

DRUG-INDUCED HOMICIDE DEFENSE TOOLKIT



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THIRD EDITION
JULY 2021

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We would like to thank the many interns who have helped produce this and previous editions of the Toolkit, including Amelia Caramadre, Caitlin Scott, and members of the Community Health Advocacy Project at Stanford Law School: Casey Lincoln, Emma Kaeser, Olivia Glass, Katie Larkin, Carly Rasmussen, and Jody Bianchini.

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Engaging with academic, community, public and private partners, we inform responses to today's most critical community challenges. This includes reducing drug overdose; improving access to effective, safe, and cost-effective health care; and aligning law enforcement practices with public health goals. True to Northeastern's mission, we use our portfolio as an opportunity for experiential learning to prepare the next generation of leaders in legal, health, and social policy professions.

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I. ABOUT THIS TOOLKIT

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, drug delivery resulting in death, or similar crimes resulting from overdoses. The creation of this Toolkit was spurred by two related trends: (1) widespread efforts by prosecutors to disseminate information and tools that aid other prosecutors and law enforcement personnel in investigating and bringing such charges, including presentations at conferences,¹ continuing legal education modules, webinars,² and the like; and (2) information from parents, news reports, and other sources about inadequate legal defense being provided to many individuals charged with these crimes. We hope that this Toolkit will assist defenders and families address these charges, and, perhaps with time, will ultimately encourage police and prosecutors to focus their resources on strategies that are less harmful and are actually effective at reducing crime, overdose, and other problems connected to addiction.

This Toolkit was produced in a collaboration of legal scholars led by the Health in Justice Action Lab, a “think-do tank” based at Northeastern University that aims to inject

¹ See *Law Enforcement Track*, National RX Drug Abuse & Heroin Summit (last updated Mar. 25, 2016).

² See *Webinars*, Smart Prosecution: Ass’n of Prosecuting Attorneys (last visited Jan. 20, 2019).

scientific evidence and public health principles into the drug policy 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.³

We would like to thank the many interns who have helped produce the various editions of the Toolkit, including Caitlin Scott, Amelia Caramadre, and members of the Community Health Advocacy Project at Stanford Law School: Casey Lincoln, Emma Kaeser, Olivia Glass, Katie Larkin, Carly Rasmussen, and Jody Bianchini.

Much remains to be learned. We would very much welcome updates, corrections, comments, and news from readers to help make the Toolkit as timely and useful as possible.

A note on citations

Because this Toolkit is a reference for litigators, citations follow Bluebook rules for court documents. To facilitate updates and new material, the Toolkit uses full or short

³ Available at: <https://ssrn.com/abstract=3265510> or <http://dx.doi.org/10.2139/ssrn.3265510>.

form citations; it does not use *id.*, *supra* or *infra* forms. A list of full citations is included in Section X.⁴

What's new in the Third Edition

This edition of the Toolkit now includes an expanded section on racial disparities and person-first representation, more material and case law in several of the states that are most aggressive in pursuing DIH enforcement, and a brief section on ineffective assistance of counsel claims. It also provides links to additional amicus curiae briefs co-authored by the Health in Justice Action Lab; discussion of the recent Third Circuit decision in *U.S. v. Semler*, in which our brief appears to have contributed to a successful result; and a summary of results in an upcoming study co-authored by the Lab's founder Leo Beletsky, finding that DIH enforcement has *itself* contributed to tens of thousands of additional deaths across the nation in the past several years.

⁴ Additional and non-exhaustive caselaw from Pennsylvania, Wisconsin, and Illinois is included in subsections to the list of full case citations. We anticipate adding Ohio case law in the next edition of the Toolkit.

II. INTRODUCTION

We are two decades into an overdose crisis that keeps getting worse. In 2020, over 90,000 people died of a drug overdose in the United States.⁵ Overdose is the leading cause of death for people under fifty.⁶ 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 public health and harm reduction strategies--such as increasing access to the opioid antidote naloxone and evidence-based treatment⁷ (typically called medication-assisted treatment [MAT] or medications for opioid use disorder [MOUD]),⁸ as well as efforts to reduce stigma toward substance use

⁵ Centers for Disease Control and Prevention, National Center for Health Statistics, Provisional Drug Overdose Death Counts (2021), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>.

⁶ 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>.

⁷ 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 [hereinafter LaSalle, *An Overdose Death*]; American Psychological Association, *Evidence-Based Treatment for Opioid Use Disorder* (2018), <https://www.apa.org/advocacy/substance-use/opioids/resources/evidence-based-treatment.pdf>.

⁸ For a general explanation of the difference among these medications--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>. Collectively, they are known as MAT, MOUD, pharmacotherapy, medication treatment (MT), opioid maintenance therapy, opioid substitution therapy, and drug substitution therapy. We prefer the usage MOUD or a variation on MAT: medication for addiction treatment. This

and addiction⁹--progress on these and other vital public health interventions remains abysmally slow.¹⁰ Unfortunately, “progress” is anything but slow on expanding the punitive approach. Prosecuting accidental overdose deaths as homicides is the hot new trend.

Variously called drug-induced homicide (DIH) or drug distribution resulting in death (DDRD),¹¹ these charges are rooted in statutes that emerged during the height of the

toolkit prefers the term MOUD (medications for opioid use disorder) because the common usage medication-assisted therapy implies that the medication is an ancillary component of treatment rather than the treatment itself, which unfortunately adds to the tragically stigmatized nature of these effective medicines. Research has demonstrated that pharmacotherapy alone is effective in patients with OUD, regardless of whether they receive counseling. See Peter D. Friedmann & Robert P. Schwartz, *Just Call it “Treatment”*, *Addiction Science and Clinical Practice*, June 2012, at 1-2; see also Leo Beletsky, *21st Century Cures for the Opioid Crisis: Promise, Impact, and Missed Opportunities*, 44 *American Journal of Law and Medicine* 359-385 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3230758. It also enables people to successfully engage additional forms of therapy, such as psychosocial and mutual aid or 12-step approaches; absent MAT/MOUD, the failure rate in those abstinence-based therapies is around 90%. See Jennifer Velander, *Suboxone: Rationale, Science, Misconceptions*, 18 *Ochsner J.* 23-29 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5855417/>. Given that OUD is a relapsing disorder and that it may take upwards of five tries before efforts at recovery succeed, these medications keep people alive on the road to recovery. See David Eddie and John Kelly, *People recover from addiction. They also go on to do good things*, *STAT* (May 3, 2021), <https://www.statnews.com/2021/05/03/people-recover-from-addiction-they-also-go-on-to-do-good-things/>.

⁹ 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>.

¹⁰ 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>.

¹¹ For the purposes of this Toolkit, we use the term DIH rather than DDRD, though there is no functional difference between the two terms. 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>.

“drugs and crime” era of crack-cocaine.¹² Rooted in felony murder statutes based on age-old English law, these provisions were promoted as a tool to prosecute major drug traffickers for deaths that their products caused.¹³ Despite the theater of passing them, they were not actually put to any use until relatively recently. Indeed, in our research, we found only one example of a DIH-type prosecution in the 1980s, a prosecution under the California felony murder law for the high-profile death of actor John Belushi, and a mere 13 in the 1990s.¹⁴

Unfortunately, a paradigm shift is underway, in which law enforcement and prosecutors treat as crimes what used to be considered accidents.¹⁵ Under pressure to respond to mounting overdose deaths, prosecutors and police rediscovered these provisions, using them with increasing frequency and fervor in the heroin and fentanyl

¹² 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> [hereinafter Allyn, *Bystanders*]. On the false narratives of crack cocaine at the time, see Carl Hart, *High Price: A Neuroscientist's Journey of Self-Discovery that Challenges Everything You Know About Drugs and Society* (2013).

¹³ See LaSalle, *An Overdose Death at 9* (quoting Act of June 4, 2003, 2003 Vt. Acts & Resolves 141).

¹⁴ See *Drug Induced Homicide*, Health in Justice Action Lab, <https://www.healthinjustice.org/drug-induced-homicide>.

¹⁵ 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/attorney-general-journal/prosecuting-drug-overdose-cases-a-paradigm-shift/> (advocating for a prosecutorial “paradigm shift”). See also LaSalle, *An Overdose Death*, at 11.

waves of the overdose crisis.¹⁶ Media coverage of these prosecutions increased threefold following the end of the first wave in 2010, spiking from 363 stories in 2011 to 1,178 in 2016.¹⁷

Many states joined the rush, and as of January 2019, almost half of state jurisdictions had a special statute that can be used to mount a drug-induced homicide prosecution (Figure 1).¹⁸ Federal law also has one by way of a sentence enhancement.¹⁹

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 and the federal government's, which impose sentences of up to life in prison.²⁰ The Trump administration infamously

¹⁶ See *Drug Induced Homicide*, Health in Justice Action Lab, <https://www.healthinjustice.org/drug-induced-homicide>; see also Centers for Disease Control and Prevention, *Understanding the Epidemic, Opioid Overdose* (Mar. 19, 2020) <https://www.cdc.gov/drugoverdose/epidemic/index.html>.

¹⁷ See generally LaSalle, *An Overdose Death at 2* (noting the increase in press coverage of drug-induced homicide prosecutions).

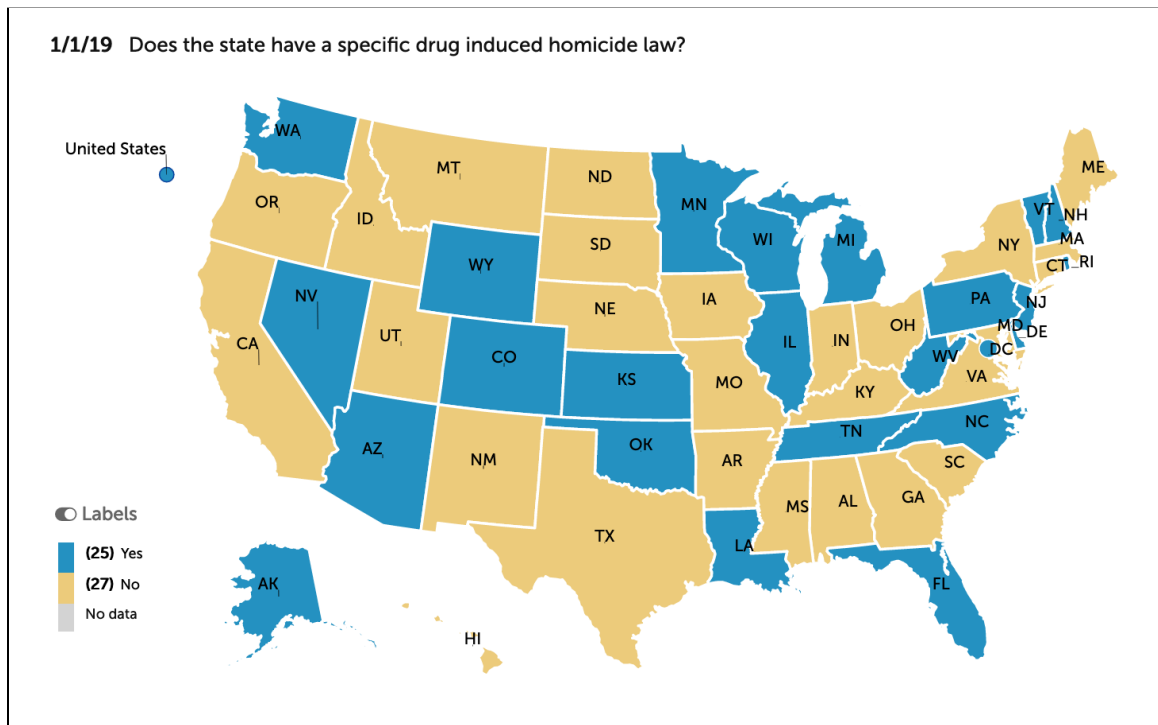
¹⁸ See Health in Justice Action Lab & Legal Science, Prescription Drug Abuse Policy System, *Drug Induced Homicide Laws* (Jan. 1, 2019), <http://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032> (a collaboration with Mission LISA on developing a comprehensive dataset and interactive tool of drug-induced homicide statutes and their elements).

¹⁹ See 21 U.S.C. §§ 841(b), 960(b). This provision is known as the “Len Bias law,” referring to the University of Maryland basketball star whose accidental overdose death was seized upon to trigger an expansion in the War on Drugs. The law itself was a piece of the broad Anti-Drug Abuse Act of 1986.

²⁰ W. Va. Code Ann. § 61-2-2.

advocated seeking not just the heavy 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.²¹

FIGURE 1²²



²¹ 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>.

²² See Health in Justice Action Lab & Legal Science, Prescription Drug Abuse Policy System, *Drug Induced Homicide Laws* (Jan. 1, 2019).

Some of these provisions are strict liability statutes requiring no criminal intent (*mens rea*).²³ Others require a recklessness or criminal negligence standard to be met.²⁴

However, none of the state or federal provisions require a financial exchange to take place nor 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.²⁵

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: involuntary manslaughter, criminal negligence, or other generic statutes can—and are—being strategically deployed in these cases.²⁶ To avoid the traditional *mens rea* requirement contained in generic statutes in states that do not have a DIH statute, a common prosecutorial strategy involves a collaboration with federal prosecutors: local district attorneys threaten that the feds will swoop in with their long sentence

²³ See Health in Justice Action Lab & Legal Science, *Drug Induced Homicide Laws* (interactive map).

²⁴ See Health in Justice Action Lab & Legal Science, *Drug Induced Homicide Laws*.

²⁵ See, e.g., 21 U.S.C. § 841(b)(1).

²⁶ See LaSalle, *An Overdose Death* at 2.

enhancement--including a mandatory life term for people with previous "serious" drug felonies--if the defendant doesn't accept a plea deal under a generic state statute.²⁷

There are numerous problems with these prosecutions, as discussed in Sections VI and VII below. DIH statutes are ostensibly intended to target major traffickers, with enforcement ostensibly intended to "send a message" to deter "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."²⁸ Analyses conducted by the Health in Justice Action Lab,²⁹ the Drug Policy Alliance,³⁰ and the *New York Times*³¹ each revealed that the majority of these drug-induced homicide cases do not

²⁷ North Carolina is an example of a state where this is happening. The National District Attorneys Association's (NDAA) 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, *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).

²⁸ NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* at 3, 11, 14.

²⁹ See *Drug Induced Homicide*, Health in Justice Action Lab.

³⁰ See LaSalle, *An Overdose Death* at 4.

³¹ 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>.

involve “traditional” drug dealers at all, but rather friends, family, and co-users of the decedent.

Considering that many people being arrested in these cases suffer from Opioid Use Disorder (OUD), it is especially important to recognize that people with OUD who are jailed or imprisoned in facilities that do not provide evidence-based treatment³² or connections to such treatment upon reentry face an astronomic spike in risk of death from overdose during their first few weeks after release.³³

DIH prosecutions also embody the structural racism found elsewhere in the criminal legal system and the systemic underinvestment in health and social supports that particularly harm communities of color.³⁴ Indeed, these prosecutions pull the rug out from the notion that the overdose crisis is mostly a “white” issue and that governments are correspondingly abandoning the punitive approaches of the War on Drugs in favor of public health strategies. In cases where the decedent purchased drugs from someone traditionally considered a “dealer,” Health in Justice Action Lab’s analysis suggests that a

³² American Psychological Association, *Evidence-Based Treatment for Opioid Use Disorder* (2018), <https://www.apa.org/advocacy/substance-use/opioids/resources/evidence-based-treatment.pdf>.

³³ See, e.g., Beletsky, Leo, 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); Shabbar I. Ranapurwala et al., *Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015*, 108 Am. J. Pub. Health 1207, 1209 (2018).

³⁴ *Carceral Resource Index*, Health in Justice Action Lab, <https://www.healthinjustice.org/carceral-resource-index> (last visited Jun. 30, 2020).

disproportionate number of charges (50%) are being brought in cases where the victim is non-Hispanic white and the dealer is a person of color; notably, overdose deaths of BIPOC rarely trigger a prosecution. 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.³⁵ Considering that average sentence lengths in these cases range from five to ten years, people of color are receiving significantly longer sentences on average. Illustratively, as of October, 2019, the median DIH sentence for a person of color was eight years, compared to five years for white defendants: a difference of 60% over a 10-year period.³⁶ In short, DIH prosecutions operate as structural drivers of racial inequity, fueling the mass incarceration of people of color and exacerbating racial health disparities.

Presently, there are two primary avenues for defending against prosecutions under drug-induced homicide statutes.³⁷ The majority of the Toolkit addresses these defenses. 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

³⁵ *Drug Induced Homicide*, Health in Justice Action Lab.

³⁶ *Drug Induced Homicide*, Health in Justice Action Lab.

³⁷ In addition to these two primary defenses, the Good Samaritan statutes in Vermont, Delaware, and Rhode Island may offer full or partial immunity to arrest or prosecution to people who seek help from emergency services. As of this writing, the Good Samaritan statutes of no other states extend their protections to homicide charges where an overdose results in death.

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 delivery/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.³⁸

III. 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*,

[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

³⁸ Because many DIH statutes impose strict liability and the required mental state varies among non-strict liability DIH statutes as well as generic state statutes, this Toolkit does not analyze *mens rea* based defenses.

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.”³⁹

Accordingly, depending on the constraints of the jurisdiction, defense counsel may choose to litigate either or both of the traditional causation requirements—the actual (or “but-for”) causation and the legal (or “proximate”) causation—in drug-induced death prosecutions.

This section first discusses both causation requirements as well as the intervening actor doctrine. Next it addresses 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.

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.”⁴⁰ But-for causation requires the

³⁹ 571 U.S. 204, 210 (2014) (first citing H.L.A. Hart & Tony Honore, Causation in the Law 104 (1959); then quoting Wayne R. Lafave, Substantive Criminal Law § 6.4(a) (2d ed. 2003)).

⁴⁰ *Burrage*, 571 U.S. at 211 (quoting Model Penal Code § 203(1)(a)).

prosecutor to prove that, but for the defendant's acts, the harm would not have occurred when it did.⁴¹ Although but-for causation is easily met in most traditional homicide prosecutions, it is often in dispute in drug-induced death prosecutions.⁴² This is because traditional homicides involve things like bullets, blades, or blunt force trauma, whereas death from overdose usually involves chemically-induced asphyxiation due to suppression of the respiratory system or choking on vomit.

In addition, drug use and overdose deaths often involve a combination of substances, including alcohol, not just one singular chemical. The majority of overdose cases in Massachusetts, for example, have involved depressants in addition to opioids.⁴³ This raises significant questions about causation if charges are brought against a defendant for providing heroin or fentanyl but the benzodiazepines also identified in the decedent's system are not addressed. 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.

⁴¹ See *Causation*, LawShelf Educ. Media, <https://lawshelf.com/courseware/entry/causation> (last visited January 20, 2019).

⁴² See LaSalle, *An Overdose Death* 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) [hereinafter Gilson, *The Burrage Decision*].

⁴³ 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).

In *Burrage*, the United States Supreme Court resolved the question of whether but-for causation applies to the federal drug-induced death statute.⁴⁴ 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 injury results from the use of” the substance.⁴⁵ 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.⁴⁶ In *Burrage*, the Supreme Court held that but-for causation is required under the federal statute.⁴⁷

Burrage involved the death of Joshua Banka, “a long-time drug user.”⁴⁸ On the day Banka died, he smoked marijuana and then injected crushed oxycodone pills he had stolen from a roommate.⁴⁹ Later, Banka and his wife bought one gram of heroin from

⁴⁴ See 571 U.S. at 206.

⁴⁵ 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).

⁴⁶ 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. Burrage*, 55 B.C.L. Rev. E. Supp. 1, 2 (2014).

⁴⁷ See 571 U.S. at 218–19.

⁴⁸ 571 U.S. at 206.

⁴⁹ 571 U.S. at 206.

Burrage.⁵⁰ Banka injected some of the heroin and was found dead by his wife a few hours later.⁵¹ The police found a number of drugs in Banka's house and car, including alprazolam, clonazepam, oxycodone, and hydrocodone.⁵² At Burrage's trial, two medical experts testified that the heroin was a contributing factor in Banka's death.⁵³ 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.⁵⁴ The trial court declined to give Burrage's requested jury instructions on causation and denied his motion for judgment of acquittal.⁵⁵ Burrage was convicted and sentenced to 20 years under 21 U.S.C. § 841(b)(1)(C).⁵⁶ The Eighth Circuit affirmed.⁵⁷

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."⁵⁸ In reaching

⁵⁰ 571 U.S. at 206.

⁵¹ 571 U.S. at 206.

⁵² 571 U.S. at 206.

⁵³ 571 U.S. at 207.

⁵⁴ 571 U.S. at 207.

⁵⁵ 571 U.S. at 207-08.

⁵⁶ 571 U.S. at 208.

⁵⁷ 571 U.S. at 208 (citing *United States v. Burrage*, 867 F.3d 1015 (8th Cir. 2012), *rev'd*, 571 U.S. 204 (2014)).

⁵⁸ *See* 571 U.S. at 214, 219.

this conclusion, the Court reasoned that it had previously held that language similar to this requires “but-for” causation in other contexts.⁵⁹ 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.”⁶⁰ Accordingly, the Court concluded, “at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.”⁶¹ But-for causation must be proven beyond a reasonable doubt, which can be a heavy burden for law enforcement and the prosecution.⁶²

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

⁵⁹ 571 U.S. at 212–14.

⁶⁰ 571 U.S. at 216 (citations omitted).

⁶¹ 571 U.S. at 218–19.

⁶² See Gilson, *The Burrage Decision*. See Section VII.A (regarding the downstream effects of this burden).

“contributes to” language.⁶³ 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.”⁶⁴ 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 traditional causation principles and is a useful case if but-for causation is being litigated in state court.

Sidenote: Failure to raise but-for causation as possible basis for a post-conviction claim based on ineffective assistance of counsel

Following *Burrage*, failure to raise or a decision to waive but-for causation might theoretically form the basis for an ineffective assistance of counsel claim.⁶⁵ In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the “Strickland test” for

⁶³ Check using the Health in Justice Action Lab’s interactive tool. *Drug Induced Homicide*, Health in Justice Action Lab.

⁶⁴ 571 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), *aff’d*, 140 N.E.3d 965 (N.Y. 2019)). 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.

⁶⁵ This section was drafted by Casey Lincoln of the Community Health Advocacy Project at Stanford Law School.

ineffective assistance of counsel. Under this test, the defendant must show: (1) that counsel's performance was deficient; and (2) that deficient performance prejudiced defense.⁶⁶

This theory has been advanced in several cases under the DDRD statute to varied levels of success.⁶⁷ In two recent 7th Circuit cases, the court vacated the district courts' dismissals of ineffective assistance of counsel claims and remanded for an evidentiary hearing. In *Gaylord v. United States*, 829 F.3d 500 (7th Cir. 2016), the court held that (1) Gaylord alleged facts to support his claim that his counsel performed deficiently by failing to provide him with the postmortem and forensic pathology reports and not challenging the application of the "death results" enhancement to his sentence and (2) Gaylord alleged sufficient information that to establish a reasonable probability that but for counsel's ineffective assistance, he would not have pled guilty.⁶⁸ In *Anderson v. United States*, 981 F.3d 565 (7th Cir. 2020), the court found that: (1) "counsel's decision not to further investigate the available toxicology evidence was unreasonable," and (2)

⁶⁶ Strickland v. Washington, 466 U.S. 668, 687 (1984).

⁶⁷ Compare *Gaylord v. United States*, 829 F.3d 500 (7th Cir. 2016) and *Anderson v. United States*, 981 F.3d 565, 575-78 (7th Cir. 2020) with *Perrone v. United States*, 889 F.3d 898, 903 (7th Cir. 2018) and *Hamilton v. United States*, No. 1:18-CR-00086-DCN, 2021 WL 1792528 at *3-5 (D. Idaho, May 5, 2021).

⁶⁸ *Gaylord v. United States*, 829 F.3d 500, 507-09 (7th Cir. 2016).

“there is a reasonable probability that the outcome of the plea process would have been different.”⁶⁹

Depending on the facts of the case, consider raising an ineffective assistance of counsel claim if counsel failed to investigate the underlying factual basis around but-for causation, failed to raise but-for causation at trial, or failed to advise defendant on the viability of a but-for causation defense before a plea agreement. Again, the success of these claims will depend on if the language of the relevant statute uses “but-for” or “contributes to” language.⁷⁰

For example, in Pennsylvania, a state with “but-for” statutory language, this could be a viable claim. While no ineffective assistance of counsel claims regarding but-for causation have yet been raised under the Pennsylvania statute, the test for ineffective assistance of counsel is a three-part inquiry that is substantively similar to *Strickland*: (1) is petitioner’s underlying claim of arguable merit; (2) did counsel have no reasonable basis for his action or inaction; and (3) did the petitioner suffered actual prejudice as a result?⁷¹ A petitioner’s claim fails if the petitioner fails to prove any of the prongs.

⁶⁹ Anderson v. United States, 981 F.3d 565, 575-78 (7th Cir. 2020).

⁷⁰ For example, this claim could be viable under Pennsylvania and Ohio statutes, but not under Illinois or Wisconsin statutes. See e.g., 18 Pa. Cons. Stat. Ann. § 303(a); State v. Kosto, 2018-Ohio-1925, at ¶ 29 ; People v. Haynes, 2020 IL App (4th) 190132-U, ¶ 22; Wis. Stat. § 940.02(2)(a), (b).

⁷¹ Commonwealth v. Ali, 608 Pa. 71, 86, 10 A.3d 282, 291 (2010).

In Ohio, a state with “but-for” statutory language, this could also be a viable claim. While no ineffective assistance of counsel claims regarding but-for causation have yet been raised under the Ohio statute, the state has adopted the *Strickland* standard for ineffective assistance of counsel claims.⁷²

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.⁷³

Proximate cause requires proof that death was a reasonably foreseeable consequence of the defendant’s conduct. Of course, as already stated, many statutes use a strict liability approach.⁷⁴ Most circuits have concluded that the federal DDRD statute does not require

⁷² State v. Mack, 2004-Ohio-1526, ¶ 4, 101 Ohio St. 3d 397, 397.

⁷³ United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010).

⁷⁴ See Health in Justice Action Lab & Legal Science, *Drug Induced Homicide Laws*. See also Section VI.F (discussing the use of a strict liability approach). Notably in its recent decision in *Commonwealth v. 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

proof of proximate cause.⁷⁵ Because the United States Supreme Court has not addressed the issue,⁷⁶ however, litigants should continue to request a proximate causation instruction if only to preserve the issue.⁷⁷

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. Carrillo*, 131 N.E.3d 812, 822, 828 (Mass. 2019) (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 828 .

⁷⁵ 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.

⁷⁶ 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. *Burrage* at 210.

⁷⁷ 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." *Burkholder* at 624.

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.⁷⁸ 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 actor of criminal responsibility.”⁷⁹ Based on this principle, courts have held outside of the DIH 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.”⁸⁰

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

⁷⁸ See Hart & Honoré, Causation in the Law at 326.

⁷⁹ Hart & Honoré, Causation in the Law at 326.

⁸⁰ E.g., *Lewis v. Alabama*, 474 So.2d 766, 771 (Ala. Ct. Crim. App. 1985).

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).⁸¹ 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 DDRD statute.⁸²

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.⁸³

⁸¹ 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>; *Opioid Overdose Crisis Compounded by Polysubstance Use*, Pew Charitable Trusts (October 2020), https://www.pewtrusts.org/-/media/assets/2020/10/opioidoverdosecrisiscompoundedpolysubstanceuse_v3.pdf.

⁸² *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.”).

⁸³ 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.”).

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.⁸⁴

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

B. Challenging the scientific evidence⁸⁵

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 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.⁸⁶ The experts at trial were unable to prove this when the decedent was on a

⁸⁴ United States v. Hatfield, 591 F.3d 945, 950 (7th Cir. 2010).

⁸⁵ 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.

⁸⁶ *Burrage v. United States*, 571 U.S. 204, 210, 216 (2014).

cocktail of other drugs.⁸⁷ 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.⁸⁸ A forensic pathologist/medical examiner may be able to challenge an autopsy finding by looking at the medical history of the decedent to determine whether an alternate cause of death exists.⁸⁹ If you need to seek court funding, you can make these requests ex parte and under seal.⁹⁰

⁸⁷ *Burrage*, 571 U.S. at 216–19.

⁸⁸ 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.

⁸⁹ 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) [hereinafter Bryan, *Beyond Bedsores*] (“Lay coroners rely heavily on the external condition of the deceased and any available medical records when determining cause and manner of death.”).

⁹⁰ *Ake v. Oklahoma*, 470 U.S. 68 (1985); see Carrie Allman & Brie Halfond, *Defending Drug Overdose Homicides in Pennsylvania*, National Association of Criminal Defense Lawyers (Nov. 6, 2019), <https://www.nacdl.org/getattachment/400082f9-aa38-426a-b6a1-6bdde325281c/powerpoint-allman-halfond.pdf>.

2. Ask for a Daubert or Frye hearing to challenge the state expert's "but-for" testimony

The expert witness admissibility requirement in Federal Rule of Evidence 702,⁹¹ as expounded upon by *Daubert v. Merrill Dow Pharm., Inc.*,⁹² 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.⁹³ *Daubert* requires trial judges in both civil and criminal proceedings to determine “whether the reasoning or methodology underlying the testimony is scientifically valid”⁹⁴

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

⁹¹ 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.

⁹² 509 U.S. 579 (1993).

⁹³ 509 U.S. 579 (1993).

⁹⁴ 509 U.S. at 592–93 (1993).

(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). Equally important is the reason for the failure to perform an autopsy, and whether a physician was consulted prior to the determination not to perform one, as the National Association of Medical Examiners (NAME) considers autopsy an essential component of investigating apparent overdose deaths.⁹⁵

Finally, as discussed below, consider challenging the state expert's expertise and impartiality. If a coroner determined the cause or manner of death, that likely means a layperson—presumably 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 exist beyond being an adult and living in the jurisdiction—neither attribute having anything to do with skill, training, or expertise. Instead, death investigators can simply be local officials in rural counties.⁹⁶

⁹⁵ 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 and Other Drugs*, 41 Am J Forensic Med Pathol 152, 153 (2019).

⁹⁶ 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

Some jurisdictions have *Frye*⁹⁷ 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, a medical examiner (ME), or a mixed Medical Examiner/Coroner (ME/C) system. Coroners and MEs differ significantly in their qualifications and in the nature of their roles.⁹⁸

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.⁹⁹ A medical examiner is a forensic pathologist who has graduated from

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) [hereinafter Robbins, *A Deadly Pair*].

⁹⁷ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁹⁸ For more on comparisons between coroners and medical examiners, including subconscious and conscious bias in these roles, see Beety, *The Overdose/Homicide Epidemic*.

⁹⁹ 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> [hereinafter Nat’l Research Council, *A Path Forward*].

medical school, received training in anatomical or clinical pathology, and received formal training in forensic pathology in a fellowship program.¹⁰⁰ 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.”¹⁰¹

A coroner is typically a county elected official, tasked with investigating deaths and with determining what the manner of death was (homicide, suicide, accident, natural, or undetermined), whether an autopsy is necessary, and in some jurisdictions, identifying the cause of death (e.g. overdose).¹⁰² Despite this range of medico-scientific responsibilities, coroners are not required to have any medical background. They must only meet minimum statutory requirements such as residency and minimum age.¹⁰³ In extreme examples, in Indiana, two seventeen-year-old high school seniors have been appointed deputy coroners.¹⁰⁴ In Pennsylvania, garbage haulers and grocery store shelf-stockers

¹⁰⁰ Nat’l Research Council, A Path Forward at 248.

¹⁰¹ Nat’l Research Council, A Path Forward at 256.

¹⁰² Nat’l Research Council, A Path Forward. at 247.

¹⁰³ Nat’l Research Council, A Path Forward. at 247. (“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.”).

¹⁰⁴ Nat’l Research Council, A Path Forward. at 247 (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

have been elected.¹⁰⁵ Accordingly, it should come as no surprise that the continuation of the coroner system has been repeatedly and increasingly questioned.¹⁰⁶

Indeed, the push for the elimination of the coroner system and replacement by scientifically-trained individuals dates back as far as the 1920s.¹⁰⁷ Yet the coroner system

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 where the only academic training required was a forty-hour course. 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/>.

¹⁰⁵ *See* Dana DiFilippo, *Wanna be a coroner? Just about anybody can - just win an election*, The Philadelphia Inquirer (May 26, 2009), https://www.inquirer.com/philly/hp/news_update/20090526_Wanna_be_a_coroner_Just_about_anybody_can_-_just_win_an_election.html.

¹⁰⁶ *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.”).

¹⁰⁷ *See* Bryan, *Beyond Bedsores* 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>.

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remains today in 28 states.¹⁰⁸ This is concerning because, depending on the jurisdiction, either laypeople or 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.¹⁰⁹ And that determination is vital to the existence of any criminal investigation or prosecution that follows.

The International Association of Coroners and Medical Examiners (IAC&ME) and the National Association of Medical Examiners (NAME) are the accrediting bodies for coroner and ME offices. While accreditation is voluntary, offices may fail for a variety of reasons. Clear illicit and prescription drug collection policies are necessary for accreditation, for example. In addition, coroners and death investigators can become certified by the American Board of Medicolegal Death Investigators (ABMDI). Their online certificant directory provides a listing of individuals granted ABMDI certification.

¹⁰⁸ CDC, *Death Investigation Systems*, (2015), <https://www.cdc.gov/phlp/publications/coroner/death.html>

¹⁰⁹ See Bryan, *Beyond Bedsores* 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.

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.¹¹⁰ 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 cause 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.¹¹¹ These notions of absolute impartiality are quite false.

a. Query determination of cause of death

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,

¹¹⁰ Bryan, *Beyond Bedsores* at 542 (citing Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. Rev. 725 (2011)).

¹¹¹ Nat’l Research Council, *A Path Forward* at 85–88.

which results in inherent difficulties in making causation decisions.”¹¹² Accordingly, particularly in coroner states, it is important for defenders to query.

Coroners and even medical examiners are increasingly making determinations of overdose as the *cause* of death without conducting proper testing or without proper rigor. Coroners *and* MEs increasingly find cause of death to be overdose without first eliminating other causes.¹¹³ 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.¹¹⁴ Troublingly--though perhaps usefully for mounting a *but-for* defense--the National

¹¹² 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). 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).

¹¹³ *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/2018/3/5/18329523/kratom-health-supplement-targeted-by-fda-linked-to-9-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>.

¹¹⁴ Drug Enforcement Administration Intelligence Report, Analysis of Drug-Related Overdose Deaths in Pennsylvania, 2015, 28 (July 2016).

District Attorneys Association (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."¹¹⁵

i. Autopsy as a tool

While the National Association of Medical Examiners recommends that all suspected overdoses receive an autopsy, local laws, budgets, and coroner politics governing jurisdiction influence which cases receive autopsies.¹¹⁶

An autopsy includes an external and internal examination of the body by a forensic pathologist (either a medical examiner or a physician employed by a coroner). Intoxication deaths are “largely functional deaths” and there are few conclusive anatomic findings at autopsy to confirm the diagnosis.¹¹⁷ In a suspected overdose death, the forensic pathologist will look for signs of illicit drug use, such as needle marks or drug evidence on the body or clothing.¹¹⁸ Internally, the pathologist may find pulmonary

¹¹⁵ NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* at 9.

¹¹⁶ Nat’l Ass’n of Med. Examiners, *Forensic Autopsy Performance Standards* 1 (Oct. 16, 2006).

¹¹⁷ James R. Gill, *From Death to Death Certificate: What do the Dead say?*, 13 J. Med. Toxicol. 111, 113 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5330954/>.

¹¹⁸ Gregory G. Davis et al., *National Association of Medical Examiners Position Paper: Recommendations for the Investigation, Diagnosis, and Certification of Deaths Related to Opioid and Other Drugs*, 41 Am J Forensic Med Pathol 152, 153 (2020), <https://pubmed.ncbi.nlm.nih.gov/32404634/>.

edema, a distended bladder, or brain swelling.¹¹⁹ Pulmonary edema is a hallmark of fatal opioid intoxication cases.¹²⁰ The development of pulmonary edema is a well-recognized consequence of narcotic intoxication but has been associated less frequently with the use of stimulants.¹²¹ Pulmonary edema appears as a blood-tinted foam exuding from the mouth and nostrils, as well as in the lungs and airway. Termed a “foam cone,” this finding is highly suggestive of heroin (and perhaps other opioid) overdose as a consequence of pulmonary edema.¹²² The presence or absence of pulmonary edema does not provide concrete answers, but is a piece of physical evidence to draw attention to.

¹¹⁹ D. Kimberley Molina et al., *Testing an Age-old Adage: Can Autopsy Findings be of Assistance in Differentiating Opioid Versus Cardiac Deaths?*, 65 J Forensic Sci. 112, 112-116 (2020), <https://onlinelibrary.wiley.com/doi/abs/10.1111/1556-4029.14174>; See also Gary L. Henderson, *Fentanyl-Related Deaths: Demographics, Circumstances, and Toxicology of 112 Cases*, 36 Journal of Forensic Sciences 422, 427 (1991), <https://pubmed.ncbi.nlm.nih.gov/2066723/>.

¹²⁰ Michael A. Graham, *Forensic Lung Pathology*, Dail and Hammar’s Pulmonary Pathology 1174, 1204-05 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7120111/>; see also Danielle E. Pelletier et al., *Common Findings and Predictive Measures of Opioid Overdose*, Academic Forensic Pathology 91, 91-98 (2017), <https://journals.sagepub.com/doi/abs/10.23907/2017.011>.

¹²¹ Michael A. Graham, *Forensic Lung Pathology*, Dail and Hammar’s Pulmonary Pathology 1174, 1214 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7120111/>.

¹²² Ricardo Jorge Dinis-Oliveria et al., “Foam Cone” exuding from the mouthed nostrils following heroin overdose, 22 Toxicology Mechanism and Methods 159, 159-160 (2012), <https://pubmed.ncbi.nlm.nih.gov/22242632/>.

ii. Toxicology as a tool

With or without an autopsy, toxicology testing should be performed to identify and quantify any substances in the body. Some coroner or ME offices may rule a death an overdose based on the results from a rapid drug test. However, screening tests alone provide incomplete evidence, as these types of screens are subject to both false positives and false negatives¹²³--especially for opioids and benzodiazepines.¹²⁴ Follow-up toxicology is incredibly valuable, particularly in a state requiring but-for causation.

Toxicology results are essential in determining the cause of death, and counsel are highly recommended to consult a competent expert because toxicology results *must* be interpreted in the context of the circumstances surrounding death, the medical history, the scene of the death, and the autopsy findings.¹²⁵ Knowledge of “human physiology and

¹²³ Manon Ceelen et al., *Post-mortem Toxicological Urine Screening in Cause of Death Determination*, 30 Hum Exp Toxicol. 1165, 1171 (2011), <https://pubmed.ncbi.nlm.nih.gov/21084528/>.

¹²⁴ Gary M. Reisfield et al., *'False-positive' and 'False-Negative' Test Results in Clinical Urine Drug Testing*, 1 Bioanalysis, 937-52 (2009), <https://pubmed.ncbi.nlm.nih.gov/21083064/>.

¹²⁵ Jonathan G. Thompson et al., *Free Oxycodone Concentrations in 67 Postmortem Cases from the Hennepin County Medical Examiner's Office*, 32 Journal of Analytical Toxicology 673, 679 (2008), <https://pubmed.ncbi.nlm.nih.gov/19007520/>; See also Hilke Andresen et al., *Fentanyl: Toxic or Therapeutic? Postmortem and Antemortem Blood Concentrations After Transdermal Fentanyl Application*, 36 Journal of Analytical Toxicology 182, 188 (2012), <https://academic.oup.com/jat/article/36/3/182/887968>.

pharmacology can provide useful clues for making this determination.” NAME accordingly recommends consulting with a pathologist or toxicologist.¹²⁶

Questions of interpretation arise frequently because many factors can complicate a toxicology report.

- The exact panel ordered by the coroner or medical examiner (ME) provides parameters for its findings. A coroner or ME’s suspicions will determine what toxicology panel to run, but a complex drug combination or specific fentanyl analog may not be revealed in its entirety if a simpler panel is ordered for analysis versus an expanded toxicology screen.
- Not all labs are the same, and understanding a particular lab’s capabilities can be critical to interpretation. Depending on the capabilities of the lab, as well as the panel ordered, a toxicology report may or may not produce expected results.
- Not all labs have the ability to keep up with the science on identifying novel substances. Some novel compounds will remain unidentified if

¹²⁶ 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 and Other Drugs*, 41 Am J Forensic Med Pathol 152, 156 (2020), <https://pubmed.ncbi.nlm.nih.gov/32404634/>.

methods have not yet been developed to determine the entirety of its chemical makeup.¹²⁷

- Lack of specificity may leave room to question what drugs were consumed by the decedent unless the metabolites can be compared directly to results of tests on unconsumed drugs at the overdose scene. For example, the presence of morphine in a toxicology report may indicate consumption of morphine, heroin, codeine, or a combination of the three. On the contrary, a more specific finding of 6-monoacetyl morphine (6-MAM) would indicate heroin use only.¹²⁸

For these reasons--which may not be an exhaustive list--consultation with a toxicologist is incredibly valuable. A coroner or an attorney without a scientific background may struggle to interpret the findings of a toxicology report. An expert can help to evaluate the report and guide further investigation. To help ensure your expert has

¹²⁷ Justin Brower, Ph.D., Forensic Toxicologist, *Drug Identification for Suspected Overdoses: Special Emphasis on Opioids*, Medicolegal Death Investigation Seminar (Nov. 10, 2018), <https://www.wakeahec.org/courses-and-events/56769/medicolegal-death-investigation-seminar-approved-for-ama-pra-category-1-credits-TM>.

¹²⁸ See Mia von Euler et al., *Interpretation of the Presence of 6-Monoacetylmorphine in the Absence of Morphine-3-glucuronide in Urine Samples: Evidence of Heroin Abuse*, 25 Therapeutic Drug Monitoring 645, 647 (2003), <https://pubmed.ncbi.nlm.nih.gov/14508389/>.

access to data beyond the basic lab report from any testing performed by the state, it is recommended you request the full “case file” or “litigation package” during discovery.¹²⁹

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 NAME standards, which provides that an overdose can either be determined an accident or a homicide.¹³⁰ However, in their most recent position paper, NAME states that, “a death certificate is no place for the legal system to try to arrange words and concepts in a way to help one side of a potential legal dispute to gain an advantage” and that “homicide as the manner of death for a drug overdose should be reserved for an intentional exposure to inappropriately sedate or end the life of a specific individual as a kind of assault or

¹²⁹ See Carrie Allman & Brie Halfond, *Defending Drug Overdose Homicides in Pennsylvania*, National Association of Criminal Defense Lawyers (Nov. 6, 2019), <https://www.nacdl.org/getattachment/400082f9-aa38-426a-b6a1-6bdde325281c/powerpoint-allman-halfond.pdf>.

¹³⁰ 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), <https://journals.sagepub.com/doi/abs/10.23907/2013.011?journalCode=afpa>.

poisoning.”¹³¹ If the death certificate names the manner of death as a homicide, defense attorneys can question this description.

Bias on the part of the ME 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 prosecution. Importantly, it is NAME’s position that “medical examiner and coroner independence is an absolute necessity for professional death investigation.”¹³²

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, ineffectual¹³³ law enforcement strategy of *sending a message*: “If you chose to sell heroin, you’re killing people and you’re murdering

¹³¹ 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 and Other Drugs*, 41 Am J Forensic Med Pathol 152, 157 (2020), <https://pubmed.ncbi.nlm.nih.gov/32404634/>.

¹³² 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) [hereinafter Melinek, *NAME Position Paper*].

¹³³ See Section VII, including Section VII.B (sending the wrong message to the wrong people).

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."¹³⁴

Another common bias is politics. Recall that coroners are elected officials; as elected officials [coroners] must be responsive to the public, and this may lead to difficulty in making unpopular determinations of the cause and manner of death."¹³⁵ Politics, including the hope of re-election or election to higher office, may accordingly shape or even predetermine the finding. Being aware of a coroner's supporters may provide valuable insight. A local Fraternal Order of Police (FOP), for example, may select a candidate to endorse. It is important to review this information with recent elections.

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,¹³⁶ there are few restrictions on prosecutors or law

¹³⁴ 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.

¹³⁵ Nat'l Research Council, *A Path Forward* at 247.

¹³⁶ Melinek, *NAME Position Paper* 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.").

enforcement involvement in death investigations.¹³⁷ “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.’”¹³⁸ Indeed, some of the investigative staff for the coroner may be former police officers,¹³⁹ or in the extreme cases of Nevada, Montana, and California, the coroner may also be the sheriff.¹⁴⁰ The NDAA's white paper on opioids explicitly urges prosecutors to develop

¹³⁷ An example:

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).

¹³⁸ See Beety, *The Overdose/Homicide Epidemic* 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. See also Valena E. Beety et. al., *Prosecuting Opioid Use, Punishing Rurality*, 80 Ohio St. L. J. 741 (2019).

¹³⁹ 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)).

¹⁴⁰ 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.”).

partnerships with coroners.¹⁴¹ It is not uncommon for police officers, detectives, and prosecutors to attend an autopsy. However, this opportunity may disadvantage the defense.

Sometimes interference and influence are 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.'"¹⁴²

Even absent direct interference, MEs and coroners are "aware of the desired result of their analyses, [and] might be influenced—even unwittingly—to interpret ambiguous data or fabricate results to support the police theory."¹⁴³ "Tunnel vision has been shown to have an effect in the initial stages of criminal investigations and this is a significant issue

¹⁴¹ NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* 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.").

¹⁴² *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) [hereinafter Hansen, *CSI Breakdown*].

¹⁴³ 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, *The Inquest and the Virtues of Soft Adjudication* 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.").

because all subsequent stages of the investigation will potentially be impacted by the information generated at this initial stage.”¹⁴⁴

Indeed, in a survey of NAME members, 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.¹⁴⁵ Of responding pathologists, twenty-two percent had “experienced political pressure to change death certificates from elected and/or appointed political officials.”¹⁴⁶ It is a reasonable assumption that knowledge of these forms of pressure and negative consequences for resistance has spread widely in the field, having a chilling effect upon professional independence.

Accordingly, 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.”¹⁴⁷ Furthermore, “[t]o promote competent and objective death

¹⁴⁴ 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, *The Multiple Dimensions*).

¹⁴⁵ Melinek, *NAME Position Paper* at 93.

¹⁴⁶ Melinek, *NAME Position Paper* at 94.

¹⁴⁷ Nat’l Ass’n of Med. Examiners, *Forensic Autopsy Performance Standards 1* (Oct. 16, 2006).

investigations: . . . Medico-legal death investigation officers *should operate without any undue influence from law enforcement agencies and prosecutors.*”¹⁴⁸ Given this context, defenders should consider querying whether the ME or coroner in the case was biased and even potentially a de facto “member[] of the prosecution’s ‘team.’”¹⁴⁹

IV. 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.”¹⁵⁰ 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.¹⁵¹ Because a person cannot distribute an item to someone who already possesses it, joint-purchasers cannot be convicted of distributing to

¹⁴⁸ Nat’l Ass’n of Med. Examiners, Forensic Autopsy Performance Standards (emphasis added).

¹⁴⁹ Hansen, *CSI Breakdown*; see also Robbins, *A Deadly Pair*.

¹⁵⁰ United States v. Swiderski, 548 F.2d 445, 450 (2d Cir. 1977).

¹⁵¹ See Swiderski, 548 F.2d at 448, 450.

each other. In the words of the New Jersey Supreme Court in *State v. Morrison*,¹⁵² “[i]t hardly requires stating that the ‘transfer’ of a controlled substance cannot occur . . . if the intended recipient already possesses that substance.”¹⁵³ And to quote the Second Circuit's decision in *U.S. v. Swiderski*, “simple joint possession does not pose any of the 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.”¹⁵⁴ Indeed, as the Third Circuit recently noted in *U.S. v. Semler*, “[i]t is well-established that, in enacting the [Controlled Substances Act], Congress ‘dr[ew] a sharp distinction between’ drug trafficking and illicit personal use of drugs.”¹⁵⁵

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

¹⁵² 902 A.2d 860 (N.J. 2006).

¹⁵³ *Morrison*, 902 A.2d. at 867.

¹⁵⁴ 548 F.2d at 450.

¹⁵⁵ *U.S. v. Semler*, No. 19-2319 (3rd. Cir, June 1, 2021), slip opn. at 10, *quoting* *Swiderski*, 548 F.2d at 449-50.

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*,¹⁵⁶ 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."¹⁵⁷ Relying on a prior California case,¹⁵⁸ the court found that:

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.¹⁵⁹

¹⁵⁶ 702 P.2d 555 (Cal. 1985).

¹⁵⁷ *Edwards*, 702 P.2d at 556.

¹⁵⁸ 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.

¹⁵⁹ *Edwards*, 702 P.2d at 559 (emphasis added) (footnotes omitted).

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.”¹⁶⁰ 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.¹⁶¹ 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.”¹⁶²

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.¹⁶³

¹⁶⁰ 902 A.2d at 867.

¹⁶¹ See *United States v. Wallace*, 532 F.3d 126, 130–31 (2d Cir. 2008).

¹⁶² 902 A.2d at 870.

¹⁶³ *Morrison*, 902 A.2d at 870.

In that case, Lewis Morrison was charged with the drug-induced death of his friend Daniel Shore.¹⁶⁴ In New Jersey, the statute is a strict liability crime.¹⁶⁵ Morrison and Shore had “pooled their money . . . [and] bought four decks of heroin” at around 3 a.m. one morning.¹⁶⁶ Morrison and Shore were together when they bought the heroin, but Morrison negotiated the purchase and took the initial physical control of the heroin.¹⁶⁷ Morrison “placed the decks in his pocket and, after driving out of the city, gave one to Shore.”¹⁶⁸ Morrison and Shore drove to Morrison’s house and used the heroin they had purchased.¹⁶⁹ Shore died of a heroin overdose a few hours later.¹⁷⁰

¹⁶⁴ See *Morrison*, 902 A.2d 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.

¹⁶⁵ 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.”).

¹⁶⁶ *Morrison*, 902 A.2d at 862–63.

¹⁶⁷ See *Morrison*, 902 A.2d at 863.

¹⁶⁸ *Morrison*, 902 A.2d at 863.

¹⁶⁹ *Morrison*, 902 A.2d at 863.

¹⁷⁰ *Morrison*, 902 A.2d at 863–64.

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 together to make the purchase; and that Shore was physically present at the time of the purchase.¹⁷¹ 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.¹⁷²

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.

¹⁷¹ *Morrison*, 902 A.2d at 870–71.

¹⁷² *Morrison*, 902 A.2d at 871 (citations omitted).

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. Wright*,¹⁷³ 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.¹⁷⁴

Because Wright and his friend had not acquired the heroin “simultaneously,”¹⁷⁵ the court found Wright’s conduct constituted “distribution.”¹⁷⁶ 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.’”¹⁷⁷

¹⁷³ *United States v. Wright*, 593 F.2d 105 (1979).

¹⁷⁴ *Wright*, 593 F.2d at 108.

¹⁷⁵ *Wright*, 593 F.2d at 108.

¹⁷⁶ *Wright*, 593 F.2d at 106.

¹⁷⁷ *Wright*, 593 F.2d 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

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*,¹⁷⁸ 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.”¹⁷⁹ In *Carithers*, the Minnesota Supreme Court considered a consolidated appeal of two cases involving

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.”).

¹⁷⁸ *State v. Carithers*, 490 N.W.2d 620 (Minn. 1992).

¹⁷⁹ *Carithers*, 490 N.W.2d at 622.

prosecutions under a drug-induced homicide felony murder statute.¹⁸⁰ 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.¹⁸¹

The court held that the joint-user defense applied because the defendant's husband constructively possessed the heroin as soon as it was purchased.¹⁸² 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.¹⁸³

¹⁸⁰ See *Carithers*, 490 N.W.2d. 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.”).

¹⁸¹ *Carithers*, 490 N.W.2d. at 620–21.

¹⁸² See *Carithers*, 490 N.W.2d. at 622.

¹⁸³ *Carithers*, 490 N.W.2d. at 622.

Accordingly, the joint-user defense applied and the court upheld dismissal of the felony murder charges.¹⁸⁴

The New Jersey Supreme Court's multi-factor “fact-sensitive” test for determining whether users simultaneously acquired possession appears to take a similar approach.¹⁸⁵ 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 shortly after the purchase might qualify for the defense, regardless of whether both were physically present at the sale.¹⁸⁶

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

¹⁸⁴ 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.”).

¹⁸⁵ *Morrison*, 902 A.2d at 870.

¹⁸⁶ *Morrison*, 902 A.2d at 870 (citation omitted).

jurisdictions have not yet resolved this question. 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.”¹⁸⁷

For instance, in *People v. Konrad*,¹⁸⁸ the Michigan Supreme Court held that the defendant constructively possessed cocaine where the evidence showed he “had paid for

¹⁸⁷ *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* Section VII.B), or that the lower charge opens the possibility of a treatment-oriented disposition rather than incarceration.

¹⁸⁸ 536 N.W.2d 517 (Mich. 1995).

the drugs and that they were his—that is, that he had the intention and power . . . to exercise control over them.”¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹ This is because a person “may constructively possess substances that their agents have *bought* for them.”¹⁹²

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.¹⁹³ In *People v. White*, the defendant, Frank White, asked his roommate Conover to buy some heroin for him.¹⁹⁴ Conover made the purchase while White was at

¹⁸⁹ *Konrad*, N.W.2d at 522.

¹⁹⁰ *Konrad*, N.W.2d at 522.

¹⁹¹ *See Konrad*, N.W.2d at 520–23.

¹⁹² *Konrad*, N.W.2d at 522..

¹⁹³ *People v. White*, 325 P. 2d 985, 987 (Cal. 1958) (en banc).

¹⁹⁴ *White*, 325 P. 2d at 986.

work and left the heroin on White's dresser.¹⁹⁵ The police found the heroin before White arrived home from work.¹⁹⁶ Even though White never had physical access to the heroin, the court sustained his possession conviction.¹⁹⁷ 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."¹⁹⁸

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.¹⁹⁹ 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 for courts to reject decisions like the

¹⁹⁵ *White*, 325 P. 2d at 986.

¹⁹⁶ *White*, 325 P. 2d at 986.

¹⁹⁷ *White*, 325 P. 2d at 987.

¹⁹⁸ *White*, 325 P. 2d at 987.

¹⁹⁹ *Carithers*, 490 N.W.2d at 622.

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*,²⁰⁰ 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.²⁰¹

²⁰⁰ 840 F.3d 865, 867 (7th Cir. 2016).

²⁰¹ See *id.* *Weldon*, 840 F.3d 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.²⁰²

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

²⁰² *Weldon*, 840 F.3d at 867 (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 section IV, 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. Carrillo*, 131 N.E.3d 812 (Mass. 2019).

... The Legislature expected the criminal culpability of parties to bear some proportion to their conduct.²⁰³

To hammer home this goal, it may be worthwhile to parse the statutory language and/or legislative terms such as “sell”—as the Minnesota Supreme Court did in *Carithers*.²⁰⁴ 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.”²⁰⁵

The Third Circuit recently followed this approach in *U.S. v. Semler*, which vacated the conviction and ordered a new trial based on the trial court’s denial of defendant’s motion to instruct the jury that individuals who jointly and simultaneously acquire possession of a controlled substance for their shared personal use can be guilty only of simple

²⁰³ 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. § 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.

²⁰⁴ See generally, *Carithers*, 490 N.W.2d at 620.

²⁰⁵ *Weldon*, 840 F.3d at 866.

possession.²⁰⁶ The majority’s non-precedential opinion applying this logic explicitly calls attention to negative downstream consequences raised in the amicus curiae brief we filed in the case.

The government would have us believe that if two drug addicts jointly and simultaneously purchase methamphetamine and return home to smoke it together, a “distribution” has occurred each time the addicts pass the pipe back and forth to each other. Such an interpretation diverts punishment from traffickers to addicts, who contribute to the drug trade only as end users and who already suffer disproportionately from its dangerous effects. Indeed, the threat of harsh penalties in any joint-use situation could jeopardize addicts’ safety even more by deterring them from using together specifically so that one can intervene if another overdoses. Moreover, given the prevalence of shared drug use, a too-broad construction of “transfer” risks arbitrary enforcement.²⁰⁷

V. 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.²⁰⁸ Even though it is a sentencing enhancement, it is considered an element of the offense and must be alleged in the indictment.²⁰⁹ The sentences are quite severe—often mandatory life terms—but

²⁰⁶ U.S. v. Semler, No. 19-2319 (3rd. Cir, June 1, 2021).

²⁰⁷ *Semler* at 11.

²⁰⁸ 21 U.S.C. §§ 841(b), § 960(b).

²⁰⁹ 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

possibilities do exist in mitigation. For more information regarding federal sentencing, see the Federal Defenders information from its Federal Criminal Practice Seminars.²¹⁰

At the state level, in addition to the usual considerations regarding sentencing and mitigation,²¹¹ Good Samaritan laws may come into play.²¹² In Vermont, Delaware, and Rhode Island, they may provide immunity to DIH charges for people who call 911 to seek help.²¹³ 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.²¹⁴ For

United States v. Reynoso, Case 1:17-cr-10350-NMG (D. Mass. Jun. 24, 2019) (prosecution's sentencing memo).

²¹⁰ Harris & Lorish, *Litigation Strategies In Opioid Overdose Cases*.

²¹¹ See Section VIII (regarding the use of person-first language to humanize defendants and other people who use drugs or suffer addiction).

²¹² 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).

²¹³ See LaSalle, *An Overdose Death* at 40.

²¹⁴ See Legal Science, *Good Samaritan Overdose Prevention Laws* at question 5.

cases not going to trial, the possibility of mitigation may offer advantages in plea bargain negotiations.²¹⁵

VI. CONSTITUTIONAL AND STATUTORY PROBLEMS WITH DIH ENFORCEMENT

This section explores several different areas where DIH laws and their enforcement prompt constitutional and statutory concerns, including creating exposure to affirmative litigation.²¹⁶

A. Disparate impact on people of color

Contrary to the conventional wisdom that the opioid crisis is a "white" problem receiving a "public health approach," DIH enforcement appears to disproportionately target people of color, perpetuating many elements of the War on Drugs and mass incarceration. 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

²¹⁵ For a resource outlining current research on plea bargaining, *see*, Subramanian, Ram, et. al., Vera Institute, *In the Shadows: A Review of Plea Bargaining*, (Sept. 2020), available at <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>.

²¹⁶ A potential constitutional problem raised elsewhere but not addressed here is conflict between the Commerce Clause and DDRD enforcement by the federal government. *See generally*, Alyssa Mallgrave, Purely Local Tragedies: How Prosecuting Drug-Induced Homicide in Federal Court Exacerbates the Overdose Crisis, 13 Drexel L. Rev. 233 (2020), available at <https://drexel.edu/~media/Files/law/law%20review/v13-1/Mallgrave%2013%20Drexel%20L%20Rev%20233.ashx>.

decendent is white, and that people of color receive median sentences that are 3 years (approximately 60%) longer than whites.²¹⁷ This pattern of practice that harkens back to one of the most egregious drivers of the War on Drugs.²¹⁸

If racial discrimination appears to be a factor in your case, consider whether a viable selective prosecution claim is available. Because this area of law is so complex, we refer you to more specialized sources.²¹⁹

²¹⁷ See *Drug Induced Homicide*, Health in Justice Action Lab, which features visual representations of the data. See section VII.A. below for more contextual data and citations for resources.

²¹⁸ 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/>.

²¹⁹ For a legal guide on raising issues of race, including selective prosecution claims, written for North Carolina defenders (but including federal issues), see Alyson Grine & Emily Coward, *Raising Issue of Race in North Carolina Criminal Cases*, in *Indigent Defense Manual Series 5-1 to 5-28* (John Rubin, ed. 2014), <https://defendermanuals.sog.unc.edu/race/5-selective-prosecution-plea-negotiations-and-charging-decisions-prosecutors>. This resource offers a list of questions to determine the viability of a selective prosecution claim as well as guidance on raising and proving these claims. For guidance on raising issues of race, including selective prosecution claims, written for Kentucky defenders (but including federal issues), see Gail Robinson, *Selective Prosecution*, 30 *Advocate: J. Crim. Just. Educ. & Rsch.* 5 (2008), https://dpa.ky.gov/Public_Defender_Resources/Documents/Litigating%20Race%20Issues.pdf. Additionally, for guidance--checklists, case law, and empirical research, among other resources--on raising racial justice concerns, including selective prosecution, in juvenile cases, see Case Advocacy, *Racial Justice for Youth: A Toolkit for Defenders*, <https://www.defendracialjustice.org/case-advocacy/> (last visited Apr. 21, 2021). While not written for defenders, the *Wisconsin Municipal Judge Benchbook*, outlines considerations of equal protection/selective prosecution claims beginning on page 12-13. *Wis. Sup. Ct., Dir. of State Cts. & Off. of Jud. Educ., Wisconsin Municipal Judge Benchbook*, 12-13 to 12-16 (2020),

Even if a claim is not available, consider how your choices of person-affirming language and storytelling can highlight and challenge racist biases and assumptions. As discussed in Section VIII below, efforts to humanize your client will, of course, make for a more zealous defense, and they may increase the chances of a more equitable outcome.

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

Considering that DIH defendants are not the “kingpins” allegedly targeted by the statutes but rather people overwhelmingly likely to suffer OUD themselves, the criminal justice system's tragic failure to provide medications for OUD such as methadone or Suboxone is a critical problem for DIH enforcement.²²⁰ If a carceral facility fails to provide MOUD or deprives an inmate suffering from OUD from continuing to receive previously-prescribed 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 carceral facilities to provide methadone to the

<https://www.wicourts.gov/publications/guides/docs/munibenchbook.pdf>. The margins contain governing case law for each prong of analysis. See also the resources available from the NACDL, *Racial Disparity Resources* (April 25, 2019), <https://www.nacdl.org/Content/RacialDisparityResources>.

²²⁰ See discussion in Sections V.C and VI.B.

plaintiff, who had been receiving physician-prescribed treatment for his OUD prior to his detention, but the state refused to consider the medical dynamics of his case. The court's ruling that the commonwealth's policy depriving methadone to inmates with OUD violated the ADA (as well as the U.S. Constitution, see below).²²¹ 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.²²²

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.²²³

²²¹ 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.

²²² *Smith v. Aroostook County*, 922 F.3d 41 (1st Cir. 2019).

²²³ See Legal Action Center, *MAT Advocacy Toolkit* (June 2021), <https://www.lac.org/resource/mat-advocacy-toolkit>; for a summary of cases and policy issues, see Sally Friedman and Gabrielle de la Gueronniere, *MOUD in Corrections: Recent Legal & Policy Developments and Implications*, Legal Action Center (January 28, 2020), <https://opioidresponsenetwork.org/documents/MOUDConference2020/Gabrielle%20de%20la%20Gueronniere-%20MOUD%20presentation%20RI.pdf>; see also O'Neill Institute for National and Global Health Law, *Applying the Evidence* (October 2019), <https://oneill.law.georgetown.edu/wp-content/uploads/Applying-the-Evidence-Report-1.pdf>.

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

Similarly, where facilities provide no or inadequate treatment services and force inmates into the misery of withdrawal,²²⁴ this may count as cruel and unusual punishment.²²⁵ 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.”²²⁶ In that case, *Pesce* was receiving physician-prescribed treatment for his OUD, but the state refused to consider the medical dynamics of his case.

D. Forcing someone into withdrawal can expose a jurisdiction to wrongful death lawsuits

²²⁴ 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/>; Nat'l Center on Addiction and Substance Abuse, *Behind Bars II: Substance Abuse and America's Prison Population* at 43 (2010), <https://files.eric.ed.gov/fulltext/ED509000.pdf> (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”).

²²⁵ See United States Department of Justice Civil Rights Division and the U.S. Attorney's Office for the District of New Jersey, *Investigation of the Cumberland County Jail (Bridgeton, New Jersey)* (January 14, 2021), <https://www.justice.gov/crt/case-document/file/1354491/download>.

²²⁶ See *Pesce* slip op'n. at 16 (citing cases). See also Legal Action Center, *Substance Use: Medication Assisted Treatment Resources* (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.

The lack of evidence-based treatment behind bars is actually a matter of life or death. The first moment this risk of death arises is when people are arrested while still under the influence. Failing to treat their withdrawal symptoms can result in death. When this happens, it exposes jurisdictions to significant civil liability. Several jurisdictions have paid significant settlements and judgments in these cases.²²⁷

E. 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

²²⁷See, e.g., Associated Press, *Snohomish County To Pay \$1m Settlement Over Woman's Heroin Withdrawal Death In Jail*, Seattle Times (Oct. 28, 2019), <https://www.seattletimes.com/seattle-news/crime/snohomish-county-to-pay-1m-lawsuit-over-inmates-heroin-withdrawal-death/>; Jo Ciavaglia, *Family Files Lawsuit in 2018 Death of Bucks County Inmate*, Bucks County Courier Times (May 21, 2019), <https://www.buckscountycouriertimes.com/news/20190521/family-files-lawsuit-in-2018-death-of-bucks-county-inmate> (noting \$300,000 in settlements from withdrawal deaths at a Pennsylvania jail); Maxine Bernstein, *Record \$10 Million Judgment Awarded In Washington County Jail Heroin Withdrawal Death*, The Oregonian (Dec. 7, 2018), <https://www.oregonlive.com/crime/2018/12/record-10-million-judgement-awarded-against-corizon-health-in-death-of-washington-county-jail-inmate.html>; Maryclaire Dale, *Pennsylvania County Pays Teen's Family Nearly \$5M Over Heroin Withdrawal Death in Jail*, NBC Philadelphia (Oct. 24, 2018), <https://www.nbcphiladelphia.com/local/settlement-jail-heroin-withdrawal-death/58460/>.

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,²²⁸ 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 communications²²⁹ and information *about* an individual's communications (also known as "metadata").²³⁰ 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:

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

²²⁸ 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).

²²⁹ Saved text messages are an example of the contents of an individual's communication that can be retrieved from their phone.

²³⁰ Phone call metadata can include the identity of the caller and recipient, time of the call, and duration of the call.

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.²³¹

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.²³²

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)²³³ and contents of communications held in storage for more than 180 days (which could be obtained with a subpoena),²³⁴ 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.”²³⁵ In contrast, federal law allows law enforcement to obtain a customer's name and “local and long distance telephone

²³¹ NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* at 9.

²³² 18 U.S.C. § 2703 (a)-(c) (2018).

²³³ 18 U.S.C. § 2703 (a) (2018).

²³⁴ 18 U.S.C. § 2703 (b) (2018).

²³⁵ 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>.

connection records” through an administrative subpoena,²³⁶ and other non-content information through a court order.²³⁷ However, some states have implemented stricter protections for certain types of communications metadata.²³⁸

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 have been advocating for years in the hope Congress will amend the Communications Assistance for Law Enforcement Act of 1994 to require encryption technology to include backdoor access for law enforcement.²³⁹

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

²³⁶ 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.

²³⁷ 18 U.S.C. § 2703 (d).

²³⁸ 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).

²³⁹ NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* at 7-9 (“Address the Obstacle of Smartphone Encryption”).

towers were connected to their phone at what times.²⁴⁰ 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 prospective CSLI.²⁴¹ 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.²⁴² 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.²⁴³ However, the Supreme Court explicitly and narrowly limited the

²⁴⁰ Marc McAllister, *GPS and Cell Phone Tracking: A Constitutional and Empirical Analysis*, 82 U. Cin. L. Rev. 207, 225 (2013).

²⁴¹ 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.

²⁴² *United States v. Carpenter*, 585 U.S. ____, No. 16-402 (Jun. 22, 2018).

²⁴³ *Carpenter*, 585 U.S. at 12.

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).”²⁴⁴

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-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.”²⁴⁵ Additionally, as lower courts have already begun to explore whether this opinion may be extended to other technologies,²⁴⁶ the protections available for other forms of location information may shift in the future.

²⁴⁴ *Carpenter*, 585 U.S.at 17.

²⁴⁵ *Tracey v. State*, 152 So. 3d 504, 526 (Fla. 2014).

²⁴⁶ 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).

Alongside privacy protections, also consider the underlying validity of the data. An expert on cell service location information could be valuable, as sometimes location information may not be as certain as the prosecution may assert, given that sometimes the non-closest tower may be used due to high traffic volume.²⁴⁷

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 smartphone. Mobile applications ("apps") are software designed to run on a mobile device and are widely employed by mobile device users²⁴⁸ 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.²⁴⁹ It is probable that prosecutors would seek to

²⁴⁷ See Carrie Allman & Brie Halfond, Defending Drug Overdose Homicides in Pennsylvania, National Association of Criminal Defense Lawyers (Nov. 6, 2019), <https://www.nacdl.org/getattachment/400082f9-aa38-426a-b6a1-6bdde325281c/powerpoint-allman-halfond.pdf>.

²⁴⁸ 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/>.

²⁴⁹ 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.

mine this broad range of information collected by mobile applications for insight into an individual's behaviors, social network, and locations.²⁵⁰

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 communications²⁵¹ (requiring a warrant),²⁵² as well as metadata about these communications (requiring a court order²⁵³ or subpoena²⁵⁴). 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

²⁵⁰ 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.

²⁵¹ 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).

²⁵² 18 U.S.C. § 2703(a)-(c).

²⁵³ 18 U.S.C. § 2703(d).

²⁵⁴ 18 U.S.C. § 2703(c)

developers have well-established mechanisms for receiving and processing law enforcement requests,²⁵⁵ while 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.²⁵⁶ Consequently, as a practical matter it may be relatively more difficult for law enforcement to obtain information from app developers than from telecommunication companies.

VII. 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

²⁵⁵ See, e.g., Instagram, *Information for Law Enforcement*, <https://help.instagram.com/494561080557017> (last accessed Nov. 20, 2018).

²⁵⁶ Balkovich et al., *Electronic Surveillance of Mobile Devices* at 6.

trafficking on a large scale.²⁵⁷ DIH enforcement doesn't work, and if one of its goals is to reduce overdose deaths, it actually exacerbates the problem.²⁵⁸

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 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*.²⁵⁹

²⁵⁷ See LaSalle, An Overdose Death at 39.

²⁵⁸ This section is essentially an updated version of arguments made by the Health in Justice Action Lab and our co-author Lisa Newman-Polk in our amicus curiae brief in the case of Commonwealth v. Carrillo (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497098. For alternative rhetorical approaches, see our amicus curiae brief in U.S. v. Semler (coauthored with Scott Burris), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717117, and our sentencing memorandum in U.S. v. Cook, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717131. Please note that these latter two briefs do not raise race-based disparities because the defendants were white, and we did not want to inadvertently encourage the courts to attempt to level racial disparities in DIH enforcement by giving these defendants extra harsh sentences.

²⁵⁹ See Commonwealth v. Jackson, 464 Mass. 758 (2013), *quoting* 1980 House Doc. 6652, at 1 (emphasis added by the Court).

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.”²⁶⁰

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...²⁶¹

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.²⁶² An article in a National Association of Attorneys General

²⁶⁰ See 2003 Vermont Law P.A. 54, §1(2) (legislative findings). See also LaSalle, An Overdose Death 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.”).

²⁶¹ NJ Div. of Criminal Justice, *Statewide Narcotics Action Plan* (Mar. 12, 1993), <https://www.state.nj.us/lps/dcj/agguide/snap93.htm>.

²⁶² 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.”).

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.”²⁶³ 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.”²⁶⁴

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 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, romantic partners, and people with whom the

²⁶³ See, e.g., Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*.

²⁶⁴ 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>.

decedent had a non-dealer relationship.²⁶⁵ Only 47 percent were brought against “traditional” drug dealers, many of whom were selling small amounts of drugs.²⁶⁶

A study conducted by the Drug Policy Alliance had similar findings.²⁶⁷ 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.²⁶⁸ An extensive study by the *New York Times* looking at prosecutions in Pennsylvania came to similar findings.²⁶⁹

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

²⁶⁵ 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/> [hereinafter Beletsky, *America's Favorite Antidote*]. Visualizations of the data are available on the Lab's website at <https://www.healthinjustice.org/drug-induced-homicide>.

²⁶⁶ Beletsky, *America's Favorite Antidote*.

²⁶⁷ See LaSalle, *An Overdose Death* at 41.

²⁶⁸ LaSalle, *An Overdose Death* at 42 (summarizing studies).

²⁶⁹ See Goldensohn, *You're Not a Drug Dealer? Here's Why the Police Might Disagree*.

other than the person who held the drugs prior to the decedent.²⁷⁰ Of course, as described above, some states have adopted a "contributes to" standard to ease the burden of proof. The NDAA's white paper on opioids would go even further, recommending that legislatures explicitly "mak[e] every person in the chain of delivery criminally liable for an overdose death[.]"²⁷¹ 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 (though, as discussed in subsection E below, evidence shows drug laws are generally ineffective at deterrence).

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.

On the first of these, naloxone nasal spray is simple to administer and effective at reversing overdoses from *all* opioids, and it can be done by emergency responders, by

²⁷⁰ See Beletsky, *America's Favorite Antidote* at 57-58.

²⁷¹ NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* at 9.

fellow users, or by others (such as people in the user's circles or bystanders).²⁷² 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.²⁷³

Naloxone works, but only if administered in time.²⁷⁴ It is therefore critical that someone else be present who can administer naloxone or call 911 to prevent accidental overdoses from turning fatal.²⁷⁵ Accordingly, the second common intervention is a public

²⁷² 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).

²⁷³ 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-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/>.

²⁷⁴ See Boyer, *Management of Opioid Analgesic Overdose*.

²⁷⁵ 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.

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--and it has been tragically borne out during the coronavirus pandemic.

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 collateral consequences such as losing their housing or shelter.²⁷⁶ 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.²⁷⁷

²⁷⁶ 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, *An Overdose Death* (summarizing studies).

²⁷⁷ 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, *Good Samaritan Overdose*.

Unfortunately, Good Samaritan laws are too narrowly drawn. In every state--except to some extent in Vermont, Delaware, and Rhode Island--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 what or whom they cover and whether they cover investigation, arrest, and/or prosecution.²⁷⁸ In other words, they create a quandary for people calling 911: you *might* not 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.²⁷⁹

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.²⁸⁰ Unfortunately, this is a case of sending the wrong message to the wrong

²⁷⁸ See Section V (regarding the relevance of Good Samaritan laws in mitigating sentence severity).

²⁷⁹ 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/>.

²⁸⁰ 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.

people. Arresting and prosecuting users and petty street dealers does not threaten kingpins, but 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.²⁸¹ This increasingly common practice of treating every overdose scene as a crime scene²⁸² 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.²⁸³ Indeed, this may become worse if the panic in law enforcement surrounding fentanyl, particularly the myth that mere bodily contact can trigger an overdose, continues to spread.²⁸⁴

²⁸¹ See, e.g., LaSalle, *An Overdose Death* at 23, 40; Allyn, *Bystanders*. See also, e.g., NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* at 9 (“Law enforcement agencies and prosecutors should treat every overdose death as a homicide and assign homicide detectives to respond to these scenes.”).

²⁸² See, e.g., LaSalle, *An Overdose Death* 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.”).

²⁸³ See LaSalle, *An Overdose Death* 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, *The Opioid Epidemic: A State and Local Prosecutor Response* at 9. This raises evidentiary issues that are discussed Section VI.D and Section VII.A.

²⁸⁴ See, e.g., Crime and Justice News, *Should Exposing Someone to Fentanyl Be a Crime?*, *The Crime Report* (Dec. 17, 2018),

Accordingly, if prosecutors are trying to “send a message” to people in the drug trade but are only targeting end-users for enforcement, 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, 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.²⁸⁵ If fellow users witnessing an overdose do not have naloxone and do not call 911, then entirely avoidable deaths will inevitably follow.

Unfortunately, research bears this out. The Health in Justice Action Lab, working with a team of econometric epidemiologists at Boston University recently conducted a statistical analysis to estimate how DDRD prosecutions covered in the media between 2000 and 2017 affected subsequent overdose rates. Using overdose death data from the Centers for Disease Control, we estimated that an increase in DIH prosecutions covered

<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>. For the science, see American College of Medical Toxicology, *ACMT Statement on Fentanyl Exposure* (July 12, 2017), https://www.acmt.net/cgi/page.cgi/_zine.html/The_ACMT_Connection/ACMT_Statement_on_Fentanyl_Exposure.

²⁸⁵ See Beletsky, *America’s Favorite Antidote*.

by the media is associated with a 7.8% increase (risk ratio of 1.078, 95% CI: (1.066, 1.091)) in overdose deaths. Further analysis suggested that in the states analyzed, there was a total of approximately 32,674 (95% CI: (27,843, 37,449)) deaths attributable to DIH prosecutions in the 50 states from 2000 to 2017.²⁸⁶ The results of this analysis directly contradict claims that DDRD prosecutions avert future overdoses. Put simply, DDRD and similar prosecutions actually aggravate the crisis they are purported to solve.

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.²⁸⁷ 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.

²⁸⁶ See Kelly Kung, Leo Beletsky, et al., *Analysis of Drug Induced Homicide Prosecutions as a Drug Overdose Prevention Measure*, CPDD 2020 Annual Meeting (June 24, 2020).

²⁸⁷ 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, *If They Die of an Overdose, Drug Users Have a Last Request*.

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.²⁸⁸ 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,

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.²⁸⁹

From moral, public health, and legal standpoints, DIH enforcement fails to consider the increased degree of harm these efforts do to people with substance use disorders. Incarceration generally has a deleterious impact on a person's mental and physical health.

²⁸⁸ 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>.

²⁸⁹ 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](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(19)30104-5/fulltext).

For those experiencing SUD, 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.²⁹⁰

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.²⁹¹ One study of people incarcerated in America found that in 2017, only 4.6 percent of people referred to treatment for OUD received medications for opioid use disorder, known throughout the medical field as the “gold standard” of care.²⁹² Indeed,

²⁹⁰ 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) [hereinafter Beletsky et al., *Fatal Re-Entry*] (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://files.eric.ed.gov/fulltext/ED509000.pdf> (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”).

²⁹¹ 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”).

²⁹² 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),

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 (leading to large wrongful death payouts as discussed above).²⁹³

The vast majority of people suffering from OUD 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 opioids,²⁹⁴ 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

<https://www.ncbi.nlm.nih.gov/pubmed/29200340>; see also Leo Beletsky, *21st Century Cures for the Opioid Crisis: Promise, Impact, and Missed Opportunities*, 44 *American Journal of Law and Medicine* 359-385 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3230758.

²⁹³ 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 in Sections VI.

²⁹⁴ See Beletsky et al., *Fatal Re-Entry* 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) [hereinafter Binswanger et al., *Return to Drug Use*]; 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) [hereinafter McKenzie et al., *Overcoming Obstacles*]; and then citing World Health Org., *Prevention of Acute Drug-related Mortality in Prison Populations During the Immediate Post-release Period*, 10–11 (2010)) [hereinafter World Health Org., *Prevention of Acute Drug-related Mortality*].

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lead them to consume opioids.²⁹⁵ Without their prior physical tolerance to the drugs, the risk of accidental overdose and death increases astronomically.²⁹⁶ The present-day heightened potency of heroin and illicitly-produced fentanyl or its analogs 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.²⁹⁷ 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.²⁹⁸

This lack of standard-of-care treatment followed by “fatal re-entry” is a tragic downstream policy problem with DIH enforcement.²⁹⁹ This is yet another reason why it is

²⁹⁵ See Beletsky et al., *Fatal Re-Entry* (citing Binswanger et al., *Return to Drug Use* 7).

²⁹⁶ See Beletsky et al., *Fatal Re-Entry* (first citing Binswanger et al., *Return to Drug Use* at 5; then citing McKenzie et. al., *Overcoming Obstacles* at 219; and then citing World Health Org., *Prevention of Acute Drug-related Mortality* at 10–11).

²⁹⁷ See Beletsky et al., *Fatal Re-Entry* at 150 (footnote omitted); Ranapurwala et. al., *Opioid Overdose Mortality*. 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>.

²⁹⁸ Byron Alex et al., *Death After Jail Release: Matching to Improve Care Delivery*, 23 J. of Correctional Health Care 83 (Jan. 1, 2017), <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).

²⁹⁹ 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

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 sentencing, and later in determination of where the sentence is served.

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, sometimes striving to bring increased access to services (either through “warm handoffs” in lieu of arrest or offering MOUD to people in carceral settings). 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. Such efforts are significantly more likely to reduce accidental

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).

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overdose deaths than DIH prosecutions, but they require citizens' willingness to open their doors and find them credible enough to engage. Aggressive DIH enforcement undermines such initiatives, steering people away from even beneficial police contact and inadvertently worsening disparities in access to care.³⁰⁰ Worse, considering that these programs also require police to work in partnership with public health and other sectors, they may 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.”³⁰¹ However, their contentions are never

³⁰⁰ See, e.g., Megan Cassidy, *Study: 45% in mental-health crisis said Phoenix police made matters worse*, The Republic (April 11, 2017), <https://www.azcentral.com/story/news/local/phoenix/2017/04/11/phoenix-police-survey-mental-health-crisis/100310696/>; German Lopez, *How America's criminal justice system became the country's mental health system*, Vox (October 18, 2016), <https://www.vox.com/2016/3/1/11134908/criminal-justice-mental-health>; Zach Rhoads, *The Problems With Post-Overdose Response Teams*, Filter (February 24, 2020), <https://filtermag.org/post-overdose-response-teams/>.

³⁰¹ NDAA, *The Opioid Epidemic: A State and Local Prosecutor Response* 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 Meiner, *Danger in Milligrams and Micrograms: United States Attorneys’ Offices Confront Illicit Fentanyl*, 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

supported by valid citations--or even any 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.³⁰²

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.³⁰³ 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

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).

³⁰² 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.

³⁰³ 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).

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and 2010, “self-reported use of illegal drugs has increased over the long term as drug prices have fallen and purity has risen.”³⁰⁴ “[T]he results show there is no statistically significant basis for believing that increasing prison admissions for drug offenses deters drug use.”³⁰⁵

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.”³⁰⁶ Substance use disorders change the neurochemistry of the brain. When

³⁰⁴ *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.

³⁰⁵ 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).

³⁰⁶ 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. Env’tl. Res. & Pub. Health 4025 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210595/>; and American Society of

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 recognizing that there will be 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.³⁰⁷

Further, there is evidence suggesting that drug enforcement activities actually lead to *increases* in crime, including *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 suppressing supply, the disruption predictably

Addiction Medicine, *Definition of Addiction* (Apr. 12, 2011),
<https://www.asam.org/resources/definition-of-addiction>.

³⁰⁷ See Roger K. Przybylski; 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).

prompts an *increase* in violent crime.³⁰⁸ 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.”³⁰⁹

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.³¹⁰ 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

³⁰⁸ See Przybylski, *Correctional and Sentencing Reform for Drug Offenders* at 17-19 (summarizing research).

³⁰⁹ 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>.

³¹⁰ 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>.

was historically cheap, on the order of \$80 per pill versus \$8 per bag. And then synthetic fentanyl and its analogs began hitting the market—which was itself a response to the economics of supply-side enforcement—and poisoning the supply.³¹¹

F. The questionable strict liability approach

DIH enforcement legally transforms accidents involving possibly risky behavior into homicide. While the strict liability approach may make sense in civil law contexts involving regulating things that are *always* inherently dangerous (such as toxic pollution or the use of explosives), deploying harsh criminal penalties in retribution for unintended consequences connected to behavior that is intentional and assumes its own risk raises normative and constitutional questions.³¹² 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.³¹³ The

³¹¹ 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>.

³¹² See generally Kaitlin S. Phillips, *From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process*, 70 Duke L.J. 659-704 (2020), <https://scholarship.law.duke.edu/dlj/vol70/iss3/4>.

³¹³ 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).

American Law Institute accordingly excludes the felony murder rule from its Model Penal Code,³¹⁴ as do several states.³¹⁵

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 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."³¹⁶

³¹⁴ 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).

³¹⁵ 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"). Other states are limiting the application and/or consequences of their felony murder rules. For example, in 2018, the California state legislature amended California's felony murder rule to require that anyone convicted of murder must act with malice--a mental state demonstrating culpability. S.B. 1437, 2017-2018 Leg. Sess.(Cal. 2018). And the Colorado state legislature is considering passing a bill that would restrict the reach and consequences of the state's felony murder rule. S.B. 21-124, 2021 Reg. Sess. (Colo. 2021). Similarly, in Maryland, a bill is under consideration that would prohibit felony murder charges from being brought against children. H.B. 385, 2021 Leg. Sess.(Md. 2021). All of these measures reflect growing recognition that strict liability provisions are contrary to public policy and require reform.

³¹⁶ Commonwealth v. Brown, 477 Mass. 805, 831 (2017) (Gants, CJ, concurring) (emphasis added), quoting Commonwealth v. Matchett, 386 Mass. 492, 506-507 (1982).

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;³¹⁷ whereas more than 2,000 people died from accidental overdoses that year.³¹⁸ 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, noting that the legislature had considered but not passed a strict liability DIH statute.³¹⁹ 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

³¹⁷ 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>.

³¹⁸ National Center for Health Statistics, Drug Overdose Mortality by State (2018), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm.

³¹⁹ 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).

crimes through judicial decisions rather than legislation.³²⁰ 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 make the drug supply safer by regulating it.

G. Better approaches to the overdose crisis

Prosecutors 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 DIH enforcement efforts, and they are far more cost-effective. Numerous cost-benefit analyses have found that treatment outperforms punitive measures; it reduces demand.³²¹ Yet only around one in ten people with substance use disorder receive any type of appropriate evidence-based treatment,³²²

³²⁰ Commonwealth v. Carrillo, S131 N.E.3d 812 (Mass. 2019). *See also* Section III.A.2.

³²¹ 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, *Correctional and Sentencing Reform for Drug Offenders* at 29-32 (describing studies).

³²² *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>.

and only one in twenty within the criminal justice system.³²³ 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.”³²⁴ Others are beginning to warm to the strategies of harm reduction, which are highly effective and cost-effective but tragically underutilized and stigmatized.³²⁵ There are even some very early signs of some prosecutors and law enforcement agencies finding cause for restraint in the use of DIH prosecutions, reserving them for cases in which the facts present greater levels of recklessness, negligence, or actual malice than a simple strict liability approach would (misguidedly) require.³²⁶

Prosecutors and law enforcement should be encouraged to use their "bully pulpit" to advocate for increased funding and access to evidence-based treatment--both inside and

³²³ Krawczyk et al., *Only One In Twenty Justice-Referred Adults In Specialty Treatment For Opioid Use Receive Methadone or Buprenorphine*.

³²⁴ See *Policing and the Opioid Crisis: Standards of Care*, Bloomberg American Health Initiative (2018), <https://www.theiacp.org/sites/default/files/Opioid%20Response%20Center/Bloomberg%20Standards%20of%20Policing%202018.pdf>.

³²⁵ Fair and Just Prosecution, *Harm Reduction Responses to Drug Use* (August 2019), https://fairandjustprosecution.org/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf.

³²⁶ See, e.g., Kristine Hamann and Charlotte Bismuth, *Seeking Justice and Solutions: A Prosecutor's Guide to Opioid Overdose Investigations*, Prosecutor's Center for Excellence (January 2021), <https://pceinc.org/wp-content/uploads/2021/02/20210202-Opioid-Overdose-Investigations-PCE-Aequitas-Final.pdf>.

outside the criminal justice system--bravely citing evidence to show that it will deter drug crime far better than counterproductive efforts like DIH enforcement. In jurisdictions that operate drug courts, prosecutors should use their bully pulpit to advocate for modernizing them.³²⁷ 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.

There *are* opportunities for prosecutors to contribute to the solution rather than the problem by using their core functions and competencies. These would include ramping up enforcement addressing fraud, abuse, and discrimination in drug treatment and other health services, including inside correctional settings; promoting access to housing, employment, and other supportive systems through enforcement of anti-discrimination, parity, and other provisions; and to oppose discriminatory and unhealthy zoning provisions that block access to harm reduction, treatment, housing, and other services.³²⁸

³²⁷ See Leo Beletsky, Dan Werb, et al., *Bold Steps Needed to Correct Course in US Drug Policies*, The Petrie-Flom Center (March 22, 2021), <https://blog.petrieflom.law.harvard.edu/2021/03/22/us-drug-policy-biden/>.

³²⁸ See Beletsky, Leo, Dan Werb, et al., *Bold Steps Needed to Correct Course in US Drug Policies*, The Petrie-Flom Center (March 22, 2021), <https://blog.petrieflom.law.harvard.edu/2021/03/22/us-drug-policy-biden/>; see also Leo Beletsky, Morgan Godvin, and Jeremiah Goulka, *The Other Public Health Crisis: How the DOJ Can Flatten the Overdose Curve*, The Appeal (June 11, 2021), <https://theappeal.org/the-lab/report/the-other-public-health-crisis-how-the-doj-can-flatten-the-overdose-curve/>.

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 and/or by adopting policies of not pursuing counterproductive investigations or prosecutions.

VIII. FINAL THOUGHTS: HUMANIZING THE DEFENDANT AND USING 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 in standard use tends to stigmatize and characterize defendants and drug users (and others) as guilty, immoral, lesser, and deserving of punishment. Positive language that presents them as fully 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.³²⁹ It also avoids inadvertently contributing to racist stereotypes and narratives.³³⁰

³²⁹ See Beth Connolly, *Why Words Matter in the Substance Use Conversation*, PEW (May 5, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/05/05/why-words-matter-in-the-substance-use-conversation>.

³³⁰ See Jonathan A. Rapping, *Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 *Legislation and Public Policy* 999-1048 (2014), <https://www.nyujlpp.org/wp-content/uploads/2014/01/Rapping-Implicitly-Unjust-16nyujlpp999.pdf>.

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.³³¹

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*.³³² Instead of *substance abuse*, say *misuse*. Instead of *felon* say *justice-involved individual* or *returning citizen* or *formerly incarcerated*; instead of

³³¹ See generally *Changing the Narrative*, Health in Justice Action Lab (2019), <https://www.changingthenarrative.news/>.

³³² For specific guidance, see *Changing the Narrative: Words Matter*, Health in Justice Action Lab (2019), <https://www.changingthenarrative.news/stigmatizing-language>.

inmate say *prisoner*, and so on.³³³ 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 people with SUDs.³³⁴ This type of knowledge may also improve the ability of defenders to represent and communicate with clients suffering SUDs. Educating judges and prosecutors by way of your current advocacy may also have downstream benefits for future clients. Addiction is a complex subject, and learning about it is complicated by the stigma and taboo-laden conventional wisdom one must cut through. An excellent and highly readable primer is Gabor Maté's book *In the Realm of Hungry Ghosts: Close Encounters with Addiction* (2010).³³⁵ In his

³³³ *Changing the Narrative: Words Matter*, Health in Justice Action Lab. 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>; see also Akiba Solomon, *What Words We Use--and Avoid--When Covering People and Incarceration*, The Marshall Project (April 12, 2021), <https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration#>; Kevin Byrd, *I Was Trained to Call Men a Word They Hated*, The Marshall Project (April 12, 2021), <https://www.themarshallproject.org/2021/04/12/i-was-trained-to-call-prisoners-a-word-they-hated>; Lawrence Bartley, *I Am Not Your 'Inmate'*, The Marshall Project (April 12, 2021), <https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate>.

³³⁴ 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).

³³⁵ For a summary of his approach, see <https://drgabormate.com/book/in-the-realm-of-hungry-ghosts/>, or his videos, such as “How Addiction Works” (Nov. 26, 2016) https://www.youtube.com/watch?v=ARyq_BtCVMo&ab_channel=JoseAguirre.

view, “The question is never ‘Why the addiction?’ but ‘Why the pain?’”³³⁶ The addiction is a negative consequence of efforts to address emotional pain. Such pain is often rooted in adverse childhood experiences (ACE) such as trauma, abuse, neglect, or displacement, and/or in mental health conditions such as depression, anxiety, or ADHD; the degree of pain to be addressed tends to be correlated, in his view, with the degree of addiction.

Additional fact-based rhetorical considerations are: (1) *illicit* fentanyl is *poisoning* the nation's illicit drug supply;³³⁷ (2) while it is not necessary to celebrate the use of recreational use addictive or illegal drugs, it is important to acknowledge that psychoactive substances have been a part of human life as long as civilization has existed, and since there will always be people who use them, society should 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 using redemption- and

³³⁶ Maté, *In The Realm of Hungry Ghosts* at 34.

³³⁷ 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>.

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

Finally, it is worth considering bringing this humanizing language and narrative to advocacy out of court. Law enforcement and prosecutors often advocate in the media with no pushback from defense counsel. While we recognize that defense counsel, particularly public defenders, are severely overburdened, we recommend exploring strategies for out-of-court advocacy. Partners or mentors in such efforts would include Zealous,³³⁸ the Harm Reduction Coalition,³³⁹ and state and local harm reduction groups and agencies.

IX. 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 overdose crisis. Our hope is to turn away from prosecutions to solve the crisis, and turn toward public health solutions.

³³⁸ <https://zealo.us/>

³³⁹ <https://harmreduction.org>

X. ADDITIONAL RESOURCES AND WORKS CITED

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.)

- Health in Justice Action Lab
- National Association of Criminal Defense Lawyers
- Drug Policy Alliance
- Legal Action Center
- Justice Collaborative
- Fair and Just Prosecution
- American Civil Liberties Union
- Harm Reduction Coalition
- State and local harm reduction groups
- 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:

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- Changing the Narrative (<https://www.changingthenarrative.news/>)
- Zealous (<https://zealo.us/>)

C. Cases

Commonwealth v. Brown, 477 Mass. 805 (2017).
Commonwealth v. Jackson, 464 Mass. 758 (2013).
Commonwealth v. Carrillo, 131 N.E.3d 812 (Mass. 2019).
Commonwealth v. Matchett, 386 Mass. 492 (1982).
Florida v. Quinton Redell Sylvestre, No. 4D17-2166 (Fla. 15th Cir. 2018).
Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
Lewis v. State, 474 So.2d 766 (Ala. Ct. Crim. App. 1985).
Naperville Smart Meter Awareness v. City of Naperville, No. 16-3755 (7th Cir. 2018).
People v. Coots, 968 N.E.2d 1151 (Ill. Ct. App. 2012).
People v. Konrad, 536 N.W.2d 517 (Mich. 1995).
People v. Morante, 975 P.2d 1071 (1999).
People v. Sporleder, 666 P.2d 135 (Co. 1983).
People v. White, 325 P. 2d 985 (Cal. 1958) (en banc).
People v. XuHui Li, 67 N.Y.S.3d 1 (N.Y. App. Div. 2017), *aff'd*, 140 N.E.3d 965 (N.Y. 2019).
Pesce v. Coppinger, 1:18-cv-11972-DJC (slip op'n), (D. Mass. Nov. 28, 2018).
Smith v. Aroostook County, 922 F.3d 41 (1st Cir. 2019).
State v. Beecroft, 813 N.W.2d 814, 834 (Minn. 2012).
State v. Carithers, 490 N.W.2d 620 (Minn. 1992).
State v. Greene, 592 N.W.2d 24 (Iowa 1999).
State v. Morrison, 902 A.2d 860 (N.J. 2006).
State v. Schnagl, 907 N.W.2d 188 (Minn. Ct. App. 2017).
State v. Shell, 501 S.W.3d 22 (Mo. Ct. App. 2016).
Tracey v. State, 152 So. 3d 504 (Fla. 2014).
United States v. Alvarado, 816 F.3d 242(4th Cir. 2016).
United States v. Burkholder, 816 F.3d 607 (10th Cir. 2016).
United States v. Burrage, 571 U.S. 204 (2014).
United States v. Carpenter, 585 U.S. ___, No. 16-402 (Jun. 22, 2018).
United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010).
United States v. Mancuso, 718 F.3d 780 (9th Cir. 2013).

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United States v. Reynoso, Case 1:17-cr-10350-NMG (D. Mass. Jun. 24, 2019) (prosecution's sentencing memo).

United States v. Rodriguez, 279 F.3d 947 (11th Cir. 2002).

United States v. Speer, 30 F.3d 605 (5th Cir. 1994).

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

United States v. Wallace, 532 F.3d 126 (2d Cir. 2008).

United States v. Washington, 41 F.3d 917 (4th Cir. 1994).

United States v. Webb, 655 F.3d 1238 (11th Cir. 2011).

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

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

Zanuccoli v. United States, 459 F. Supp. 2d 109 (D. Mass. 2006).

a. Pennsylvania

- *Commonwealth v. Arrington*, 247 A.3d 456 (Pa. Super. Ct. 2021) (holding that conspiracy to commit involuntary manslaughter in a DDRD context is a cognizable offense in Pennsylvania and venue is proper either in the county where drugs are purchased or the death occurs).
- *Commonwealth v. Peck*, 242 A.3d 1274 (Pa. 2020) (reversing a DDRD conviction when the drug delivery occurred outside the state).
- *Commonwealth v. Burton*, 234 A.3d 824 (Pa. Super. Ct. 2020) (finding sufficient evidence to support the defendant's DDRD's conviction and affirming denial of motion to suppress cell-site location information).
- *Commonwealth v. Hopkins*, 228 A.3d 577 (Pa. Super. Ct. 2020) (finding the defendant had intentionally waived his appellate rights during plea negotiations in a DDRD case).
- *Commonwealth v. Beatty*, 227 A.3d 1277 (Pa. Super. 2020) (remanding for resentencing when the trial court failed to provide reasoning for a sentence outside guidelines).
- *Commonwealth v. Carr*, 227 A.3d 11 (Pa. Super. Ct. 2020) (holding conspiracy to commit drug delivery resulting in death as a cognizable crime and finding defendant constructively possessed the drugs in question when he ordered their sale by phone from within prison).
- *Commonwealth v. Graham*, 196 A.3d 661 (Pa. Super. Ct. 2018) (holding that venue is proper both in the county where the drug delivery occurs and in the county where the death occurs).

- *Commonwealth v. Kakhankham*, 132 A.3d 986 (Pa. Super. Ct. 2015) (holding Pennsylvania's DDRD statute is not unconstitutionally void for vagueness).
- *Commonwealth v. Storey*, 167 A.3d 750 (Pa. Super. Ct. 2017) (rejecting defendant's argument that Pennsylvania's DDRD statute is unconstitutionally void for vagueness when applied to someone other than the person the defendant originally sold the drugs to).
- *Commonwealth v. Proctor*, 156 A.3d 261 (Pa. Super. Ct. 2017) (rejecting defendant's argument that Pennsylvania's DDRD statute is unconstitutionally void for vagueness when applied to a death resulting from multiple drugs, when the use of other drugs was unknown to the defendant).
- *Commonwealth v. Mosley*, 114 A.3d 1072 (Pa. Super. Ct. 2015) (holding the trial court erred in admitting hearsay statements and drug-related text messages that were not properly authenticated, but finding the errors harmless).

b. Wisconsin

- *State v. Bannister*, 302 Wis. 2d 158, 165 (2007) (providing an example of the state agreeing to drop the homicide charge in exchange for the defendant agreeing “not to object to evidence that an autopsy was done upon [the deceased] and that morphine was found in his body at the time of death”—also providing a discussion of the ‘corroboration rule’ where the defendant confesses).
- *State v. Mattox*, 373 Wis. 2d 12 (2017) (holding that “1) [a]n out-of-state toxicology report requested by a medical examiner as part of the routine autopsy protocol in a drug overdose death did not constitute testimonial evidence in the resulting homicide prosecution against the drug dealer who supplied the heroin responsible for the fatal overdose and its use at trial did not infringe on defendant’s confrontation right; 2) [that] [a]ll toxicology reports solely identifying the concentration of substances present in biological samples sent by the medical examiner were generally non-testimonial when requested by a medical examiner and not at the impetus of law enforcement; 3) [that] [t]he primary purpose of those toxicology reports was to provide information to the medical examiner

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searching for the cause of death, not to create evidence against a defendant in a criminal prosecution”).

- *State v. Osinski*, Nos. 2009AP2878-CR, 2009AP2879-CR, unpublished slip op. (WI App April, 20, 2011) (holding that the court considered appropriate sentencing factors).
- *State v. Patterson*, 329 Wis. 2d 599 (2010) (holding that charging the defendant with first-degree reckless homicide by delivery of a controlled substance in violation of Wis. Stat. § 940.02(2)(a) (2008) and contributing to the delinquency of a child with death as a consequence in violation of Wis. Stat. §948.40(1), (4)(a) (2008) was not multiplicitous despite the convictions stemming from the same death).
- *State v. Poehlman*, No. 2004AP2491-CR, unpublished slip op. (WI App June 21, 2005) (holding that a jury instruction stating that “it must appear that the use of the Oxycodone was a substantial factor in producing the death” appropriately tracked Wisconsin's first-degree reckless homicide statute).

c. *Illinois*

- *People v. Nere*, 2018 IL 122566, 115 N.E.3d 205 (holding the state is only required to prove that the defendant's act was a contributing cause, rather than the 'but for' cause of death in DIH cases).
- *People v. Strickland*, 2017 IL App (2d) 150241-U (finding the trial court erred in denying defendant the benefit of his plea bargain after a DIH conviction, which provided that he would get credit against each of two consecutive sentences).
- *People v. Brown*, 2016 IL App (2d) 140462-U (holding that defendant forfeited his chain-of-custody challenge to the admissibility of drug evidence after failing to raise it at trial).
- *People v. Kidd*, 2013 IL App (2d) 120088, 997 N.E.2d 634 (reversing conviction and remanding for new trial when trial counsel failed to proffer entire pattern jury instruction regarding "delivery" when joint possession was in question).
- *People v. Coots*, 2012 IL App (2d) 100592, 968 N.E.2d 1151 (holding that trial counsel's failure to submit a proposed supplemental instruction on the

meaning of "delivery" was objectively unreasonable and, given that joint possession was in question, prejudiced defendant).

- *People v. Moore*, 2012 IL App (2d) 110711-U (discussing the one-act, one-crime rule which precludes the entry of both involuntary manslaughter and drug-induced homicide convictions because only one person was killed).
- *Faircloth v. Sternes*, 367 Ill. App. 3d 123, 853 N.E.2d 878 (2006) (holding that Illinois's DIH statute was not unconstitutionally vague when it failed to specify that it applied to drug traffickers and failed to specify the requisite mental state, and finding that punishment as a Class X felony did not violate the state constitution).
- *People v. Boand*, 362 Ill. App. 3d 106, 838 N.E.2d 367 (2005) (holding that Illinois's DIH statute was not unconstitutionally vague when it failed to specify the intended targets of prosecution, the requisite mental state, or the foreseeability of death).
- *People v. Faircloth*, 234 Ill. App. 3d 386, 599 N.E.2d 1356 (1992) (holding that the trial court did not err in refusing his requested jury instruction on involuntary manslaughter as a lesser included offense of drug-induced homicide).

D. Secondary Sources

Advocacy Call on Drug-Induced Homicide Laws, National Association of Criminal Defense Lawyers (Oct. 30, 2019), <https://www.nacdl.org/Media/Advocacy-Call-on-Drug-Induced-Homicide-Laws> (last accessed Apr. 28, 2021).

Alex, Byron, et al., *Death After Jail Release: Matching to Improve Care Delivery*, 23 *J. of Correctional Health Care* 83 (Jan. 1, 2017), <https://journals.sagepub.com/doi/abs/10.1177/1078345816685311?journalCode=jcxa>

Allen, Ben, *No Standard Exists in PA to Accurately Track Heroin Overdose Deaths*, WITF (Apr. 9, 2015).

Allman, Carrie, et al., *Humanizing the Client & the Cause: Effective Sentencing, Managing Media, & Engaging the Community*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov.

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6, 2019), <https://www.nacdl.org/Media/Humanize-the-Client-and-Cause-Sentence-Media-Cmnty> (last visited Apr. 28, 2021).

Allman, Carrie & Brie Halfond, *Pretrial Motions Practice*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019), <https://www.nacdl.org/Media/Pretrial-Motions-Practice> (last visited Apr. 28, 2021).

Allyn, Bobby, *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>.

American Academy of Forensic Sciences Standards Board, Best Practice Recommendation 037, Guidelines for Opinions and Testimony in Forensic Toxicology (Jan. 2019), <http://www.asbstandardsboard.org/published-documents/toxicology-published-documents/>.

American College of Medical Toxicology, *ACMT Statement on Fentanyl Exposure* (July 12, 2017), https://www.acmt.net/cgi/page.cgi/_zine.html/The_ACMT_Connection/ACMT_Statement_on_Fentanyl_Exposure.

American Psychological Association, *Evidence-Based Treatment for Opioid Use Disorder* (2018), <https://www.apa.org/advocacy/substance-use/opioids/resources/evidence-based-treatment.pdf>.

American Society of Addiction Medicine, *Definition of Addiction* (Apr. 12, 2011), <https://www.asam.org/resources/definition-of-addiction>.

Andresen, Hilke, et al., *Fentanyl: Toxic or Therapeutic? Postmortem and Antemortem Blood Concentrations After Transdermal Fentanyl Application*, 36 Journal of Analytical Toxicology 182, 188 (2012), <https://academic.oup.com/jat/article/36/3/182/887968>.

Associated Press, *Snohomish County To Pay \$1m Settlement Over Woman's Heroin Withdrawal Death In Jail*, Seattle Times (Oct. 28, 2019), <https://www.seattletimes.com/seattle-news/crime/snohomish-county-to-pay-1m-lawsuit-over-inmates-heroin-withdrawal-death>.

Associated Press, *Teen Becomes Indiana's Youngest Coroner*, News OK (May 12, 2007), <https://newsok.com/article/3053301/teen-becomes-indianas-youngest-coroner>.

Association of State and Territorial Health Officials, *Improving Drug Specificity and Completeness on Death Certificates for Overdose Deaths: Opportunities and Challenges for States* (Feb. 23, 2018), <https://www.astho.org/Rx/Improving-Drug-Spec-and-Comp-on-Death-Certs-for-Overdose-Deaths-Meeting-Report/>.

Balkovich, Edward, 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.

Balkovich, Edward, 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.

Banta-Green, Caleb J. 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/>.

Barnett, Brian, *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/>.

Bartley, Lawrence, *I Am Not Your 'Inmate'*, The Marshall Project (April 12, 2021), <https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate>.

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

Bebinger, Martha, *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>.

Disclaimer: All content is provided for informational purposes only and does not constitute legal advice

Beety, Valena E. et. al., *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. Rev. 707 (2019).

Beety, Valena E., *The Overdose/Homicide Epidemic*, 34 Ga. St. U. L. Rev. 983 (2018).

Beety, Valena E. et. al., *Prosecuting Opioid Use, Punishing Rurality*, 80 Ohio St. L. J. 741 (2019).

Beletsky, Leo, *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/>.

Beletsky, Leo, Dan Werb, et al., *Bold Steps Needed to Correct Course in US Drug Policies*, The Petrie-Flom Center (March 22, 2021), <https://blog.petrieflom.law.harvard.edu/2021/03/22/us-drug-policy-biden/>.

Beletsky, Leo, *Prosecuting Overdose Deaths as Homicides is Counterproductive*, The Columbus Dispatch, (Dec. 19, 2019), <https://www.dispatch.com/opinion/20191219/column-prosecuting-overdose-deaths-as-homicides-is-counterproductive>.

Beletsky, Leo & Davis, Corey, *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>.

Beletsky, Leo & Goulka, Jeremiah, *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>.

Beletsky, Leo & Goulka, Jeremiah, *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/.

Beletsky, Leo, Morgan Godvin, and Jeremiah Goulka, *The Other Public Health Crisis: How the DOJ Can Flatten the Overdose Curve*, The Appeal (June 11, 2021), <https://theappeal.org/the-lab/report/the-other-public-health-crisis-how-the-doj-can-flatten-the-overdose-curve/>.

Beletsky, Leo, 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)

Beletsky, Leo, *With Massive Prisoner Release, Averting Fatal Reentry*, Huffington Post (Nov. 3, 2015), https://www.huffpost.com/entry/with-massive-prisoner-rel_b_8462816.

Beletsky, Leo, et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 Am. J. Pub. Health 231 (2008).

Beletsky, Leo, *21st Century Cures for the Opioid Crisis: Promise, Impact, and Missed Opportunities*, 44 American Journal of Law and Medicine 359-385 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3230758.

Bernstein, Maxine, *Record \$10 Million Judgment Awarded In Washington County Jail Heroin Withdrawal Death*, The Oregonian (Dec. 7, 2018), <https://www.oregonlive.com/crime/2018/12/record-10-million-judgement-awarded-against-corizon-health-in-death-of-washington-county-jail-inmate.html>.

Binder, Guyora, *The Culpability of Felony Murder*, 83 Notre Dame L. Rev. 965, 966 (2008)

Binswanger, Ingrid A., 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).

Boyer, Edward W., *Management of Opioid Analgesic Overdose*, 367 N. Eng. J. Med. 146, 150–53 (2012).

Breitler, Alex, ‘*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>.

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

Broughton, Mark A., *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).

Brower, Justin, Ph.D., Forensic Toxicologist, *Drug Identification for Suspected Overdoses: Special Emphasis on Opioids*, Medicolegal Death Investigation Seminar (Nov. 10, 2018), <https://www.wakeahec.org/courses-and-events/56769/medicolegal-death-investigation-seminar-approved-for-ama-pra-category-1-credits-™>.

Brown, Ben & Buckler, Kevin, *Pondering personal privacy: a pragmatic approach to the Fourth Amendment protection of privacy in the information age*, 20 Contemp. Just. Rev. 227 (2017).

Bryan, Clarissa, *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).

Byrd, Kevin, *I Was Trained to Call Men a Word They Hated*, The Marshall Project (April 12, 2021), <https://www.themarshallproject.org/2021/04/12/i-was-trained-to-call-prisoners-a-word-they-hated>

Carceral Resource Index, Health in Justice Action Lab, <https://www.healthinjustice.org/carceral-resource-index> (last visited Jun. 30, 2020).

Cassidy, Megan, *Study: 45% in mental-health crisis said Phoenix police made matters worse*, The Republic (April 11, 2017), <https://www.azcentral.com/story/news/local/phoenix/2017/04/11/phoenix-police-survey-mental-health-crisis/100310696/>.

Causation, LawShelf Educ. Media, <https://lawshelf.com/courseware/entry/causation> (last visited January 20, 2019).

Ceelen, Manon, et al., *Post-mortem Toxicological Urine Screening in Cause of Death Determination*, 30 Hum Exp Toxicol. 1165, 1171 (2011), <https://pubmed.ncbi.nlm.nih.gov/21084528/>.

Centers for Disease Control and Prevention, *Death Investigation Systems* (2015) <https://www.cdc.gov/phlp/publications/coroner/death.html>.

Centers for Disease Control and Prevention, National Center for Health Statistics, Provisional Drug Overdose Death Counts (2021), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>.

Centers for Disease Control and Prevention, *Understanding the Epidemic*, Opioid Overdose (Mar. 19, 2020) <https://www.cdc.gov/drugoverdose/epidemic/index.html>.

Changing the Narrative, Health in Justice Action Lab (2019), <https://www.changingthenarrative.news/>.

Changing the Narrative: Words Matter, Health in Justice Action Lab (2019), <https://www.changingthenarrative.news/stigmatizing-language>.

Ciavaglia, Jo, *Family Files Lawsuit in 2018 Death of Bucks County Inmate*, Bucks County Courier Times (May 21, 2019), <https://www.buckscountycouriertimes.com/news/20190521/family-files-lawsuit-in-2018-death-of-bucks-county-inmate>.

Cipriano, Andrea, *Record Overdose Deaths in 12-Month Period: CDC*, The Crime Report, (Dec. 30, 2020), <https://thecrimereport.org/2020/12/30/record-overdose-deaths-in-12-month-period-cdc/>.

Cloud, David & Davis, Chelsea, *First Do No Harm: Advancing Public Health in Policing Practices*, Vera Institute of Justice (2015), <https://www.vera.org/downloads/publications/First-Do-No-Harm-FINAL-12032015.pdf>.

Coffey, Douglas & Dr. Amy Hawes, *Understanding and Challenging Cause of Death: Forensic Pathology and Coroner's Systems - Sample Cross*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019), <https://www.nacdl.org/Media/Understand-and-Challenge-COD-Sample-Cross> (last visited Apr. 28, 2021).

Connolly, Beth, *Why Words Matter in the Substance Use Conversation*, PEW (May 5, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/05/05/why-words-matter-in-the-substance-use-conversation>.

Cooper, John, *Inquests 24* (Hart Publishing Ltd) 2011.

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>.

Dale, Maryclaire, *Pennsylvania County Pays Teen's Family Nearly \$5M Over Heroin Withdrawal Death in Jail*, NBC Philadelphia (Oct. 24, 2018),

<https://www.nbcphiladelphia.com/local/settlement-jail-heroin-withdrawal-death/58460/>.

Davis, Linsey, *Amanda Barnett, Indiana's Youngest Death Investigator*, WTHR: News (Apr. 15, 2016), <https://www.wthr.com/article/amanda-barnett-indianas-youngest-death-investigator>.

Davis, Gregory G., 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),

<https://journals.sagepub.com/doi/abs/10.23907/2013.011?journalCode=afpa>.

Davis, Gregory G., et al., *National Association of Medical Examiners Position Paper: Recommendations for the Investigation, Diagnosis, and Certification of Deaths Related to Opioid and Other Drugs*, 41 Am J Forensic Med Pathol. 152-159 (2020),

<https://pubmed.ncbi.nlm.nih.gov/32404634/>.

DEA Philadelphia Field Division, *Intelligence Report: Analysis of Drug-Related Overdose Deaths in Pennsylvania*, 2015, 28 (July 2016).

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/>.

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>.

Dep't of Justice, *National Heroin Task Force Final Report and Recommendations*, at 12 (Dec. 31, 2015), <https://www.justice.gov/file/822231/download>.

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>.

Dineen, Kelly K., *Addressing Prescription Opioid Abuse Concerns in Context: Synchronizing Policy Solutions to Multiple Complex Public Health Problems*, 40 *Law & Psychol. Rev.* 1, 41–42 (2016).

Dinis-Oliveria, Ricardo Jorge, et al., “*Foam Cone*” *exuding from the mouthed nostrils following heroin overdose*, 22 *Toxicology Mechanism and Methods* 159, 159-160 (2012),
<https://pubmed.ncbi.nlm.nih.gov/22242632/>.

Drake, Dr. Jasmine, *Understanding and Challenging the Drugs: Chemistry and Toxicology*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019),
<https://www.nacdl.org/Media/Understand-and-Challenge-the-Drugs-Chemis-Toxicol> (last visited Apr. 28, 2021).

Drake, Jasmine & Jennifer Wyatt Bougeois, *Changing Faces: How The Opioid Epidemic Is Sweeping Across Urban Minority Communities in the US*, *Houston Forward Times* (May 7, 2019),
<https://forwardtimes.com/changing-faces-how-the-opioid-epidemic-is-sweeping-across-urban-minority-communities-in-the-u-s/>.

Drug Enforcement Administration Intelligence Report, *Analysis of Drug-Related Overdose Deaths in Pennsylvania*, 2015, 28 (July 2016).

Drug Induced Homicide, Health in Justice Action Lab,
<https://www.healthinjustice.org/drug-induced-homicide> (last visited Jan. 20, 2019).

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.

Drug Policy Alliance, *Municipal Drug Strategy: Lessons in Taking Drug Policy Reform Local* (2019),
https://drugpolicy.org/sites/default/files/drug_policy_alliance_municipal_drug_strategy_lessons_in_taking_drug_poli_0.pdf.

Eddie, David and John Kelly, *People recover from addiction. They also go on to do good things*, STAT (May 3, 2021),
<https://www.statnews.com/2021/05/03/people-recover-from-addiction-they-also-go-on-to-do-good-things/>.

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.

Ellis, Eddie, *Open Letter on Language* (last visited Oct. 2, 2019),
<http://prisonstudiesproject.org/language/>

Ernst, Benjamin, *A Simple Concept in a Complicated World: Actual Causation, Mixed-Drug Deaths and the Eighth Circuit's Opinion in United States v. Burrage*, 55 B.C.L. Rev. E. Supp. 1, 2 (2014).

Fair and Just Prosecution, *Harm Reduction Responses to Drug Use* (August 2019),
https://fairandjustprosecution.org/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf.

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>.

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.

Findley, Keith A. & Scott, Michael S., *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 293 (2006).

Fleming, Rory, *We Should Be Vigilant Against Attacks on the Supreme Court's Burrage Ruling*, Filter (Apr. 1, 2020), <https://filtermag.org/supreme-court-burrage/>.

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/>.

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>.

Gill, James R., *From Death to Death Certificate: What do the Dead say?*, 13 J. Med. Toxicol. 111, 113 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5330954/>.

Gilson, Thomas P., et al., *Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions—The Burrage Decision*, 7 Acad. Forensic Pathology 87, 88 (2017).

Godvin, Morgan, *My Friend and I Both Took Heroin. He Overdosed. Why Was I Charged with His Death?*, Wash. Post (Nov. 26, 2019), https://www.washingtonpost.com/outlook/my-friend-and-i-both-took-heroin-he-overdosed-why-was-i-charged-for-his-death/2019/11/26/33ca4826-d965-11e9-bfb1-849887369476_story.html.

Goldensohn, Rosa, *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>.

Goldensohn, Rosa, *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>.

Goodison, Sean, et al., *Law Enforcement Efforts to Fight the Opioid Crisis: Convening Police Leaders, Multidisciplinary Partners and Researchers to Identify Promising Practices and to Inform a Research Agenda*, The RAND Corporation (2019), https://www.rand.org/content/dam/rand/pubs/research_reports/RR3000/RR3064/RAND_RR3064.pdf.

Goulka, Jeremiah, et al., *The Overdose Crisis, Public Health, and DDRD Prosecutions*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019),

Disclaimer: All content is provided for informational purposes only and does not constitute legal advice

<https://www.nacdl.org/Media/DDRD-Charges-in-Context-Overdose-Pub-Health-Prosec> (last visited Apr. 28, 2021).

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-nearly-1-million-in-first-responder-naloxone-grants>.

Graham, Michael A., *Forensic Lung Pathology*, Dail and Hammar's Pulmonary Pathology 1174, 1214 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7120111/>.

Grime, Alyson, & Coward, Emily, *Raising Issue of Race in North Carolina Criminal Cases*, in *Indigent Defense Manual Series 5-1 to 5-28* (John Rubin, ed. 2014), <https://defendermanuals.sog.unc.edu/race/5-selective-prosecution-plea-negotiations-and-charging-decisions-prosecutors>.

Hart, Carl, *High Price: A Neuroscientist's Journey of Self-Discovery that Challenges Everything You Know About Drugs and Society* (2013).

Hart, H.L.A. & Honoré, Tony, *Causation in the Law* 104 (1959).

Hall, Wayne D. & Farrell, Michael, *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>.

Hamann, Kristine and Charlotte Bismuth, *Seeking Justice and Solutions: A Prosecutor's Guide to Opioid Overdose Investigations*, Prosecutor's Center for Excellence (January 2021), <https://pceinc.org/wp-content/uploads/2021/02/20210202-Opioid-Overdose-Investigations-PCE-Aequitas-Final.pdf>.

Hansen, Mark, *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).

Harper, Jake, *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>.

Harris, Andrea & Lorish, Lisa, *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>.

Harris, Andrea, *Understanding and Challenging the Law: Federal Drug Delivery When Death Results Statute Decoded*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019), <https://www.nacdl.org/Media/Understand-Challenge-Law-Fed-DDRD-Statute-Decoded> (last visited Apr. 28, 2021).

Hawes, Dr. Amy, *Understanding and Challenging Cause of Death: Forensic Pathology and Coroners System*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019), <https://www.nacdl.org/Media/Understand-and-Challenge-COD-Forens-Pathol-Coroner> (last visited Apr. 28, 2021).

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>.

Henderson, Gary L., *Fentanyl-Related Deaths: Demographics, Circumstances, and Toxicology of 112 Cases*, 36 *Journal of Forensic Sciences* 422, 427 (1991), <https://pubmed.ncbi.nlm.nih.gov/2066723/>.

Henderson, Stephen E., *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).

Hernandez, Cynthia & El-Sabawi, Taleed, *Defending Death by Distribution Cases in North Carolina: A Checklist* (Jun. 17, 2020). Available at SSRN: <https://ssrn.com/abstract=3633578>.

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>.

Hickman, Blair, *Inmate. Prisoner. Other. Discussed.* (Apr. 3, 2016), <https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed>.

Disclaimer: All content is provided for informational purposes only and does not constitute legal advice

Ihlenfeld II, William J., “*Death Results*” *Prosecutions Remain Effective Tool Post-Burrage*, U.S. Att’ys’ Bull. (Sep. 2016)

Innamorato, Sarah, Keynote Address at NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019),
<https://www.nacdl.org/Media/Keynote-Address-Rep-Sara-Innamorato-PA-State-House>.

Instagram, *Information for Law Enforcement*, <https://help.instagram.com/494561080557017> (last accessed Nov. 20, 2018).

DB, Kandel, 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>.

Just Science, *Just Throwing DARTs at the Opioid Crisis*, Forensic Technology Center of Excellence (Dec. 19, 2018), <https://forensiccoe.org/js7-e7/>.

Just Science, *Just the Census of Medical Examiners and Coroners*, Forensic Technology Center of Excellence (Aug. 30, 2019), <https://forensiccoe.org/sr-cmec/>.

Katz, Josh, *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>.

Kelly Kung, Leo Beletsky, et al., *Analysis of Drug Induced Homicide Prosecutions as a Drug Overdose Prevention Measure*, CPDD 2020 Annual Meeting (June 24, 2020).

Krause, Rachael, *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/>.

Krawczyk, Noa, 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>.

Kreit, Alex, *The Opioid Crisis and the Drug War at a Crossroads*, 80, Ohio St. L. J., 887 (2019), https://kb.osu.edu/bitstream/handle/1811/89971/1/OSLJ_V80N4_0887.pdf.

Lafave, Wayne R., *Substantive Criminal Law* § 6.4(a) (2d ed. 2003)

Larimer, Sarah, *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.

Larochelle, Marc R., 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#>.

LaSalle, Lindsay, *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

Latimore, Amanda & Bergstein, Rachel, “*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>.

Law Enforcement Track, National RX Drug Abuse & Heroin Summit (last updated Mar. 25, 2016), <http://nationalrxdrugabusesummit.org/law-enforcement/#LEN4>.

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.

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

Disclaimer: All content is provided for informational purposes only and does not constitute legal advice

Legal Science, Prescription Drug Abuse Policy System, Good Samaritan Overdose Prevention Laws (Jul. 1, 2018), <http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153>.

Lopez, German, *How America's criminal justice system became the country's mental health system*, Vox (October 18, 2016), <https://www.vox.com/2016/3/1/11134908/criminal-justice-mental-health>.

Lopez, German, *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>.

Lopez, German, *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>.

Lupick, Travis, *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>.

Lurie, Julia, *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/>.

MacMahon, Paul, *The Inquest and the Virtues of Soft Adjudication*, 33 Yale L. & Pol'y Rev. 275, 304 (2015)

Main, Mark, *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>.

Mallgrave, Alyssa, Note, *Purely Local Tragedies: How Prosecuting Drug-Induced Homicide in Federal Court Exacerbates the Overdose Crisis*, 13 Drexel L. Rev. 233 (2020).

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/>.

Markos, Mary, 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/>.

Marshall, D.L. & Abdullah Shihpar, *The Latest Failure in the War on Drugs*, The New York Times, (Nov. 19, 2019), <https://www.nytimes.com/2019/11/19/opinion/drug-induced-homicide-overdose.html>.

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>.

Maté, Gabor, *In the Realm of Hungry Ghosts: Close Encounters with Addiction* (2010).

Mauck, Stormie, Comment, *Drug Dealer or Murderer? Pennsylvania's Approach to Drug Delivery Resulting in Death*, 123 Penn St. L. Rev. 813 (2019)

McAllister, Marc, GPS and Cell Phone Tracking: A Constitutional and Empirical Analysis, 82 U. Cin. L. Rev. 207, 225 (2013).

McKenzie, Michelle, et al., *Overcoming Obstacles to Implementing Methadone Maintenance for Prisoners: Implications for Policy and Practice*, 5 J. Opioid Mgmt. 219 (2009)

McNeil, Brian, *Understanding and Challenging the Law: Pennsylvania Drug Delivery Resulting in Death (DDRD) Statute Decoded*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019), <https://www.nacdl.org/Media/Understand-Challenge-the-Law-PA-DDRD-Statutes> (last visited Apr. 28, 2021).

Meinero, Sam Adam, *Danger in Milligrams and Micrograms: United States Attorneys' Offices Confront Illicit Fentanyl*, U.S. Att'ys' Bull. (Jul. 2018)

Melinek, Judy, et al., *National Association of Medical Examiners Position Paper: Medical Examiner, Coroner, and Forensic Pathologist Independence*, 3 Acad. Forensic Pathol. 93, 94 (2013).

Merrall, Elizabeth L.C., et al., *Meta-analysis of Drug-related Deaths Soon After Release from Prison*, 105 Addiction 1545, 1549 (2010).

Molina, Kimberley D., et al., *Testing an Age-old Adage: Can Autopsy Findings be of Assistance in Differentiating Opioid Versus Cardiac Deaths?*, 65 J Forensic Sci. 112, 112-116 (2020), <https://onlinelibrary.wiley.com/doi/abs/10.1111/1556-4029.14174>.

The Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems*, (Mar. 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems#4-drug-imprisonment-varies-widel>.

Nakhaeizadeh, Sherry, et al., *The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations*, 4 Brit. J. Am. Legal Stud. 527, 539 (2015)

Nat'l Ass'n of Med. Examiners, *Forensic Autopsy Performance Standards 1* (Oct. 16, 2006).

National Center on Addiction and Substance Abuse, *Behind Bars II: Substance Abuse and America's Prison Population at 43* (2010), <https://files.eric.ed.gov/fulltext/ED509000.pdf>

National Center for Health Statistics, *Drug Overdose Mortality by State* (2018), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm.

National Center for State Courts, *National Judicial Opioid Task Force* (2019), <https://www.ncsc.org/information-and-resources/resource-centers/resource-centers-items/opioids-and-the-courts/resource-center>.

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>.

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>.

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>.

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>.

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>.

Neil, Mark, *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>.

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.

Newman-Polk, Lisa & Dr. Miriam Harris, *Opioids, Addiction, and the Brain*, NACDL Defending Drug Overdose Homicides in Pennsylvania (Nov. 6, 2019), <https://www.nacdl.org/Media/Opioids-Addiction-and-the-Brain> (last visited Apr. 28, 2021).

NJ Div. of Criminal Justice, Statewide Narcotics Action Plan (Mar. 12, 1993), <https://www.state.nj.us/lps/dcj/agguide/snap93.htm>.

Nosrati, Elias, 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](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(19)30104-5/fulltext).

Nowotny, Kathryn M., *Race/Ethnic Disparities in the Utilization of Treatment for Drug Dependent Inmates in U.S. State Correctional Facilities*, 40 Addictive Behaviors 148, 150 (2015).

O'Neill Institute for National and Global Health Law, *Applying the Evidence* (October 2019), <https://oneill.law.georgetown.edu/wp-content/uploads/Applying-the-Evidence-Report-1.pdf>.

Opioid Overdose Crisis Compounded by Polysubstance Use, Pew Charitable Trusts (October 2020), https://www.pewtrusts.org/-/media/assets/2020/10/opioidoverdosecrisiscompoundedpolysubstance_use_v3.pdf.

Ornstein, Charles, *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>.

Pardo, Bryce, 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-s>
[ales](https://www.latimes.com/opinion/story/2019-08-30/fentanyl-opioids-overdose-deaths-treatment-s).

Pelletier, Danielle E., et al., *Common Findings and Predictive Measures of Opioid Overdose*, Academic Forensic Pathology 91, 91-98 (2017), <https://journals.sagepub.com/doi/abs/10.23907/2017.011>.

Perez, Sarah, *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/>.

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>.

Phillips, Kaitlin S., Note, *From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process*, 70 Duke L. J. 659 (2020).

Police Executive Research Forum (PERF), *The Unprecedented Opioid Epidemic: As Overdoses Become a Leading Cause of Death, Police, Sheriffs, and Health Agencies Must Step Up Their Response* (September 2017), <https://www.policeforum.org/assets/opioids2017.pdf>.

Policing and the Opioid Crisis: Standards of Care, Bloomberg American Health Initiative (2018), <https://www.theiacp.org/sites/default/files/Opioid%20Response%20Center/Bloomberg%20Standards%20of%20Policing%202018.pdf>.

Przybylsk, Roger K., 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).

Racial Disparity Resources, NACDL (April 25, 2019), <https://www.nacdl.org/Content/RacialDisparityResources>.

Racial Justice for Youth: A Toolkit for Defenders, *Case Advocacy*, <https://www.defendracialjustice.org/case-advocacy/> (last visited Apr. 21, 2021).

Ranapurwala, Shabbar I., et al., *Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015*, 108 Am. J. Pub. Health 1207, 1209 (2018).

Rapping, Jonathan A., *Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 Legislation and Public Policy 999-1048 (2014), <https://www.nyujlpp.org/wp-content/uploads/2014/01/Rapping-Implicitly-Unjust-16nyujlpp999.pdf>.

Reisfield, Gary M., et al., *'False-positive' and 'False-Negative' Test Results in Clinical Urine Drug Testing*, 1 *Bioanalysis*, 937-52 (2009), <https://pubmed.ncbi.nlm.nih.gov/21083064/>.

Rhoads, Zach, *The Problems With Post-Overdose Response Teams*, *Filter* (February 24, 2020), <https://filtermag.org/post-overdose-response-teams/>.

Robbins, Ira P., *A Deadly Pair: Conflicts of Interest Between Death Investigators and Prosecutors*, 79 *Ohio St. L. J.* 902, 903 (2018).

Robinson, Gail, *Selective Prosecution*, 30 *Advocate: J. Crim. Just. Educ. & Rsch.* 5 (2008), https://dpa.ky.gov/Public_Defender_Resources/Documents/Litigating%20Race%20Issues.pdf.

Robinson, Paul H. & Williams, Tyler Scot, *Mapping American Criminal Law Variations Across the States: Ch. 5 Felony-Murder Rule*, *Penn. Law Legal Scholarship Repository* No. 1719 at 3 (2017).

Rosenstein, Rod, *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>.

Sally Friedman and Gabrielle de la Gueronniere, *MOUD in Corrections: Recent Legal & Policy Developments and Implications*, *Legal Action Center* (January 28, 2020), <https://opioidresponsenetwork.org/documents/MOUDConference2020/Gabrielle%20de%20la%20Gueronniere-%20MOUD%20presentation%20RI.pdf>.

Schiraldi, Vincent & Ziedenberg, Jason, *Costs and Benefits? The Impact of Drug Imprisonment in New Jersey* at 27 (2003), https://www.drugpolicy.org/sites/default/files/jpi_njreport.pdf.

Schumaker, Erin, *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.

Scicchitano, Eric, *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.

Siegel, Zachary A., *Amid Opioid Crisis Pennsylvania District Attorneys Advocate for War on Drugs*, The Appeal (Dec. 20, 2017), <https://theappeal.org/amid-opioid-crisis-pennsylvania-district-attorneys-advocate-for-war-on-drugs-d998afd9416d/>.

Siegel, Zachary A. & Beletsky, Leo, *Charging “Dealers” With Homicide: Explained*, The Appeal (Nov. 2, 2018), <https://theappeal.org/charging-dealers-with-homicide-explained/>

Solomon, Akiba, *What Words We Use--and Avoid--When Covering People and Incarceration*, The Marshall Project (April 12, 2021), <https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration#>.

Smith, Peter Andrey, *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>.

Sussman, Steve, & Sussman, Alan N., *Considering the Definition of Addiction*, 10 Int’l J. Envtl. Res. & Pub. Health 4025 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210595/>.

Tashea, Jason, *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/

Thompson, Jonathan G., et al., *Free Oxycodone Concentrations in 67 Postmortem Cases from the Hennepin County Medical Examiner’s Office*, 32 Journal of Analytical Toxicology 673, 679 (2008), <https://pubmed.ncbi.nlm.nih.gov/19007520/>.

Tonry, Michael, *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.

United States Department of Justice Civil Rights Division and the U.S. Attorney's Office for the District of New Jersey, *Investigation of the Cumberland County Jail (Bridgeton, New Jersey)* (January 14, 2021), <https://www.justice.gov/crt/case-document/file/1354491/download>.

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>.

Vaughn, Joshua, *A Pennsylvania Man Survived an Overdose Only to be Charged with Homicide*, The Appeal (July 24, 2018), <https://theappeal.org/a-pennsylvania-man-survived-an-overdose-only-to-be-charged-with-homicide/>.

Vaughn, Joshua, *Man Charged with Homicide for Sharing Drugs with Woman who Later Died* (Jan. 15, 2019), <https://theappeal.org/man-charged-with-homicide-for-sharing-drugs-with-woman-who-later-died/>.

Vaugh, Joshua, *Crime Stat: Overdose Deaths Lead Charged Homicides in Cumberland County*, The Sentinel (Jan. 21, 2019), https://cumberlink.com/news/local/crime-and-courts/crime-stat-overdose-deaths-lead-charged-homicides-in-cumberland-county/article_acab8c1e-ad30-5768-b046-fa6bb02084bd.html.

Vaughn, Joshua, *Opioid Intervention Court reaches one-year mark in Cumberland County*, The Sentinel, (Feb. 26, 2019), https://cumberlink.com/news/local/crime-and-courts/opioid-intervention-court-reaches-one-year-mark-in-cumberland-county/article_71aa791c-75a9-5bb7-9b02-7ce8e59c273f.html.

Vaughn, Joshua, *Law Enforcement is Urged to "Think Like a Parent, Not a Prosecutor"*, The Appeal (July 10, 2019), <https://theappeal.org/law-enforcement-is-urged-to-think-like-a-parent-not-a-prosecutor/>.

Velander, Jennifer, *Suboxone: Rationale, Science, Misconceptions*, 18 Ochsner J. 23-29 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5855417/>.

Vincent, Louise, *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/>.

Von Euler, Mia, et al., *Interpretation of the Presence of 6-Monoacetylmorphine in the Absence of Morphine-3-glucuronide in Urine Samples: Evidence of Heroin Abuse*, 25 Therapeutic Drug Monitoring 645, 647 (2003), <https://pubmed.ncbi.nlm.nih.gov/14508389/>.

Walley, Alexander, 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/>.

Webinars, Smart Prosecution: Ass'n of Prosecuting Attorneys, <https://www.smartprosecution.org/recent-webinars> (last visited Jan. 20, 2019).

Werb, Dan, 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>.

Williams, Paige, *The Wrong Way to Fight the Opioid Crisis*, The New Yorker, February 3, 2020, <https://www.newyorker.com/magazine/2020/02/10/the-wrong-way-to-fight-the-opioid-crisis>.

Winkelma, Tyler N.A., 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>.

Wisconsin Municipal Judge Benchbook, 12-13 to 12-16 (2020), <https://www.wicourts.gov/publications/guides/docs/munibenchbook.pdf>.

World Health Org., *Prevention of Acute Drug-related Mortality in Prison Populations During the Immediate Post-release Period*, 10–11 (2010).

XI. CONTACT US

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

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