- and there is a real possibility of naloxone being administered in a timely fashion by lay people in a significant percentage of accidental overdoses. But yet again, these prosecutions deter people from using drugs together, thereby undermining the life-saving interventions that Massachusetts seeks to promote. Ironically, in this case, the Commonwealth argues that Mr. Carrillo should have used the heroin with Mr. Sinacori the night of his death because it might have saved his life (C.B. at 32) -- and yet, prosecutions like the one here discourage this life-saving practice because individuals like Mr. Carrillo fear that if they are present and call 911, they will be arrested and held criminally liable.

In addition to these major initiatives, prosecutions like the one here also undermine progress in criminal justice agencies' efforts to recast themselves as embracing a "public health approach" to the overdose crisis. Outreach efforts by police teams require people to open their doors. Programs such as the Police-Assisted Addiction and Recovery Initiative (PAARI) and the Gloucester Police Department's Angel program require that users feel comfortable voluntarily approaching police for help accessing support resources. These programs also require police to work in partnership with public health and other sectors. Creative efforts like these undertaken by criminal justice agencies around the state will be undermined by

aggressive prosecutions in other Massachusetts jurisdictions. The bottom line is that prosecuting people who use and share drugs is at cross-purposes with Massachusetts efforts to fight stigma and help people who use drugs emerge from the shadows to make healthier choices. As a result, more rather than fewer lives are at risk.

B. More the rule than an exception, this case exemplifies how drug-induced homicide and similar prosecutions often ensnare the "lowest hanging fruit" rather than the manufacturers, traffickers, and dealers whom the laws intend to target.

The Commonwealth's legislative history is clear: criminal penalties for drug distribution are intended to deter traffickers and dealers from preying on youth and those who are addicted. Similarly, Governor Baker's recent proposed death-results bill, 2017 Senate Doc. No. 2158, intended "to hold accountable *those who profit* from the sale of these dangerous drugs." See Governor's Press Office, Press Release: Baker-Polito Administration Unveils Bill to Strengthen Penalties for Dangerous Drug Distribution, Witness Intimidation (Aug. 30, 2017) (emphasis added).[31] Despite the explicit

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[31] https://www.mass.gov/news/baker-polito-administration-unveils-bill-to-strengthen-penalties-for-dangerous-drug. Statements by proponents of such legislation in other states have a similar focus upon dealers, including strict liability "drug distribution resulting in death" statutes. For instance, Vermont's "death results" statute specifically states that it is directed "at the entrepreneurial drug dealers who traffic in large amounts of illegal drugs for profit,"

(FOOTNOTE CONTINUED ON NEXT PAGE)

intention of these drug laws, prosecutions of individuals like Mr. Carrillo -- who are not dealers or traffickers, and instead are struggling with addiction and purchase drugs on behalf of themselves and peers -- are the norm, rather than the exception. In fact, this case is illustrative of a national trend.

Research conducted by the Health in Justice Action Lab at Northeastern University School of Law has found that a full half (50 percent) of drug-induced homicide and similar prosecutions resulting from fatal overdose events across the country are brought against other users, friends, relatives, and people with whom the decedent had a non-dealer relationship. See America's Favorite Antidote. Only 47 percent were brought against "traditional" drug dealers, many of whom, notably, were selling small amounts of drugs in order to manage their own addictions. Id. An extensive study by the New York Times looking at prosecutions in Pennsylvania came to

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[31](FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
and that it "is not directed at" people who "resort to small-scale sale of drugs to support their addiction." See 2003 Vermont Law P.A. 54, §1(2) (legislative findings). See also An Overdose Death Is Not Murder at 15-16 (quoting legislative statements nationwide, such as "We want to get the drug dealers. That is what this bill is designed to do."). Indeed, the National Heroin Task Force's recommendation that more drug-induced homicide prosecutions be brought was intended to target traffickers and makes no mention of regular users. See National Heroin Task Force Final Report and Recommendations at 12 ("Federal prosecutors should prioritize prosecutions of heroin traffickers when the distribution of that drug results in death or serious bodily injury from use of that product.").

similar findings. See Goldensohn, They Shared Drugs. Someone Died. Does That Make Them Killers? New York Times (May 25, 2018).[32] See also An Overdose Death Is Not Murder at 42 (citing research of several state drug-induced homicide statistics and finding that: in New Jersey, 25 of 32 identified prosecutions were against friends of the decedent; in Wisconsin, 90 percent of prosecutions targeted friends, relatives, or low-level street dealers; and in several Illinois counties, prosecutions usually targeted whoever was the last person with the decedent at the scene of the accidental overdose).

While presumably these prosecutions are an attempt to deliver a measure of justice to the families, friends, and communities of people who die from accidental overdoses, they rely on tenuous logic. Law enforcement is under considerable community and political pressure to "do something" about the opioid crisis. Practically, however, it may be difficult and time-consuming to identify drug traffickers and, legally, it may be challenging to successfully prosecute them. Thus, people within the victim's immediate family or social nexus become the likely target of investigation and prosecution.

From moral, public health, and legal standpoints, these prosecutions fail to consider the increased

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[32] https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html

degree of harm caused by incarcerating people with substance use disorders who are charged in these cases. Incarceration generally has a deleterious impact on a person's health. For those with substance use disorders, the health risks are especially severe because very few jails or prisons offer treatment of any kind, let alone evidence-based behavioral therapies or medications. See National Center on Addiction and Substance Abuse, Behind Bars II: Substance Abuse and America's Prison Population at 43 (2010) (correctional facilities that do offer addiction-related services tend to provide only "alcohol and other drug education or low-intensive outpatient counseling sessions rather than evidence-based, intensive treatment").[33] As a result, most people suffering from opioid use disorder rapidly lose their accumulated tolerance to opioids once jailed. However, their brain chemistry does not reset to the point of losing cravings, and so when they return to society their brains crave the drugs their bodies can no longer tolerate. This astronomically increases their risk of dying from an accidental overdose upon reentry. See Beletsky, et al., Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration, 7 Northeastern Univ. L.J. 155 (2015).[34]

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[33]https://www.centeronaddiction.org/download/file/fid/487

[34] https://ssrn.com/abstract=2628297

In the Commonwealth, newly-released inmates are 120 times more likely to overdose and die during the first month after re-entry than the general population. Massachusetts Department of Public Health, An Assessment of Fatal and Nonfatal Opioid Overdoses in Massachusetts 2011-2015, 50 (2017).[35]

C. The threat of prosecution and imprisonment does not deter drug sales or drug use.

In addition, on the policy front, evidence demonstrates that these prosecutions lack a deterrent effect, particularly against people suffering from addiction. There is a broad consensus among scholars and policy analysts that the threat of legal sanction does not deter drug dealing or drug use, even when the threatened punishments are increased. See Tonry, The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings, 38 Crime & Justice 65 (2009).[36]

There is no evidence that enforcing drug crime laws -- from trafficking to possession -- has led to reductions in drug use. According to publicly available data from law enforcement, corrections, and health agencies, there is no statistically significant relationship between a state's imprisonment rate for drug crimes and three measures of state drug problems:

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[35] https://www.mass.gov/files/documents/2017/08/31/legislative-report-chapter-55-aug-2017.pdf

[36] https://scholarship.law.umn.edu/faculty_articles/501

rates of illicit drug use, drug overdose deaths, and drug arrests. See Pew Charitable Trusts, Pew Analysis Finds No Relationship Between Drug Imprisonment and Drug Problems (June 19, 2017).[37] Similarly, research has found no drug use reduction by increasing sentence length; as more people were convicted to longer federal sentences for drug crimes between 1980 and 2010, "self-reported use of illegal drugs has increased over the long term as drug prices have fallen and purity has risen." Pew Charitable Trusts, Federal Drug Sentencing Laws Bring High Cost, Low Return at 1 (Aug. 2015).[38] "[T]he results show there is no statistically significant basis for believing that increasing prison admissions for drug offenses deters drug use." Schiraldi & Ziedenberg, Costs and Benefits? The Impact of Drug Imprisonment in New Jersey at 27 (2003).[39]

This failure of punitive measures to suppress demand stems from the very nature of addiction. As discussed in Argument I above, substance use disorders change the neurochemistry of the brain. When it comes to addiction, one of the foundational elements of the

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[37]https://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2017/06/pew-analysis-finds-no-relationship-between-drug-imprisonment-and-drug-problems (including all drugs and all levels of drug offenses, from possession to trafficking).

[38] https://www.pewtrusts.org/-/media/assets/2015/08/federal_drug_sentencing_laws_bring_high_cost_low_return.pdf

[39] https://www.drugpolicy.org/sites/default/files/jpi_njreport.pdf

disease is that it alters brain neurochemistry such that it compels a person to satisfy cravings *despite recognized negative consequences*. See Sussman & Sussman, Considering the Definition of Addiction, 10 Int'l J. Environmental Research and Public Health 4025 (2011).[40] In addition to the cravings, the physical and psychological pain of withdrawal (also described above) is a powerful driver of impulsive behavior. In this context, ratcheting up criminal consequences to deter behavior that is tied to an individual's addiction is bound to fail because it misses the very definition of this disease. See Przybylsk, Correctional and Sentencing Reform for Drug Offenders at 14-16 (Sep. 2009) (Correctional and Sentencing Reform) (summarizing research).[41] Further, there is evidence suggesting that drug enforcement activities actually lead to increases in violent crime. So long as demand for illegal drugs exists, attempts to constrict the drug supply by incarcerating traffickers will continue to lead to the "replacement effect," whereby individuals or organizations quickly fill the void created by enforcement activities. This replacement effect does disrupt drug markets, but instead of suppressing supply, these

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[40] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210595/. See also American Society of Addiction Medicine, Definition of Addiction (Apr. 12, 2011), https://www.asam.org/resources/definition-of-addiction.

[41] http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf

activities systematically prompt an *increase* in violent crime. See Correctional and Sentencing Reform at 17-19 (summarizing research). A comprehensive review of studies analyzing the relationship between drug enforcement and drug violence found that "the existing scientific evidence suggests drug law enforcement contributes to gun violence and high homicide rates and that increasingly sophisticated methods of disrupting organizations involved in drug distribution could paradoxically increase violence." Werb, et al., Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review, 22 Int'l J. of Drug Policy 87 (2011).[42]

District attorneys are under intense pressure to demonstrate that they are "doing something" about the opioid crisis. There are much more effective approaches to solving the crisis than these counterproductive prosecutions. Numerous cost-benefit analyses have found that treatment outperforms punitive measures; it reduces demand.[43] Yet in Massachusetts, as well as nationally, only around one in ten people with substance use disorder receive any type of appropriate evidence-based treatment, and only one in twenty within

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[42]https://www.sciencedirect.com/science/article/pii/S0955395911000223

[43] For example, a 1997 study found that treatment was 15 times more effective at reducing drug-related violent crimes than incarceration; and a 2006 study found that Wisconsin could reduce prison expenditures by $3 to $4 per additional dollar spent on treatment. See Correctional and Sentencing Reform at 29-32 (describing studies).

the criminal justice system. See Larochelle, et al., Medication for Opioid Use Disorder After Nonfatal Opioid Overdose and Association With Mortality: A Cohort Study, 169 Annals of Internal Medicine 137 (2018);[44] Krawczyk, et al., Only One In Twenty Justice-Referred Adults In Specialty Treatment For Opioid Use Receive Methadone Or Buprenorphine, 36 Health Affairs (Millwood) 2046 (2017).[45] This presents a huge opportunity, and some law enforcement and prosecution leaders are already making a difference by choosing to advocate for increasing the availability of evidence-based treatment in the community to close the "care gap." See Bloomberg American Health Initiative, Policing and the Opioid Crisis: Standards of Care (2018) (signed by the chief of the Arlington, MA, police department, among others).[46] Advocating for increased funding and access to evidence-based treatment would far better serve Massachusetts than counterproductive efforts that fail to deter drug crime.

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[44] http://annals.org/aim/article-abstract/2684924/medication-opioid-use-disorder-after-nonfatal-opioid-overdose-association-mortality#

[45] https://www.ncbi.nlm.nih.gov/pubmed/29200340

[46] http://americanhealth.jhu.edu/sites/default/files/inline-files/PolicingOpioidCrisis_LONG_final_0.pdf

CONCLUSION

For the above-stated reasons, this Court should hold that when individuals purchase heroin with collective money for themselves and another, all parties who agree to the transaction and provide money are criminally liable for joint venture drug possession. Moreover, this Court should hold that the procurement of heroin for another in the circumstances of a case like this, does not meet the standard of wanton or reckless conduct required for involuntary manslaughter. Accordingly, the convictions should be vacated.

Respectfully submitted,

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January, 2019.

ADDENDUM

Statutory Provisions Cited

G.L. c. 94C, §32

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment.

(b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance as defined by section thirty-one of this chapter under this or any prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than 3 1/2 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 3 1/2 years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum 3 1/2 year term of imprisonment, as established herein.

(c) Any person serving a mandatory minimum sentence for violating any provision of this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C; or

(iii) the offense was committed during the commission or attempted commission of a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

G.L. c. 94C, §34

No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as provided in Section 32L of this Chapter or as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. Any person who violates this section by possessing heroin shall for the first offense be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both, and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years or by a fine of not more than five thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years. Any person who violates this section by possession of more than one ounce of marihuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. Except for an offense involving a controlled substance in Class E of section thirty-one, whoever violates the provisions of this section after one or more convictions of a violation of this section or of a felony under any other provisions of this chapter, or of a corresponding provision of

earlier law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both.

If any person who is charged with a violation of this section has not previously been convicted of a violation of any provision of this chapter or other provision of prior law relative to narcotic drugs or harmful drugs as defined in said prior law, or of a felony under the laws of any state or of the United States relating to such drugs, has had his case continued without a finding to a certain date, or has been convicted and placed on probation, and if, during the period of said continuance or of said probation, such person does not violate any of the conditions of said continuance or said probation, then upon the expiration of such period the court may dismiss the proceedings against him, and may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge pursuant to this section; provided, however, that departmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed; and provided further, that such a record shall be maintained in a separate file by the department of probation solely for the purpose of use by the courts in determining whether or not in subsequent proceedings such person qualifies under this section. The record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose. No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.

Notwithstanding any other penalty provision of this section, any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not

previously been convicted of any offense pursuant to the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed.

It shall be a prima facie defense to a charge of possession of marihuana under this section that the defendant is a patient certified to participate in a therapeutic research program described in chapter ninety-four D, and possessed the marihuana for personal use pursuant to such program.

Notwithstanding any general or special law to the contrary, a laboratory may possess, store, analyze, process and test medical marijuana and medical marijuana-infused products; provided, however, that such laboratory shall do so in accordance with the department's regulations and written guidelines governing procedures for quality control and testing of products for potential contaminants.

G.L. c. 94C, §34A

(a) A person who, in good faith, seeks medical assistance for someone experiencing a drug-related overdose shall not be charged or prosecuted for possession of a controlled substance under sections 34 or 35 if the evidence for the charge of possession of a controlled substance was gained as a result of the seeking of medical assistance.

(b) A person who experiences a drug-related overdose and is in need of medical assistance and, in good faith, seeks such medical assistance, or is the subject of such a good faith request for medical assistance, shall not be charged or prosecuted for possession of a controlled substance under said sections 34 or 35 if the evidence for the charge of possession of a controlled substance was gained as a result of the overdose and the need for medical assistance.

(c) The act of seeking medical assistance for someone who is experiencing a drug-related overdose may be used as a mitigating factor in a criminal prosecution under

the Controlled Substance Act, 1970 P.L. 91?513, 21 U.S.C. section 801, et seq.

(d) Nothing contained in this section shall prevent anyone from being charged with trafficking, distribution or possession of a controlled substance with intent to distribute.

(e) A person acting in good faith may receive a naloxone prescription, possess naloxone and administer naloxone to an individual appearing to experience an opiate-related overdose.

G.L. c. 123A, §1

"Likelihood of serious harm", (1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

G.L. c. 123, §35

For the purposes of this section the following terms shall, unless the context clearly requires otherwise, have the following meanings:

> "Alcohol use disorder", the chronic or habitual consumption of alcoholic beverages by a person to the extent that (1) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning, or (2) the person has lost the power of self-control over the use of such beverages.
>
> "Facility", a public or private facility that provides care and treatment for a person with an alcohol or substance use disorder.
>
> "Substance use disorder", the chronic or habitual consumption or ingestion of controlled substances

> or intentional inhalation of toxic vapors by a person to the extent that: (i) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning; or (ii) the person has lost the power of self-control over the use of such controlled substances or toxic vapors.

Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe has an alcohol or substance use disorder. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. If such person is not immediately presented before a judge of the district court, the warrant shall continue day after day for up to 5 consecutive days, excluding Saturdays, Sundays and legal holidays, or until such time as the person is presented to the court, whichever is sooner; provided, however that an arrest on such warrant shall not be made unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a qualified social worker.

If, after a hearing which shall include expert testimony and may include other evidence, the court finds that such person is an individual with an alcohol or substance use disorder and there is a likelihood of serious harm as a result of the person's alcohol or

substance use disorder, the court may order such person to be committed for a period not to exceed 90 days to a facility designated by the department of public health, followed by the availability of case management services provided by the department of public health for up to 1 year; provided, that a review of the necessity of the commitment shall take place by the superintendent on days 30, 45, 60 and 75 as long as the commitment continues. A person so committed may be released prior to the expiration of the period of commitment upon written determination by the superintendent of the facility that release of that person will not result in a likelihood of serious harm. Such commitment shall be for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health. Subsequent to the issuance of a commitment order, the superintendent of a facility may authorize the transfer of a patient to a different facility for continuing treatment; provided, that the superintendent shall provide notification of the transfer to the committing court.

If the department of public health informs the court that there are no suitable facilities available for treatment licensed or approved by the department of public health or the department of mental health, or if the court makes a specific finding that the only appropriate setting for treatment for the person is a secure facility, then the person may be committed to: (i) a secure facility for women approved by the department of public health or the department of mental health, if a female; or (ii) the Massachusetts correctional institution at Bridgewater or other such facility as designated by the commissioner of correction, if a male; provided, however, that any person so committed shall be housed and treated separately from persons currently serving a criminal sentence. The person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. The department of public health shall maintain a roster of public and private facilities available, together with the number of beds currently available and the level of security at each facility, for the care and treatment of alcohol use disorder and substance use disorder and shall make the roster available to the trial court.

Annually, not later than February 1, the commissioner shall report on whether a facility other than the Massachusetts correctional institution at Bridgewater is being used for treatment of males under the previous paragraph and the number of persons so committed to such a facility in the previous year. The report shall be provided to the clerks of the senate and house of representatives, the chairs of the joint committee on public safety and homeland security and the chairs of the joint committee on the judiciary.

Nothing in this section shall preclude a facility, including the Massachusetts correctional institution at Bridgewater or such other facility as may be designated by the commissioner of correction, from treating persons on a voluntary basis.

The court, in its order, shall specify whether such commitment is based upon a finding that the person is a person with an alcohol use disorder, substance use disorder, or both. The court, upon ordering the commitment of a person found to be a person with an alcohol use disorder or substance use disorder pursuant to this section, shall transmit the person's name and nonclinical identifying information, including the person's social security number and date of birth, to the department of criminal justice information services. The court shall notify the person that such person is prohibited from being issued a firearm identification card pursuant to section 129B of chapter 140 or a license to carry pursuant to sections 131 and 131F of said chapter 140 unless a petition for relief pursuant to this section is subsequently granted.

After 5 years from the date of commitment, a person found to be a person with an alcohol use disorder or substance use disorder and committed pursuant to this section may file a petition for relief with the court that ordered the commitment requesting that the court restore the person's ability to possess a firearm, rifle or shotgun. The court may grant the relief sought in accordance with the principles of due process if the circumstances regarding the person's disqualifying condition and the person's record and reputation are determined to be such that: (i) the person is not likely to act in a manner that is dangerous to public safety; and (ii) the granting of relief would not be contrary to the public interest. In making the determination, the court may consider evidence from a licensed physician or clinical psychologist that the

person is no longer suffering from the disease or condition that caused the disability or that the disease or condition has been successfully treated for a period of 3 consecutive years.

If the court grants a petition for relief pursuant to this section, the clerk shall provide notice immediately by forwarding a certified copy of the order for relief to the department of criminal justice information services, who shall transmit the order, pursuant to paragraph (h) of section 167A of chapter 6, to the attorney general of the United States to be included in the National Instant Criminal Background Check System.

A person whose petition for relief is denied may appeal to the appellate division of the district court for a de novo review of the denial.

G.L. c. 111E, §10

Any defendant who is charged with a drug offense shall, upon being brought before the court on such charge, be informed that he is entitled to request an examination to determine whether or not he is a drug dependent person who would benefit by treatment, and that if he chooses to exercise such right he must do so in writing within five days of being so informed.
If the defendant requests such an examination, the court may in its discretion determine that the defendant is a drug dependent person, who would benefit by treatment, without ordering the examination. In such event, the court shall inform the defendant that he may request assignment to a drug treatment facility, and advise him of the consequences of assignment and that if he is so assigned the court proceedings shall be stayed for the term of such assignment.

The court proceedings shall be stayed for the period during which a request made under this section is under consideration by the court. If the defendant requests an examination, the court shall, unless the court has already determined that the defendant is a drug dependent person, appoint a psychiatrist, or if it is, in the discretion of the court, impracticable to do so, a physician, to conduct the examination at an appropriate location designated by it. In no event shall the request for such an examination or any statement made by the defendant during the course of

the examination, or any finding of the psychiatrist or physician be admissible against the defendant in any court proceedings.

The psychiatrist or physician shall report his findings in writing to the court within five days after the completion of the examination, stating the facts upon which the findings are based and the reasons therefor. If the defendant is also charged with a violation of any law other than a drug offense, the stay of the court proceedings may be vacated by the court upon the report of the psychiatrist or physician, whereupon the report shall be considered upon disposition of the charges in accordance with sections eleven and twelve, and the remaining provisions of this chapter shall not apply. If the defendant is charged with a drug offense only and if the psychiatrist or physician reports that the defendant is a drug dependent person who would benefit by treatment, the court shall inform the defendant that he may request assignment to a drug treatment facility, and advise him of the consequences of the assignment and that if he is so assigned the court proceedings shall be stayed for the term of such assignment.

If the defendant requests assignment and if the court determines that he is a drug dependent person who would benefit from treatment the court may stay the court proceedings and assign him to a drug treatment facility.

An order assigning a person under this section shall specify the period of assignment, which shall not exceed eighteen months or the period of time equal to the maximum sentence he could have received had he been found guilty of every count alleged in the complaint or indictment, whichever is shorter.

In determining whether or not to grant a request for assignment under this section, the court shall consider the report, the past criminal record of the defendant, the availability of adequate and appropriate treatment at a facility, the nature of the offense with which the defendant is charged including, but not limited to, whether the offense charged is that of a sale or sale to a minor, and any other relevant evidence. In the event that the defendant requests assignment and if the court determines that the defendant is a drug dependent person who would benefit by treatment, and the defendant is charged for the first time with a drug

offense not involving the sale or manufacture of dependency related drugs, and there are no continuances outstanding with respect to the defendant pursuant to this section, the court shall order that the defendant be assigned to a drug treatment facility without consideration of any other factors.

Before such assignment, the court shall consult with the facility or the division, to determine that adequate and appropriate treatment is available.

If the defendant requests assignment, and if the court determines that the defendant is a drug dependent person who would benefit by treatment, and the defendant is charged for the first time with a drug offense not involving the sale or manufacture of dependency related drugs, and there are no continuances outstanding with respect to the defendant pursuant to this section, and adequate and appropriate treatment at a facility is not available, the stay of court proceedings shall remain in effect until such time as adequate and appropriate treatment at a facility is available.

In all other cases, an assignment order shall not be made unless, after consultation with the facility or the division, the court determines that adequate and appropriate treatment is available, provided, however, that the court may in its discretion order that the stay of court proceedings remain outstanding until such time as adequate and appropriate treatment is available.

In the event that the stay of the court proceedings remains in effect for the reason that adequate and appropriate treatment at a facility is not available, the issue of the availability of adequate and appropriate treatment at a facility may be reopened at any time by the court on its own motion, or on motion by the prosecutor, or the defendant.

In no event shall any defendant be assigned pursuant to this section unless the defendant consents in writing to the terms of the assignment order.

If the psychiatrist or physician reports that the person is not a drug dependent person who would benefit by treatment, the defendant shall be entitled to request a hearing to determine whether or not he is a drug dependent person who would benefit by treatment.

The court may on its own motion, or shall, upon request of the defendant or his counsel, appoint an independent psychiatrist, or if it is impracticable to do so, an independent physician to examine the defendant and testify at the hearing. If the court determines that the defendant is a drug dependent person who would benefit by treatment, the procedures and standards applicable to a defendant who is determined by the court, following the report of the first examining psychiatrist or physician to be a drug dependent person who would benefit by treatment, shall apply to the defendant.

If the court does not assign the defendant to a facility, the stay of the court proceedings shall be vacated.

At any time during the term of assignment, the administrator may transfer any inpatient, to an outpatient program if he finds that the patient is a proper subject for an outpatient program; provided, however, that the administrator may retransfer the patient to an inpatient program if he finds that the person is not suitable for outpatient treatment, and provided further that immediately upon such transfer the administrator shall notify in writing the assigning court and the director of such transfer.

Any patient assigned under this section may apply in writing to the assigning court for discharge or transfer either from inpatient or outpatient treatment or from one facility to another; provided, however, that not more than one such application may be made in any three-month period. Upon receipt of an application for discharge or transfer, the court shall give written notice to the patient of his right to a hearing and to be represented by counsel at the hearing.

Within ten days of the receipt by the court of an application for discharge, the administrator and an independent psychiatrist, or, if none is available, an independent physician, designated by the court to make an examination of the patient shall report to the court as to whether or not the patient would benefit from further treatment at a facility. If the court determines that the patient would no longer so benefit, the patient's application for discharge shall be granted. If the court does not so determine, said application shall be denied.

Within ten days of the receipt by the court of an application for transfer, the administrator shall report to the court as to whether the patient is a proper subject for the transfer for which he has made application. If the court determines that the patient is a proper subject for the transfer, the patient's application for transfer shall be granted and the assigning court shall be so notified. If the court does not so determine, said application shall be denied.

Throughout the period of assignment at a facility pursuant to this section, the administrator of said facility shall provide quarterly written reports on the progress being made in treatment by the defendant to the assigning court. Failure to comply may be grounds for suspension of the facility's license. At the end of the assignment period, or when the patient is discharged by the administrator, or when the patient prematurely terminates treatment at a facility, whichever occurs first, the administrator shall notify in writing the assigning court and the director of such termination, and further shall state the reasons for such termination, including whether the defendant successfully completed the treatment program.

In reaching its determination of whether or not the defendant successfully completed the treatment program, the court shall consider, but shall not be limited to, whether the defendant cooperated with the administrator and complied with the terms and conditions imposed on him during his assignment. If the report states that the defendant successfully completed the treatment program, or if the defendant completes the term of treatment ordered by the court, the court shall dismiss the charges pending against the defendant. If the report does not so state, or if the defendant does not complete the term of treatment ordered by the court, then, based on the report and any other relevant evidence, the court may take such action as it deems appropriate, including the dismissal of the charges or the revocation of the stay of the court proceedings.

As to any defendant determined by the court pursuant to this section to be a drug dependent person who would benefit by treatment, concerning whom the court does not order assignment in lieu of prosecution, the court may in the event that such person is convicted of the criminal charges, order that he be afforded treatment pursuant to either section eleven or twelve. The provisions of this chapter shall apply to juveniles in

the same manner and under the same terms and conditions as adults; provided that no juvenile shall be committed to a facility without the consent of his parents or guardian.

The provisions of this section shall apply to proceedings in the superior court provided, however, that no defendant who has been examined for his drug dependency pursuant to this section in a district court shall have the right to a new examination if his case is bound over or appealed to the superior court; provided, however, that a superior court judge may, in his discretion, grant a second such drug examination.

During any stays authorized by this section, the court may in its discretion place the defendant in the care of a probation officer until he is accepted at a facility. For the purposes of this section, the term ''facility'' shall include federal facilities. The provisions of this section shall not apply to a person charged with violating sections thirty-two to thirty-two G, inclusive, of chapter ninety-four C of the General Laws.

G.L. c. 272, §7

Whoever, knowing a person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of his prostitution, from moneys loaned, advanced to or charged against him by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or shall share in such earnings, proceeds or moneys, shall be punished by imprisonment in the state prison for a period of five years and by a fine of five thousand dollars.

The sentence of imprisonment imposed under this section shall not be reduced to less than two years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served two years of such sentence. Prosecutions commenced under this section shall not be continued without a finding nor placed on file.

CERTIFICATE OF COMPLIANCE

I, the undersigned counsel for Amici Curiae, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to Mass.R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass.R.A.P. (16)(e) (references to the record); Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass.R.A.P. 16(h) (length of briefs); Mass.R.A.P. 18 (appendix to the briefs); and Mass.R.A.P. 20 (forms of briefs, appendices, and other papers).

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SJC-12617

COMMONWEALTH vs. JESSE CARRILLO.

Hampshire. February 4, 2019. - October 3, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Homicide. Controlled Substances. Wanton or Reckless Conduct. Practice, Criminal, Request for jury instructions.

Indictments found and returned in the Superior Court Department on September 28, 2015.

The cases were tried before John A. Agostini, J.

The Supreme Judicial Court granted an application for direct appellate review.

J.W. Carney, Jr. (Reyna Ramirez also present) for the defendant.

Cynthia M. Von Flatern, Assistant District Attorney (Jeremy C. Bucci, Assistant District Attorney, also present) for the Commonwealth.

Leo Beletsky, of New York, & Lisa Newman-Polk, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

Maura Healey, Attorney General, & Randall E. Ravitz, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

GANTS, C.J. In October 2013, Eric Sinacori, a twenty year old junior at the University of Massachusetts in Amherst, died from a heroin overdose. His death was yet another tragic loss of a promising young adult whose life was cut short by the proliferation of heroin and other opioids that have ravaged communities across the Commonwealth. The defendant, a graduate student at the university, had provided him with the heroin that caused his death. Following a jury trial, the defendant was convicted of involuntary manslaughter and distribution of heroin. We granted the defendant's application for direct appellate review.

On appeal, the defendant raises two arguments. First, he contends that the Commonwealth presented insufficient evidence to support the involuntary manslaughter conviction. Second, he claims that he is entitled to a new trial on the indictment charging distribution of heroin because the judge erred in denying his request to instruct the jury on the lesser included offense of possession of heroin for personal use.

To find a defendant guilty of involuntary manslaughter caused by wanton or reckless conduct, our case law requires proof beyond a reasonable doubt that the defendant engaged in conduct that creates "a high degree of likelihood that substantial harm will result to another." Commonwealth v. Welansky, 316 Mass. 383, 399 (1944). Selling or giving heroin

to another person may be wanton or reckless conduct where, under the circumstances, there is a high degree of likelihood that the person will suffer substantial harm, such as an overdose or death, from the use of those drugs. And in many cases the circumstances surrounding the distribution of heroin will permit a rational finder of fact to find beyond a reasonable doubt that the transfer of heroin created a high degree of likelihood of substantial harm, such as an overdose or death. But not every case will present circumstances that make such conduct "wanton or reckless." This is one such case.

We conclude that the mere possibility that the transfer of heroin will result in an overdose does not suffice to meet the standard of wanton or reckless conduct under our law. The Commonwealth must introduce evidence showing that, considering the totality of the particular circumstances, the defendant knew or should have known that his or her conduct created a high degree of likelihood of substantial harm, such as an overdose or death.

Here, no evidence was presented during the Commonwealth's case-in-chief that would permit a reasonable jury to conclude that the inherent possibility of substantial harm arising from the use of heroin -- which is present in any distribution of heroin -- had been increased by specific circumstances to create a high degree of likelihood of substantial harm. For instance,

the Commonwealth did not present evidence that the defendant knew or should have known that the heroin was unusually potent or laced with fentanyl; evidence that Sinacori was particularly vulnerable to an overdose because of his age, use of other drugs, or prior overdoses; or evidence that the defendant knew or should have known that Sinacori had overdosed but failed to seek help. In the absence of any such evidence, we conclude that the Commonwealth did not meet its burden of producing sufficient evidence for a reasonable jury to conclude that the defendant's conduct in this case created a high degree of likelihood that Sinacori would suffer substantial harm, such as an overdose or death, from his use of the heroin. The defendant's conviction of involuntary manslaughter must therefore be vacated, and a required finding of not guilty entered.

We affirm the defendant's conviction of distribution of heroin. We conclude that, in the circumstances of this case, the judge did not err in denying the defendant's request for a lesser included jury instruction on simple possession, even though Sinacori asked the defendant to purchase heroin for him and the defendant did not profit from the sale. Where the defendant traveled alone to New York to obtain the heroin that he later sold to Sinacori, and where Sinacori played no active role in the purchase of those drugs, no reasonable jury could

conclude that the defendant was anything other than a "link in the chain" of distribution of the heroin, rather than merely a joint possessor of the heroin for personal use.[1]

Discussion. 1. Involuntary manslaughter. We consider first whether the evidence was sufficient to support a finding of involuntary manslaughter beyond a reasonable doubt by a reasonable trier of fact. Because the defendant moved for a required finding of not guilty at the close of the Commonwealth's case, we review the sufficiency of only the evidence presented at the time the Commonwealth rested after its case-in-chief, viewing that evidence in the light most favorable to the Commonwealth. Commonwealth v. Berry, 431 Mass. 326, 330, 332 (2000) (sufficiency of evidence determined "by an examination of the evidence at the close of the Commonwealth's case-in-chief"). We reserve discussion of the evidence offered by the defendant after the Commonwealth rested for our analysis of his challenge to the judge's denial of his request for a jury instruction on the lesser included offense of possession of heroin for personal use.

[1] We acknowledge the amicus briefs submitted by the Attorney General and by the Committee for Public Counsel Services, The Health in Justice Action Lab at Northeastern University School of Law, and Massachusetts Association of Criminal Defense Lawyers.

a. The evidence viewed in the light most favorable to the Commonwealth. In the fall of 2013, the defendant and Sinacori lived in the same neighborhood in Amherst. Both were heroin users. Based on the text messages presented in evidence, a reasonable fact finder could have inferred that the defendant met Sinacori shortly before September 30, 2013, and Sinacori learned that the defendant periodically traveled to purchase heroin. In a text message sent on September 30, Sinacori asked the defendant when he was making "the next run." Sinacori indicated he would be willing to purchase "another bun" of heroin[2] when the defendant made that "run." The defendant said he could provide two "buns" for $180, but if Sinacori wanted only one "bun," it would cost one hundred dollars. The defendant also sent a text message to Sinacori that he would have to pay in advance.

They arranged to meet on October 1, when the defendant left Massachusetts to travel to the Bronx borough of New York to pick up the "buns." During the defendant's trip, the defendant told Sinacori that he was also going to a drug store to purchase a

[2] The jury could infer through the totality of the evidence presented by the Commonwealth in its case-in-chief that a "bun" referred to a ten-bag "bundle" of heroin that cost one hundred dollars. This was later confirmed by the defendant in his testimony.

"new rig";[3] Sinacori sent a text message that he would like to split a "10 pack" with the defendant, unless the defendant needed them all. The defendant, upon his return, invited Sinacori to his apartment to "[d]o some."

Sinacori went to the defendant's apartment that evening and used heroin with the defendant. Later that night, Sinacori asked the defendant in a text message if he "could get another bun tomorrow." The defendant replied that if he were to "let go one from [his] headstash," he would charge "mad dollar" for it. Sinacori agreed to wait for the defendant's next trip; the defendant replied by text that he would be leaving at 5 P.M. on October 3. Sinacori gave the defendant seventy dollars before the defendant left on his trip, and asked the defendant to "spot" him thirty dollars. The defendant drove to the Bronx to buy heroin. At 8:44 P.M. that evening, the defendant sent Sinacori a text message stating, "Candy acquired," and added that he was on his way back. Later, the defendant sent a text message that he was delayed because of traffic in Hartford, Connecticut. Sinacori replied that his "veins are crying" and that he was hurting. At 11:40 P.M., the defendant sent a text message that he knew that Sinacori was "hurtin but u will very

[3] Although the Commonwealth did not explain or introduce evidence as to what a "rig" is in this context, it refers to "slang for a hypodermic needle and syringe used to inject heroin." State v. Ferrell, 2017-Ohio-9341 ¶16 (Ohio Ct. App.).

soon be in the loving comforting arms of Miss H." The defendant said he would drive to Sinacori's home so that Sinacori would not "have to go far in hurt mode." As he approached, the defendant asked Sinacori whether he had the balance of thirty dollars; Sinacori sent a text message that he only had twenty dollars. They agreed that either the defendant would give him "nine," inferably referring to nine out of ten bags of heroin, or Sinacori would get the remaining ten dollars the next day. The defendant arrived at Sinacori's home just before midnight, and at 12:20 A.M sent a text message to Sinacori to ask, "Ehh??? ;)" and "How much tropicana did u drink?," which inferably was asking him how much heroin he had used.[4] Sinacori did not reply to either text.

On the afternoon of October 4, Sinacori's father entered his son's apartment and found his son dead, with a used needle nearby. The police found three waxed bags with a Tropicana stamp that had been torn open, and six more bags that had not been opened. The analyst at the drug laboratory found that the bags contained heroin with a purity range of "roughly from [fifty-eight] to [sixty-nine] percent." The autopsy conducted by the medical examiner revealed that the cause of death was "acute heroin intoxication." A toxicology specialist testified

[4] The brand of heroin purchased by the defendant bore the mark "Tropicana" on its packaging.

that the opiate found in Sinacori's blood was heroin and that no fentanyl was present in the blood.

From this evidence, a reasonable jury could have inferred that the defendant and Sinacori on October 1 together used the heroin the defendant had procured earlier that day from the Bronx. Two days later, the defendant traveled again to the Bronx to obtain a "bun" of heroin for Sinacori, and more heroin for himself. When the defendant was traveling through Hartford on his way back to Amherst, Sinacori was suffering from withdrawal pain. The defendant delivered nine bags of heroin to Sinacori that night, omitting one bag because Sinacori had apparently not paid the remaining ten dollars he owed to the defendant. Sinacori used three of those bags and this time overdosed, causing his death.

The Commonwealth contends that this evidence reveals at least two circumstances showing that the defendant knew or should have known that his conduct was wanton or reckless. First, there was evidence from the text messages that Sinacori was suffering from withdrawal symptoms ("my veins are crying") before he used the heroin, and the Commonwealth argues that the defendant should have known that an addicted person in withdrawal is more likely to overdose. But there was no expert evidence -- or even lay testimony -- that a heroin user is more likely to overdose when he or she is suffering from withdrawal.

We cannot reasonably take judicial notice that this is true, or that the defendant or a reasonable person would know it to be true.

Second, the Commonwealth claims that when his text to Sinacori at 12:20 A.M. asking, "How much tropicana did u drink?" went unanswered, the defendant should have recognized that Sinacori had overdosed and immediately sought help. We decline to give so much inferential weight to the failure of a person to respond to such a text message.

In sum, there was no evidence that the defendant knew or should have known that the transfer of heroin to Sinacori created a high degree of likelihood of substantial harm, such as an overdose or death. As discussed in greater detail infra, where courts in drug-induced homicide cases have found the evidence sufficient to support a conviction of involuntary manslaughter, there generally has been evidence of specific circumstances that a reasonable person would understand to heighten the risk of harm, such as where the drugs were unusually potent, the user was particularly vulnerable to an overdose, or the defendant failed to seek help after the user became unconscious or unresponsive. Of course, this list is not exhaustive of all the circumstances that may increase the risk of serious harm.

In this case, however, the Commonwealth proved little more than the fact that heroin was transferred from one person to another. Here, the heroin in question was not laced or tainted with fentanyl; the defendant purchased the same brand of heroin for his own personal use; the defendant observed Sinacori use the same brand of heroin two days earlier without apparent problem; the defendant did not personally inject Sinacori with heroin or any other drugs; there is no evidence that the defendant had any knowledge of any other drug or alcohol use by Sinacori that could have increased the likelihood of an overdose; and the defendant did not observe Sinacori overdose and fail to call for help. Nor was there any expert testimony regarding the relative potency of heroin of the purity that the drug laboratory analyst found, or regarding the likelihood that heroin of that purity would result in an overdose.

The issue we confront, then, is whether evidence of heroin distribution alone is sufficient to support a conviction of involuntary manslaughter where the heroin caused a tragic death.

b. Wanton or reckless conduct in the context of a transfer of heroin. "Involuntary manslaughter is 'an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct.'" Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010), quoting

Commonwealth v. Gonzalez, 443 Mass. 799, 808 (2005). Our model homicide instructions, adopting language from Commonwealth v. Welansky, 316 Mass. at 399, provide that "[w]anton or reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another." Model Jury Instructions on Homicide 88 (2018) (involuntary manslaughter). See Welansky, supra ("The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another"). In determining what actions are wanton or reckless, we focus on "the conduct that caused the result, . . . not the resultant harm" (emphasis added). Commonwealth v. Hardy, 482 Mass. 416, 424 (2019).

The phrase -- "a high degree of likelihood that substantial harm will result to another" -- separates wanton or reckless conduct from the unreasonable risk of harm that constitutes negligence or gross negligence. As this court declared in Welansky, 316 Mass. at 399: "The words 'wanton' and 'reckless' are thus not merely rhetorical or vituperative expressions used instead of negligent or grossly negligent. They express a difference in the degree of risk and in the voluntary taking of risk so marked, as compared with negligence, as to amount substantially and in the eyes of the law to a difference in

kind." The risk of harm must be more than a possible or unreasonable risk; it must reach a "high degree of likelihood." See id. See also id. at 397 ("Usually wanton or reckless conduct consists of an affirmative act, like driving an automobile or discharging a firearm, in disregard of probable harmful consequences to another" [emphasis added]). And the harm to another person must be substantial, involving death or grave bodily injury. See Sandler v. Commonwealth, 419 Mass. 334, 336 (1995) ("The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run that risk").

Where the Commonwealth alleges that a defendant committed involuntary manslaughter by selling or giving heroin to another person, who died from its use, the distribution of that heroin must be proven to be wanton or reckless conduct, which means that the distribution must have created a high degree of likelihood of death or grave bodily injury. The most common risk of death or grave bodily injury from the distribution of heroin arises from the risk of an overdose. See National Institutes of Health: National Institute on Drug Abuse, Drug Facts: Heroin (revised June, 2019), https://www.drugabuse.gov/publications/drugfacts/heroin [https://perma.cc/G43Q-6R6W] (noting that heroin overdose results in "breathing [that] slows or stops, . . . decreas[ing] the amount of oxygen that reaches

the brain, a condition called hypoxia[,] [which] can have short- and long-term effects and effects on the nervous system, including coma and permanent brain damage"). We recognize that every use of heroin presents the possibility of an overdose causing death or grave bodily injury, but "a high degree of likelihood" of death or grave bodily injury requires more than the mere possibility of an overdose; it requires proof of a high degree of likelihood of an overdose. See Lofthouse v. Commonwealth, 13 S.W.3d 236, 241 (Ky. 2000) (conviction of reckless homicide based on transfer of illegal drugs "required proof beyond a reasonable doubt that there was a substantial and unjustifiable risk that [the victim] would die if he ingested the cocaine and heroin furnished to him by [the defendant]"); State v. Shell, 501 S.W.3d 22, 32-33 (Mo. Ct. App. 2016) (to prove involuntary manslaughter based on transfer of heroin, "it was incumbent upon the State to prove, beyond a reasonable doubt, that [d]efendant was aware of the risk that [d]ecedent's death was probable as a result of injecting heroin").[5]

[5] We recognize that, in some circumstances, such as where the health of the user is already fragile, or the user employs contaminated needles, the use of heroin might pose a risk of death or grave bodily injury even without an overdose. We need not address that possibility here, where there was no evidence that Eric Sinacori's health was impaired or that any equipment he used to inject heroin was contaminated.

Similarly, we also recognize that there may be circumstances where a defendant provides heroin to a user who

Our model jury instructions also provide:

> "If the defendant realized the grave risk created by his conduct, his subsequent act amounts to wanton or reckless conduct whether or not a reasonable person would have realized the risk of grave danger. Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton or reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another."

Model Jury Instructions on Homicide, supra at 89-90. Therefore, to prove a defendant guilty of involuntary manslaughter in these circumstances, the Commonwealth must prove not only that the defendant's conduct created a high degree of likelihood that the user would overdose from the heroin, but also that the defendant knew of this high degree of likelihood or should have known of it, given his own personal knowledge and experience.

c. Massachusetts case law. "Perhaps it is a testament to prosecutorial discretion, trial judges properly dismissing cases based on insufficient evidence, and juries conscientiously performing their function that we have had few occasions to

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overdoses in the presence of the defendant, and the defendant fails to seek medical attention or other help to the overdose victim, who dies. In these circumstances, even if there was not a high degree of likelihood of an overdose, the failure of the person who provided the heroin that caused the overdose to exercise reasonable care to prevent the overdose victim from dying may be sufficient to support a conviction of voluntary manslaughter. See Commonwealth v. Levesque, 436 Mass. 443, 450 (2002) ("Where a defendant's failure to exercise reasonable care to prevent the risk he created is reckless and results in death, the defendant can be convicted of involuntary manslaughter").

review convictions on the basis that the evidence was insufficient to prove 'wanton or reckless' conduct." Hardy, 482 Mass. at 423. We have decided three cases where a defendant was prosecuted for involuntary manslaughter after providing heroin to a person who died from an overdose. Two were full opinions: Commonwealth v. Catalina, 407 Mass. 779 (1990), and Commonwealth v. Auditore, 407 Mass. 793 (1990). The other, Commonwealth v. Perry, 416 Mass. 1003 (1993), was a short rescript opinion in which we adopted the analysis of the Appeals Court from the same case.

In each of these cases, the issue before the court was whether the evidence before the grand jury was sufficient to support the probable cause needed for an indictment, not whether the evidence was sufficient to support a conviction of involuntary manslaughter. See Auditore, 407 Mass. at 796 ("Emphasizing that we are dealing only with the standard of probable cause"); Catalina, 407 Mass. at 789-790 ("The defendant has not yet been tried on this charge, so we are not concerned with whether sufficient evidence exists to warrant a finding of his guilt beyond a reasonable doubt. Rather, we consider only whether the information before the grand jury was adequate to establish his identity and probable cause to arrest him for the crime charged"). See also Perry, 416 Mass. at 1003-1004. This is the first case of involuntary manslaughter based on the

transfer of drugs where we address the sufficiency of the evidence to support a finding of proof beyond a reasonable doubt, rather than probable cause.

The standard for probable cause "is a relatively low threshold, requiring only sufficiently trustworthy information to instill in a reasonable person the requisite belief of criminality" (quotations and citation omitted). Paquette v. Commonwealth, 440 Mass. 121, 132 (2003), cert. denied, 540 U.S. 1150 (2004). Yet in finding probable cause in Catalina, 407 Mass. at 790 n.12, we noted that "there was evidence that the defendant knew he was distributing a highly potent brand of heroin, that [the deceased] had a low tolerance for the drug and had overdosed in the past, that she could not handle a whole bag of this type of heroin, and that she needed to be warned not to 'do a whole one.'" In finding probable cause in Auditore, 407 Mass. at 796, we noted that the brand of heroin sold by the defendant "was twice as strong as the average dose," that he had a supply of this brand of heroin in his apartment in Gloucester, and that this brand of heroin "had caused at least two deaths by overdose in the Gloucester area." And in finding probable cause in the rescript opinion in Perry, 416 Mass. at 1004, we simply adopted the reasons advanced by the Appeals Court. In the Appeals Court opinion, it was noted that there was evidence that the defendant knew that the heroin she had obtained for the

deceased was unusually dangerous; the defendant, after she learned that the deceased had collapsed after injecting himself, commented, "That's what happens when you get good stuff." Commonwealth v. Perry, 34 Mass. App. Ct. 127, 130 (1993). Consequently, even though the court in these cases was determining only whether there was probable cause to support an indictment for involuntary manslaughter, the court noted circumstances in each of those cases that are not present here -- facts that a reasonable person would understand to increase the risk of substantial harm.

Two reported decisions by the Appeals Court have upheld convictions of involuntary manslaughter where the defendant provided illegal drugs to another person who overdosed and died. In both cases, there was specific evidence that the defendant knew or should have known that his or her conduct created a high degree of likelihood of substantial harm to another.

In Commonwealth v. Osachuk, 43 Mass. App. Ct. 71, 72 (1997), the Appeals Court affirmed an involuntary manslaughter conviction where the defendant, having earlier provided the victim with methadone and having loaned her money to purchase cocaine, provided the victim with heroin, knowing that she intended to mix it with cocaine to produce a "speed ball," and then after she became unconscious, personally injected her with more cocaine to try to wake her up. "[E]xperts for both the

Commonwealth and the defense agreed that the results of blood tests were consistent with death caused by cocaine, heroin and methadone intoxication." Id. at 73. Perhaps because of the weight of the evidence, the defendant on appeal challenged only the sufficiency of the evidence as to causation, and did not challenge whether the defendant's conduct was wanton or reckless.[6] Id. at 71.

In Commonwealth v. Vaughn, 43 Mass. App. Ct. 818, 819-820 (1997), the defendant injected the victim with heroin and, after she passed out and became unresponsive, left her alone "for some time," returned and slapped her in an effort to rouse her, and when that failed, he "went back downstairs and watched television." See id. at 825-826 (jury could infer defendant's subjective awareness of risks of injecting heroin from his conduct after victim passed out).

Another case, Commonwealth v. Walker, 442 Mass. 185 (2004), merits attention, although it did not concern the transfer of heroin. In Walker, the defendant repeatedly mixed a high dose of sleeping medication -- which contained a benzodiazepine called temazepam -- into drinks that he prepared for various women. Id. at 187-189 & n.3. Eventually, one woman died from a combination of temazepam and alcohol. Id. at 189. We affirmed

[6] The defendant here does not challenge the causal link between his conduct and Sinacori's death.

the jury's conviction of involuntary manslaughter. Id. at 204. In so doing, we identified the specific evidence that proved that the defendant knew or should have known that his conduct created a high degree of likelihood that substantial harm would result. We noted first that the defendant used a particularly high dose, and that the Commonwealth introduced testimony from an expert who testified as to the toxicity of the dose the defendant administered. Id. at 189, 192. Importantly, we also noted that the defendant had engaged in such conduct on previous occasions and "watched [the] injurious effects take hold," and that he thus should have understood that his actions would likely "be toxic, if not lethal." Id. at 193.

The case now before us is unique, not only because it is the first time we have addressed the sufficiency of the evidence for an involuntary manslaughter conviction based on the distribution of heroin, but also because it is the first time we have confronted such a case where there was no evidence, for example, of the unusual potency of the heroin, of the vulnerability of the user to an overdose, or of the defendant's failure to seek help when the user appeared to overdose.

The Commonwealth contends that we have already decided that the distribution of heroin of unknown strength alone, without more, is sufficient to support a conviction of involuntary

manslaughter. In making this argument, the Commonwealth relies upon our statement in Perry:

> "In Commonwealth v. Catalina, 407 Mass. 779, 790-791 (1990), . . . we held that the distributing of a particularly potent form of heroin to one who injected it and died as a result constituted evidence sufficient for an indictment by a grand jury of manslaughter. See [id.] at 790 n.12. However, we did not limit the effect of this rule to that specific form of heroin because all heroin of unknown strength is inherently dangerous and carries a 'high probability that death will occur.' Id. at 791, quoting with approval People v. Cruciani, 70 Misc. 2d 528, 536 (N.Y. [Suffolk Co. Ct.] 1972)."

Perry, 416 Mass. at 1004.

The last sentence of this statement is dictum; in Catalina, as earlier noted, we identified considerable evidence that the defendant should have recognized would result in substantial harm, and therefore did not need to address whether the indictment could survive without any such evidence. But it is admittedly powerful dictum because, if it is true that the use of "all heroin of unknown strength . . . carries 'a high probability that death will occur,'" then the distribution of heroin alone would suffice to support a finding of wanton or reckless conduct because it would always create "a high degree of likelihood that substantial harm will result to another." And we note that at least one other State court has relied on this language from our Catalina and Perry opinions for the proposition that, in Massachusetts, the distribution of heroin alone is sufficient to support a guilty finding of involuntary

manslaughter where the heroin causes the user's death. See State v. Miller, 874 N.W.2d 659, 664 (Iowa App. 2015). We now reject that proposition.

The Commonwealth put forth no evidence at trial that the use of heroin generally carries a "high probability" of death or even overdose. In the absence of such evidence, if the assertion that "all heroin of unknown strength . . . carries 'a high probability that death will occur'" is to be used to support the sufficiency of evidence at trial, a reasonable person must know this to be true. But we cannot infer that a reasonable person would know this to be true unless it indeed is true. Neither this court in Perry or Catalina, nor the New York trial court in Cruciani, where the statement originated, provided any empirical factual support for that statement.[7]

[7] In the New York case cited by the court, People v. Cruciani, 70 Misc. 2d 528, 529, 537 (N.Y. Suffolk Co. Ct. 1972), the trial judge denied the defendant's motion to dismiss the counts in the indictment charging reckless manslaughter in the second degree and criminally negligent homicide. It is noteworthy that, after the defendant was convicted of reckless manslaughter, the Court of Appeals of New York, in affirming the conviction, rejected the defendant's claim that the evidence of recklessness was insufficient by noting that "the proof show[ed], among other things, that defendant Cruciani injected [the victim] with heroin (1) when, in his own words, she was already 'completely bombed out on downs' (depressants like morphine into which heroin is rapidly converted by the body's metabolic processes), (2) at a time when she had lost the capacity to 'walk or talk straight', and (3) despite his admission of awareness that there was a substantial possibility that a further injection in her then drug-saturated state would cause her to 'fall out' (in modern vernacular of drug users,

Heroin is undoubtedly an inherently dangerous drug, and heroin overdoses have undoubtedly caused a tragic number of deaths. See Massachusetts Department of Public Health, Data Brief: Opioid-Related Overdose Deaths among Massachusetts Residents, at 2 (Feb. 2019), https://www.mass.gov/files/documents/2019/02/12/Opioid-related-Overdose-Deaths-among-MA-Residents-February-2019.pdf [https://perma.cc/2Z2Z-RN2W] (over 1,000 Massachusetts residents died from opioid-related overdoses each year between 2014 and 2018). But we can find no evidence -- nor has the Commonwealth pointed us to any -- proving that any use of heroin of unknown strength carries a "high probability" of substantial harm, such as an overdose or death. According to recent data gathered by the Substance Abuse and Mental Health Services Administration, in 2017 approximately 652,000 Americans suffered from "heroin use disorder," which is defined as "clinically significant impairment caused by the recurrent use of heroin." Substance Abuse and Mental Health Services Administration, Key Substance Use and Mental Health Indicators in the United States: Results from the 2017 National Survey on Drug Use and Health 33 (2017), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf [https://perma.cc/V92Q-2DJ8]. And 886,000

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that she would die)." People v. Cruciani, 36 N.Y.2d 304, 305 (1975).

Americans used heroin that year. Id. at 19. Among those individuals, the Centers for Disease Control and Prevention reported 15,482 drug overdose deaths involving heroin. National Institutes of Health: National Institute on Drug Abuse, Overdose Death Rates (revised Jan. 2019), https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates [https://perma.cc/2ZC8-X7NN]. This is, of course, a national tragedy. But as devastating as the heroin epidemic has been, we cannot rationally conclude from this data that every single instance of heroin distribution carries a "high probability" that the user will die.

The rate of overdose, of course, is higher than the rate of death. Reliable data regarding the incidence of overdoses (or the ratio of overdoses to deaths) is more difficult to obtain than data regarding the incidence of death, because so many overdoses are unreported. The Centers for Disease Control and Prevention has estimated that in 2015, 81,326 emergency department visits occurred for "heroin-related poisonings" in the United States, a year in which 12,989 individuals were reported to have died from drug overdoses involving heroin. See Centers for Disease Control and Prevention, 2018 Annual Surveillance Report of Drug-Related Risks and Outcomes 19, https://www.cdc.gov/drugoverdose/pdf/pubs/2018-cdc-drug-surveillance-report.pdf [https://perma.cc/23PU-QN3B]; Rudd,

Seth, David, & Scholl, Increases in Drug and Opioid-Involved Deaths -- United States, 2010-2015, 65 MMRW 1445, 1450 (Dec. 30, 2016). But even if we recognize that the rate of overdose substantially exceeds the rate of death, we still could not reasonably assume that all heroin of unknown strength carries a high probability that overdose will occur, or that a reasonable person would know that to be true. It is fair to assume that a reasonable person would know that the use of heroin of unknown strength is inherently dangerous and carries a significant possibility of overdose or death. But to suggest that a reasonable person would know that any use of heroin carries a high probability or a substantial likelihood of overdose or death is a bridge too far.[8]

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[8] It is worthy of note that the dramatic increase in the overdose death rate over the past decade is mainly attributable to the widespread introduction of synthetic fentanyl. See National Institutes of Health: National Institute on Drug Abuse, Overdose Death Rates (revised Jan. 2019), https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates [https://perma.cc/2ZC8-X7NN]. According to the Massachusetts Department of Public Health, "[a]mong the 1,902 [Massachusetts] opioid-related overdose deaths in 2018 where a toxicology screen was also available, 1,695 of them (89%) had a positive screen result for fentanyl. In the fourth quarter of 2018, heroin or likely heroin was present in approximately 32% of opioid-related overdose deaths that had a toxicology screen." Massachusetts Department of Public Health, Data Brief: Opioid-Related Overdose Deaths among Massachusetts Residents 2(May 2019), https://www.mass.gov/files/documents/2019/05/15/Opioid-related-Overdose-Deaths-among-MA-Residents-May-2019.pdf [https://perma.cc/2BSH-YY8T]. As discussed supra, the toxicology results of Sinacori's blood revealed heroin, not fentanyl.

The creation of a per se rule -- that the transfer of heroin to a person addicted to heroin, without more, is sufficient to support a finding of the required element of wanton or reckless conduct -- is inconsistent, both jurisprudentially and empirically, with the requirement that conduct, to be found wanton or reckless, must create a high degree of likelihood that substantial harm will result to another. For all practical purposes, an indictment for involuntary manslaughter premised on the transfer of heroin revises the definition of wanton or reckless. We decline to carve out a heroin exception to our law of involuntary manslaughter. Nor need we do so where the distribution of heroin alone carries severe penalties and where, when specific evidence of circumstances increasing the risk of harm is proven, a distribution of heroin resulting in death may be punished as involuntary manslaughter.

d. Approach of other State courts. Although the definition of "wanton or reckless" as applied to involuntary manslaughter is not uniform among the fifty States, we think it worthy of note that numerous State appellate courts that have recently considered the issue have declined to adopt a per se rule that the distribution of heroin alone, without more, suffices to support a verdict of involuntary manslaughter.

The Supreme Court of Kentucky in Lofthouse, 13 S.W.3d at 241, in vacating a conviction of reckless homicide, rejected both the defendant's "proposition that furnishing controlled substances to one who subsequently dies from their ingestion can never support a conviction of criminal homicide and the Commonwealth's proposition that such will always support a conviction" (emphasis in original). Id. The court highlighted the importance of additional evidence:

> "[G]uilt of criminal homicide, like any other offense, depends upon proof. . . . For example, in the Tennessee case of State v. Randolph, [676 S.W.2d 943 (Tenn. 1984)], there was evidence that another of one defendant's customers had died the same way two weeks earlier, and that another defendant knew that the heroin sold to the victim was 'uncut' and dangerous because it had not been diluted. And in the New York case of People v. Cruciani, [36 N.Y.2d 304 (1975)], there was evidence that the defendant injected the victim with heroin after she was already 'bombed out' on depressants and that the defendant was aware of the substantial possibility that the injection would cause the victim's death."

Lofthouse, supra.

The Missouri Court of Appeals in Shell, 501 S.W.3d at 32, vacated a defendant's conviction of involuntary manslaughter where the "[d]efendant's [only] affirmative act was delivering heroin to" the victim. The court concluded that, despite State testimony by a forensic pathologist of the inherent risk of heroin overdose, the State did not prove beyond a reasonable doubt that the defendant acted recklessly, because it did not prove beyond a reasonable doubt that the victim's death was

probable under the circumstances. Id. at 33. It further noted that "[w]hile we recognize the concern of the heroin epidemic and the rise in deaths as a result of heroin use . . . [t]o rule as the State suggests and hold that [the d]efendant acted recklessly simply by providing [the victim] with heroin would create a per se involuntary manslaughter rule, which we are unwilling [to] impose upon criminal defendants absent clear legislative intent." Id.

The Court of Appeals of Iowa came to a similar conclusion, also vacating a conviction of involuntary manslaughter arising out of an overdose death. See Miller, 874 N.W.2d at 667. The court determined that, without circumstances increasing the risk of harm, there was insufficient evidence to establish that the defendant acted recklessly. Id. at 666 (there must be "evidence establishing an increased risk of death and the defendant's awareness of an elevated risk of overdose and death beyond mere delivery of the controlled substance"). As to the State's suggestion "that the delivery of heroin, without more, is always substantial evidence of recklessness," the court rejected "this per se or categorical approach," id. at 664, for three reasons:

> "First, such an approach is inconsistent with our case law regarding criminal recklessness. The mere delivery of heroin, without more, does not necessarily establish a sufficiently material increase in the probability of the proscribed harm. More important, the per se approach is inconsistent with the culpability aspect of recklessness, in which the jury must determine whether the defendant had

> or should have had a 'subjective awareness of the risk' such that his disregard of the increased risk warrants criminal sanction. . . . Second, the per se approach is inconsistent with our general approach to criminal proceedings, which requires the State to prove beyond a reasonable doubt each and every element of the offense. . . . Third, adopting a rule of strict liability for death resulting from delivery of a controlled substance is a policy decision best addressed by the legislature rather than the judiciary."[9]

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[9] As to this third point, at least eighteen States have enacted laws providing for strict liability homicide where a person transfers heroin to another who later overdoses and dies. See Alaska Stat. § 11.41.120(a)(3) (manslaughter); Colo. Rev. Stat. § 18-3-102(1)(e) (murder in first degree only as to distribution to minor on school grounds); Fla. Stat. § 782.04(1)(a)(3) (murder in first degree); 720 Ill. Comp. Stat. 5/9-3.3 ("drug-induced homicide" with minimum sentence of fifteen years); La. Rev. Stat. Ann. § 14:30.1(A)(3) (second degree murder); Mich. Comp. Laws § 750.317a (drug-induced homicide with sentence up to life); Minn. Stat. § 609.195(b) (murder in third degree); N.H. Rev. Stat. § 318-B:26(IX) (strict liability homicide with sentence up to life); N.J. Stat. Ann. § 2C:35-9 (strict liability homicide); N.C. Gen. Stat. § 14-17(b)(2) (second degree murder); Okla. Stat. tit. 21, § 701.7(B) (murder in first degree); 18 Pa. Cons. Stat. § 2506 ("drug dealing resulting in death" as homicide offense); R.I. Gen. Laws § 11-23-6 (drug-induced homicide only as to distribution to minor, carrying life sentence); Tenn. Code Ann. § 39-13-210(a)(2) (second degree murder); Wash. Rev. Code § 69.50.415 ("controlled substances homicide"); W. Va. Code § 61-2-1 (murder in first degree); Wis. Stat. § 940.02(2)(a), (b) (first degree reckless homicide); Wyo. Stat. Ann. § 6-2-108 (drug induced homicide).

Three other States ratchet up the permissible sentencing range for drug distribution where it results in death from an overdose. See Del. Code Ann. tit 16, § 4752B; Kan. Stat. Ann. § 21-5430; Vt. Stat. Ann. tit. 18, § 4250.

The Massachusetts Legislature has considered strict liability homicide legislation but did not enact it. See 2017 Senate Doc. No. 2158 at 7 ("Any person who . . . distributes[ ] or dispenses heroin . . . is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and shall be punished by imprisonment for life or for

Id. at 664-665.

Most recently, in State v. Thomas, 464 Md. 133, 140 (2019), the Court of Appeals of Maryland -- Maryland's highest court -- affirmed the defendant's conviction of involuntary manslaughter on the theory of gross negligence but declared that "a per se rule providing that all heroin distribution resulting in death constitutes gross negligence involuntary manslaughter is unwise and not in keeping with our precedent." Id. at 167. "Instead," the court stated, "we must consider the inherent dangerousness of distributing heroin with the attendant environmental risk factors presented by each case." Id.[10] That conclusion is consistent with our holding here.

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any term of years as the court may order, and by a fine or not more than $25,000; provided, however, that the sentence of imprisonment . . . shall not be reduced to less than 5 years, nor suspended, nor shall any such person be eligible for probation, parole or furlough or receive a deduction from his or her sentence for good conduct until such person shall have served 5 years of such sentence").

A bill with the same text as the 2017 bill was reintroduced in 2019. See 2019 House Doc. No. 1411.

[10] We recognize that the court in State v. Thomas, 464 Md. 133, 145, 147-150, 180 (2019), found the evidence sufficient to establish gross negligence involuntary manslaughter based on facts comparable to those in the instant case: the victim was known to be drug addicted, the defendant had sold four bags of heroin to the nineteen year old victim on the night he died from an overdose, the defendant himself had regularly used four bags of the same heroin product and had not overdosed, there was no evidence of the unusual potency of the heroin, and, when confronted with the victim's death, the defendant told the

Today we simply reaffirm that "guilt of criminal homicide, like any other offense, depends upon proof." Lofthouse, 13 S.W.3d at 241. Where there is specific evidence that the defendant knew or should have known that his or her conduct created "a high degree of likelihood that substantial harm will result," Welansky, 316 Mass. at 399, the Commonwealth may indeed convict the person who sold or gave the heroin to the decedent of involuntary manslaughter. But here, the Commonwealth in its

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police lieutenant, "He couldn't have overdosed off what I sold him; I only sold him four bags."

But we also recognize that the legal standard in Maryland for gross negligence involuntary manslaughter differs from our legal standard for involuntary manslaughter, even though Maryland law equates "'gross negligence' with a 'wanton or reckless disregard for human life'" (citation omitted). Id. at 153. Although the common law of Massachusetts defines wanton or reckless conduct as conduct that creates a high degree of likelihood that substantial harm will result to another, under the common law of Maryland, "'gross negligence' mens rea is established by asking whether the accused's conduct, under the circumstances, amounted to a disregard of the consequences which might ensue and indifference to the rights of others" (quotations omitted). Id., quoting State v. Albrecht, 336 Md. 475, 500 (1994). The Thomas court added that, for criminal gross negligence, "the inherent dangerousness of the act engaged in, as judged by a reasonable person, . . . is combined with environmental risk factors which, together, make the particular activity more or less 'likely at any moment to bring harm to another'" (emphasis added). Thomas, supra at 159, quoting Johnson v. State, 213 Md. 527, 533 (1957). Indeed, the court noted that the holdings of the Kentucky court in Lofthouse, 13 S.W.3d at 241, and the Iowa court in Miller, 874 N.W.2d at 663, were "inapt" because the standard for criminal gross negligence in those States "requires the State to demonstrate a higher 'probability of harm' than the one borne out by our cases." Thomas, supra at 166.

case-in-chief proved little more than that Sinacori overdosed and died after using heroin given to him by the defendant; it proved no additional facts that transformed the inherent possibility of an overdose arising from any use of heroin into a high degree of likelihood of an overdose. As a result, the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant knew, or that a reasonable person would have known, that there was a high degree of likelihood that Sinacori would overdose from the use of that heroin. Consequently, the conviction cannot stand. We remand the case to the Superior Court for entry of a required finding of not guilty on the involuntary manslaughter indictment.

2. Failure to give instruction on the lesser included offense of simple possession of heroin. As another consequence of his transfer of heroin to Sinacori, the defendant was convicted of distribution of heroin in violation of G. L. c. 94C, § 32.[11] The second issue on appeal is whether the judge erred by declining to instruct the jury on the lesser included offense of simple possession of heroin. The defendant argues that the jury should have been given the opportunity to convict

[11] The defendant was sentenced on the heroin distribution conviction to two years and six months in a house of correction, with one year to serve and the balance suspended and five years' probation. He was sentenced to a concurrent probation term of five years on the involuntary manslaughter conviction.

him only of possession, not distribution, because he and Sinacori were engaged in a "joint venture" to possess heroin when the defendant purchased it in New York. The defendant twice requested this instruction -- before trial and after the close of all the evidence -- and objected to the judge's refusal to give it. Accordingly, we review the judge's decision for prejudicial error. Commonwealth v. Henderson, 434 Mass. 155, 158 (2001).

In contrast with our evaluation of the sufficiency of the evidence of involuntary manslaughter, where we considered only the evidence that was presented before the defendant moved for a required finding of not guilty after the Commonwealth rested its case-in-chief, here we review all the evidence presented at trial to determine whether it would permit the jury to find the defendant guilty only of simple possession. See id. "In determining whether any view of the evidence would support a conviction on a lesser included offense, 'all reasonable inferences must be resolved in favor of the defendant,' Commonwealth v. Vanderpool, 367 Mass. 743, 746 (1975)." Commonwealth v. Gilmore, 399 Mass. 741, 746 (1987), quoting Commonwealth v. Egerton, 396 Mass. 499, 503 (1986). If the evidence would so permit, "a judge must, upon request, instruct the jury on the possibility of conviction of the lesser crime"

(citation and emphasis omitted). Commonwealth v. Roberts, 407 Mass. 731, 737 (1990).

a. The defendant's testimony. The defendant testified in his own defense and admitted that he possessed heroin on the evening in question and gave some of that heroin to Sinacori. The defendant testified that he frequently drove from Amherst to the Bronx -- up to four times per week -- to purchase heroin for his own personal use. After Sinacori asked the defendant to purchase some heroin for him, the defendant on October 1, 2013, collected one hundred dollars from Sinacori and drove to New York to purchase heroin both for himself and for Sinacori. Upon his return, he and Sinacori each used some of their own heroin in the defendant's apartment. Sinacori sent him a text message on October 3 to ask if he was "making another run," which the defendant understood to mean that Sinacori wanted more heroin. Sinacori provided the defendant with seventy dollars to purchase seven bags of heroin, and promised to give the defendant another thirty dollars later that evening in exchange for a total of ten bags. As he had done when he previously went to New York to buy heroin for himself and Sinacori, the defendant put Sinacori's money -- and then the heroin once it was purchased -- in a different pocket to keep their respective shares separated. Sinacori was ultimately only able to produce another twenty dollars, so the defendant gave Sinacori nine bags and kept the

remaining one out of the ten-pack for himself, in addition to the other heroin that he had bought for himself.

Sinacori did not accompany the defendant to New York in either instance. There was no evidence that Sinacori himself had any interaction with the defendant's supplier in New York or had any role in negotiating prices. In contrast, the defendant frequently purchased his own heroin from the same supplier, sometimes negotiating for discounts. On September 30, for example, before the October 1 "run" to buy heroin for himself and Sinacori, the defendant sent Sinacori a text message indicating that he would try to get a "deal" on twenty bags.

b. Discussion. The statutory scheme governing distribution of controlled substances defines "[d]istribute" as "to deliver other than by administering or dispensing a controlled substance." G. L. c. 94C, § 1. "Deliver" is defined as "to transfer, whether by actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship." Id. The defendant contends that, although he literally delivered heroin to Sinacori, he did not deliver the heroin within the meaning of G. L. c. 94C, § 1, because Sinacori jointly and constructively possessed his share of the heroin at the same time that the defendant purchased it in New York, and the defendant thus could not "deliver" or "distribute" heroin that Sinacori already possessed. See State

v. Morrison, 188 N.J. 2, 14 (2006) ("It hardly requires stating that the 'transfer' of a controlled dangerous substance cannot occur . . . if the intended recipient already [legally] possesses that substance"). In view of the relevant case law and the factual circumstances in this case, however, we are not persuaded that a reasonable jury could have found that Sinacori jointly possessed his share of the heroin when the defendant purchased it for him in New York.

In Commonwealth v. Johnson, 413 Mass. 598, 605 (1992), we held that "to purchase [narcotics], even with friends' money, intending to transfer it to them, constitutes distribution," in violation of G. L. c. 94C, § 32. While we recognized an exception "[w]here two or more persons simultaneously and jointly acquire possession of a drug for their own use intending only to share it together," which would constitute joint possession, this is "limited to the situation when the persons . . . are there at the acquisition together and simultaneously acquire." Id. at 604. Of course, "[n]o cases require literal simultaneous possession" or acquisition, Weldon v. United States, 840 F.3d 865, 867 (7th Cir. 2016), but Johnson suggests that all parties engaged in joint possession must at least be physically present at the time the drugs are acquired. We further held in Commonwealth v. Fluellen, 456 Mass. 517, 525 (2010), that a joint possession theory is "inapplicable to

circumstances where a defendant facilitates a transfer of drugs from a seller to a buyer." See Commonwealth v. Jackson, 464 Mass. 758, 763 (2013) (facilitating transfer of drugs "can constitute the crime of distribution even if the defendant intends to share some of the drug with the buyer"); Commonwealth v. Rodriguez, 456 Mass. 578, 584 n.8 (2010) (distinguishing "defendant's transfer of cocaine he had just purchased, which would constitute distribution, [and] his division of the cocaine that [he and another] had simultaneously and jointly acquired, which would constitute joint possession"). In short, the crime of distribution occurs "whenever the defendant serves as 'a link in the chain' between supplier and consumer." Jackson, supra at 764, quoting Fluellen, supra.

Here, the defendant argues that we should revisit our rule that drugs are jointly possessed only where both persons were present when the drugs were acquired. First, he contends, in essence, that Johnson and its progeny are no longer good law in light of our holding in Commonwealth v. Zanetti, 454 Mass. 449, 462 (2009), where we held that a defendant need not be physically present at the crime scene to be found guilty as a joint venturer. Second, he argues that, in spite of Johnson, physical presence at the time of acquisition is not required where "the absent [party] was then entitled to exercise joint physical possession" of the illicit drugs (emphasis in

original). State v. Carithers, 490 N.W.2d 620, 622 (Minn. 1992). We address these arguments in turn.

In Zanetti, 454 Mass. at 463, we amended the formulation for joint venture liability that was articulated in Commonwealth v. Bianco, 388 Mass. 358, 366, S.C., 390 Mass. 254 (1983), which provided that "[t]he test [for joint venture] is whether each defendant was (1) present at the scene of the crime, (2) with knowledge that another intends to commit the crime or with intent to commit a crime, and (3) by agreement is willing and available to help the other if necessary." Concluding that this framework was confusing and failed to respect "the spirit behind the common law as now reflected in the aiding and abetting statute, G. L. c. 274, § 2," we instead adopted the formulation of aiding and abetting in cases where there was evidence "that more than one person may have participated in the commission of the crime." Zanetti, supra at 467. In so doing, we clarified that an accomplice who knowingly participated in the offense with the intent required for that offense may be convicted of the offense as a joint venturer even if not physically present at the scene of the crime. Id. at 462, 467. See Commonwealth v. Brown, 477 Mass. 805, 813 (2017), cert. denied, 139 S. Ct. 54 (2018), quoting Commonwealth v. Silanskas, 433 Mass. 678, 690 n.13 (2001) ("A defendant may be convicted as a coventurer when he or she is not present at the scene of the crime 'so long as

the jury [find] [that the defendant] had actually associated [himself or herself] with the criminal venture and assisted in making it a success'").

The flaw in the defendant's argument is that, since the time we decided the Zanetti case, we have repeatedly reaffirmed the requirement that both persons be physically present at the time of acquisition in order to show joint possession of narcotics under G. L. c. 94C. See Jackson, 464 Mass. at 763; Fluellen, 456 Mass. at 524-525. And, as we made clear in Zanetti, our "shift from the language of joint venture to the language of aiding and abetting does not enlarge or diminish the scope of existing joint venture liability." Zanetti, 454 Mass. at 468. Nor does it change our definition of joint possession.

Second, the defendant suggests, essentially, that our holding in Johnson requiring physical presence at the time of acquisition should be reexamined in light of our legal principles of constructive possession. Certainly, the possession of heroin "need not be exclusive," but "may be joint and constructive." Commonwealth v. Beverly, 389 Mass. 866, 870 (1983). See Instruction 3.220 of the Criminal Model Jury Instructions for Use in the District Court (2009) (possession) ("A person can also 'possess' something even if he is not its sole owner or holder. For example, a person is considered to

'possess' something which he owns or holds jointly with another person, who is keeping it for both of them").

And, to be sure, various courts have concluded that "[a] buyer could have 'constructive possession' before actual delivery," United States v. Palacios-Quinonez, 431 F.3d 471, 475 (5th Cir. 2005), cert. denied, 547 U.S. 1035 (2006), such as where a defendant so directly orders the "disposition or movement of the drug as to warrant the inference he possesses it." Id., quoting Armstrong v. Superior Court, 217 Cal. App. 3d 535, 539 (1990). See United States v. Pelusio, 725 F.2d 161, 167 (2d Cir. 1983), quoting United States v. Craven, 478 F.2d 1329, 1333 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973) ("Constructive possession exists when a person . . . knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others"). Consequently, a defendant who directs a courier to pick up a substantial quantity of heroin on his or her behalf may be found to have possessed the drugs once the courier obtained the drugs, even where the defendant is not present at the pick-up, and therefore may be found guilty of possession with intent to distribute if the drugs are seized when they are still in the courier's possession. See, e.g., United States v. Manzella, 791 F.2d 1263, 1266 (7th Cir. 1986) ("doctrine of constructive possession . . . creates a legal fiction to take

care of such cases as that of a drug dealer who operates through hirelings who have physical possession of the drugs. It would be odd if a dealer could not be guilty of possession, merely because he had the resources to hire a flunky to have custody of the drugs"); United States v. Felts, 497 F.2d 80, 82 (5th Cir. 1974), cert. denied, 419 U.S. 1051 (1974) ("a party who instigated the sale, negotiated the price, and caused the drug to be produced for the customer had constructive possession of it," which is sufficient to support conviction of possession with intent to distribute).

But here, the issue is whether a reasonable jury could conclude that the delivery the defendant made to Sinacori was not a "distribution" of drugs, but was instead a joint possession of drugs for personal use. In Commonwealth v. Blevins, 56 Mass. App. Ct. 206, 209 (2002), the Appeals Court identified circumstances where a defendant charged with distribution was entitled to a requested instruction on simple possession:

> "The evidence -- that the defendant and his two companions were friends who on occasion shared drugs; that the three had pooled their money to purchase drugs they intended to share; that they each participated in the negotiation for the purchase of drugs; and that all were present when the drugs were paid for and received -- was, if believed, sufficient to support a finding that the drugs were simultaneously and jointly acquired and intended to be shared only by the three purchasers."

Similarly, the United States Court of Appeals for the Seventh Circuit in Weldon, 840 F.3d at 867, concluded that a defendant may be guilty only of drug possession rather than of drug distribution where three friends "agreed to get high together, they shared the expense, they all went together to the drug dealer, and they shared the drug they bought from him." The fact that the defendant was the one who got out of the vehicle, paid the pooled money to the drug dealer, and carried the drugs back to the vehicle for the three of them to share did not necessarily mean that he was guilty of drug distribution. Id. at 866.[12]

If we were faced with facts comparable to those in Weldon, where equal partners participated in a drug purchase but only one partner walked to the supplier's vehicle to receive the drugs, we might need to revisit the rule in Johnson that drugs can be jointly possessed for personal use only where all persons were present when the drugs were acquired. But we need not

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[12] The court reasoned:

> "Suppose you have lunch with a friend, order two hamburgers, and when your hamburgers are ready you pick them up at the food counter and bring them back to the table and he eats one and you eat the other. It would be very odd to describe what you had done as 'distributing' the food to him. It is similarly odd to describe what [the defendant] did as distribution."

Weldon v. United States, 840 F.3d 865, 866 (7th Cir. 2016).

revisit that rule here, because we do not have facts comparable to those in Weldon. In this case, the defendant traveled several hours across State lines to purchase the heroin while Sinacori remained in Amherst. There was no evidence that Sinacori had any involvement in negotiating the transaction. In contrast, the defendant explained to Sinacori the prices that were available, and the defendant alone had a role in trying to bargain for discounts. Moreover, the record reveals no evidence that Sinacori knew who the defendant's supplier was, or that he even knew precisely where the defendant was going. And when Sinacori was unable to pay the defendant for all the heroin that he purchased, the defendant kept a bag for himself, exercising a certain level of control over the drugs that he obtained from his supplier.

Here, unlike in Weldon, the defendant giving the drugs to Sinacori -- rather than vice-versa -- was not the result of a mere fortuity or convenience. The defendant was the "middle man," the link in the chain between supplier and buyer, who facilitated the sale of drugs to the buyer -- Sinacori. The fact that the defendant made no profit from the transaction is not dispositive as to whether he distributed the drugs rather than jointly possessed them for personal use. See Johnson, 413 Mass. at 605. What is dispositive is that the defendant's active role in this transaction differed substantially from

Sinacori's passive role -- the defendant knew the supplier, negotiated prices, traveled alone to obtain the heroin, and determined whether he would share the heroin with Sinacori. See People v. Edwards, 39 Cal.3d 107, 114 (1985) (distinguishing scenario with "equal partners" in consummation of drug purchase, which would be joint possession, from scenario where one person "instigated the purchase and was actively involved in arranging and consummating the deal, while [the other] was wholly passive and merely accepted the heroin," which would be distribution). On the facts of this case, viewed in the light most favorable to the defendant, we conclude that no reasonable jury could have concluded that the defendant was guilty only of the simple possession of heroin. The judge therefore did not err in denying the defendant's request for the lesser included instruction.

Conclusion. The order denying the defendant's request to instruct the jury on the lesser included offense of simple possession of heroin is affirmed, as is the judgment of conviction of distribution of heroin. As to the defendant's conviction of involuntary manslaughter, the judgment is vacated, the verdict is set aside, and the case is remanded to the Superior Court for entry of a required finding of not guilty.

So ordered.