DRUG-INDUCED HOMICIDE DEFENSE TOOLKIT

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PRELIMINARY VERSION

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SUMMARY

In response to the growing opioid crisis, many prosecutors are treating overdose deaths as homicides. Since 2010, drug-induced homicide prosecutions have increased at least threefold. Criminal defense attorneys and defendants' families have asked for help in understanding these cases and how to defend them. This Toolkit is an effort to provide that help.

This is the preliminary version of the Toolkit, intended to serve these communities while it is being updated and refined based upon the insights of academic and practitioner colleagues. It will soon be Bluebooked and formatted into a more attractive document and released more broadly. Please share your thoughts with us at the email address above.

The Toolkit is intended to be a living document. It will accordingly be updated frequently.

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Table of Contents

I Introduction

Nearing the end of its second decade, the crisis of fatal opioid-involved overdose in the United States has gone from bad to worse. Last year, 72,000 people died of a drug overdose in the United States.[6] Overdose is now the leading cause of death for people under 50. There is broad agreement that reducing opioid overdose deaths requires wider distribution of the opioid antidote naloxone, rapid scale-up in evidence-based treatment, and reducing stigma associated with substance use and addiction. Progress on these and other vital public health interventions remains abysmally slow. Meanwhile, there is a new and growing trend in enforcing drug-induced homicide and similar laws in overdose death cases. Originally intended to implicate dealers in accidental drug overdoses, charges were rarely brought until recent years. Just since 2010, prosecutions based on such provisions have spiked at least threefold, from 363 in 2011 to 1,178 in 2016.[7]

[6] https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm

[7] Lindsay LaSalle, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, Drug Policy Alliance (2017) *available at*

Drug-induced homicide statutes emerged during the height of the "drugs and crime" era of crack-cocaine. These provisions were passed under the assumption that they would be used to prosecute major traffickers for deaths that their products caused. Under pressure to find solutions to mounting overdose deaths, prosecutors and police began to use these provisions with increasing frequency and fervor, largely ensnaring low-level drug dealers, as well as individuals who do not fit the characterization of a "dealer." Analyses by our Health in Justice Action Lab and by the New York Times revealed that the majority of these drug-induced homicide cases do not involve "traditional" drug dealers, but rather friends, family, and co-users of the overdose decedent. Additionally, in cases that do involve organized drug distribution, there is a high likelihood of racial bias. Our Lab's analysis suggests that a disproportionate number of charges being brought in cases where the victim is non-Hispanic white and the dealer is a person of color, and that people of color accused of drug induced homicide or similar crimes receive sentences 2.1 years longer, on average, than white defendants.[8] For individuals suffering Opioid Use Disorder who are convicted in these cases, they face an enormous spike in risk of death from overdose during their first few weeks after incarceration. There are many problems with these arrests and prosecutions. Much remains to be learned. It is hoped that this Toolkit will assist defenders and families and, perhaps with time, will encourage police and prosecutors to focus their resources on more effective strategies for reducing crime and delinquency.

1. 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 or similar crimes resulting from overdoses. The creation of this toolkit was spurred by two related trends: (1) information from parents, news reports, and other sources about pervasively inadequate defense being provided to many individuals charged with these crimes, and (2) widespread efforts by prosecutors to disseminate information and tools that aid other prosecutors and law enforcement in

http://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf (noting that drug-induced homicide prosecutions are increasing across the country).

[8] Updated racial statistics coming soon

investigating and bringing drug-induced homicide and related charges, including presentations at conferences, continuing legal education modules, webinars, and the like.

This Toolkit lays the foundation for our Lab's mission to inject scientific evidence and public health principles to level the playing field in this rapidly-expanding prosecutorial offensive. An explainer on drug-induced homicide laws and prosecutions for parents and family members is available through the New York Times Q&A for readers.

This Toolkit is intended to be a living document. It will be revised and expanded soon and frequently. Please share your thoughts on how it can be improved.

2. About Drug-Induced Homicide and Similar Provisions

Today, almost half of US state jurisdictions have a special statute that can be used to mount a drug-induced homicide prosecution.[9] Although the laws all use an analogous instrumental

[9] The Lab is currently collaborating with Mission LISA on developing a comprehensive dataset of drug-induced homicide statutes and their elements. As of this writing, existing statutes include: Alaska (Alaska Stat. § 11.41.120(a)(3)); Colorado (Colo. Rev. Stat. § 18-3-102(e)); Florida (Fla. Stat. § 782.04(1)(a)(3)-(4)); Illinois (720 Ill. Comp. Stat. 5/9-3.3); Louisiana (La. Rev. Stat. Ann. § 14:30.1(3)); Michigan (Mich. Comp. Laws Ann. § 750.317a); Minnesota (Minn. Stat. § 609.195(b)); New Hampshire (N.H. Rev. Stat. Ann. § 318-B:26(IX)); New Jersey (N.J. STAT. ANN. § 2C:35-9); North Carolina (N.C. Gen. Stat. Ann. § 14-17(b)(2)); Pennsylvania (18 Pa. Cons. Stat. Ann. § 2506); Rhode Island (R.I. Gen. Laws § 11-23-6) (only applies to drug delivery to a minor); Tennessee (Tenn. Code Ann. § 39-13-210(a)(2)); Vermont (Vt. Stat. Ann. tit. 18, § 4250); Washington (Wash. Rev. Code Ann. § 69.50.415); West Virginia (W. Va. Code Ann. § 61-2-1, State v. Jenkins, 729 S.E.2d 250, 229 (W.Va. 2012) (death resulting from an overdose of a controlled substance and occurring in the commission of or attempt to commit a felony offense of manufacturing or delivering such controlled substance, subjects the manufacturer or deliverer of the controlled substance to the felony murder rule); Wisconsin (Wis. Stat. § 940.02(2)(a)); Wyoming (Wyo. Stat. Ann. § 6-2-108).

Statutes also being utilized California (Cal. Penal Code § 192) (Involuntary manslaughter); Connecticut (Conn. Gen. Stat. Ann. § 53a-56); Georgia (Ga. Code Ann. § 16-5-3); Indiana (Ind. Code Ann. § 35-42-1-5); Iowa (Iowa Code Ann. § 707.5); Kentucky (Ky. Rev. Stat. Ann. § 507.050, Lofthouse v. Com., 13 S.W.3d 236, 238 (Ky. 2000) (guilt of criminal homicide for furnishing controlled substances to one who subsequently dies from their ingestion depends upon proof)); Massachusetts (Mass. Gen. Laws Ann. Ch. 265 § 13, Commonwealth v. Catalina, 407 Mass. 779, 791, 556 N.E.2d 973 (1990) (person who furnishes drug to another, who voluntarily consumes it and dies as a result, may be liable for manslaughter because consumption of the drug was a foreseeable consequence of his actions); Maryland (Md. Code Ann., Crim. Law § 2-207); Missouri (Mo. Ann. Stat. § 565.024); Nevada (N.R.S. § 200.070, Sheriff, Clark Cty. v. Morris, 99 Nev. 109, 111, 659 P.2d 852, 854

framework, these provisions use a variety of criminal law mechanisms, including felony-murder, depraved heart offences, or involuntary or voluntary manslaughter. At the extreme end of the punitive spectrum, there are among these laws capital one provisions like West Virginia's, which imposes sentences up to life in prison, and are eligible for the death penalty.[10]

Some of these provisions are strict liability statutes requiring no criminal intent (*mens rea*),[11] presumably under the rationale that death from consumption of illicit substances is always foreseeable. Others require a recklessness or criminal negligence standard to be met.[12] But none of the state or federal provisions require a financial exchange take place or exclude small-time dealers or fellow users from prosecution; those being charged with an underlying trafficking charge involving higher drug quantities may face stiffer penalties. It should be noted, however, that a specialized drug-induced homicide or similar statute is not necessary for an individual to be charged in a fatal overdose: criminal negligence or other generic statutes can--and are--being deployed in these cases.

(1983) (in context of unlawful sale of controlled substances resulting in death, second-degree felony-murder rule may be premised on either felonious intent provision or unlawful act); New York (N.Y. Penal Law § 125.10 & § 125.15); North Dakota (N.D. Cent. Code Ann. § 12.1-16-02); Ohio (Ohio Rev. Code Ann. § 2903.04); Texas (Tex. Penal Code Ann. § 19.02); Virginia (Va. Code Ann. § 18.2-33)

[10] W. Va. Code Ann. § 61-2-1. To date, there have been no death penalty sentences handed out in these cases, but that may change at any time.

[11] Classification matrix coming soon

[12] Classification matrix coming soon

II. Available Defenses[13]

Presently there are two primary ways to challenge drug-induced homicide prosecutions. If your case involves a user who was sharing drugs with another user, consider whether the joint-user (also known as joint-purchaser) defense applies; it would undermine the distribution charge that is an essential element of DIH prosecutions. The other approach is to challenge the prosecution's effort to establish causation—that the drug(s) in question were the legal cause of the decedent's overdose.

1. The Joint-User Defense

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." *United States v. Swiderski,* 548 F.2d 445, 450 (2d Cir. 1977). 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. Because a person cannot distribute an item to someone who already possesses it, joint-purchases cannot be convicted of distributing drugs to each other. In the words of the New Jersey Supreme Court, "[i]t hardly requires stating that the 'transfer' of a controlled substance cannot occur . . . if the intended recipient already possesses that substance." *New Jersey v. Morrison*, 188 N.J. 2, 14 (2006).

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

[13] Drafted by Alex Kreit

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

b. Application to Drug-Induced Homicide Prosecutions

In *People v. Edwards*, 39 Cal.3d 107 (1985), the California Supreme Court reversed the defendant's convictions for furnishing heroin and 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." 39 Cal.3d at 110. Relying on a prior California case,[14] the court found that "[t]he 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." *Id*. at 113-14 (emphasis added).

What is required to demonstrate that defendant and decedent were joint-users? It is not sufficient for one person to buy drugs and perhaps later share with friends.[15] The key question, in the words of the New Jersey Supreme Court, is "whether defendant distributed

[14] 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,* 548 F.2d 445, 450 (2d Cir. 1977), suggesting that they might have been unaware of these cases. Nevertheless, the decision in *Edwards* closely tracks the joint-user cases.

[15] See, e.g., *United States v. Wallace*, 532 F.3d 126 (2d Cir. 2008).

the heroin to [decedent] or whether both jointly possessed the heroin at the time defendant purchased the drug from the street dealer." *New Jersey v. Morrison,* 188 N.J. 2, 14 (2006). The court concluded, based on its review of relevant case law, that the joint-user inquiry requires a "fact-sensitive analysis." *Id*. at 19.

> 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.

Id. at 19.

In that case, Lewis Morrison was charged with the drug-induced death of his friend Daniel Shore.[16] In New Jersey, the statute is a strict liability crime.[17] Morrison and Shore had "pooled [their] money and bought four decks of heroin" at around 3 a.m. one morning. *Id*. at 5. Morrison and Shore were together when they bought the heroin, but Morrison negotiated the purchase and took the initial physical control of the heroin. Morrison "placed the decks in his pocket and, after driving out of the city, gave one to Shore." *Id*. at 6. Morrison and Shore drove to Morrison's house and used the heroin they had purchased. Shore died of a heroin overdose a few hours later. *Id*. at 6-8.

[16] 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. The trial court agreed; the State appealed. 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.

[17] *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.").

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. The court concluded:

> 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.

Id. at 20.

c. Analyzing the Simultaneous Acquisition Requirement

Courts are split on how they interpret the joint-user doctrine's requirement that the drugs be simultaneous 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.

i. 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*, 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 "asked 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." 593 F.2d 105, 108 (1979). Because Wright and his friend had not acquired the heroin "simultaneously," the court found Wright's conduct constituted "distribution." *Ibid.* 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.’” *Ibid*.

For additional cases holding or suggesting that physical presence is required, see, e.g., *United States v. Mancuso*, 718 F.3d 780, 798 (9th Cir. 2013) (“Even assuming the *Swiderski* rule was binding in the Ninth Circuit, it would not apply to Mancuso's case, because the record does not support finding that any of the witnesses pooled money with Mancuso and traveled with him to acquire the cocaine jointly, intending only to share it together.”); *People v. Coots*, 968 N.E.2d 1151, 1158 (Ill. App. Ct. 2012) (reviewing cases applying the joint-user defense and 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 “[t]he record reveals that while 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”).

ii. 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*, 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." 490 N.W.2d 620, 622 (Minn. 1992). In *Carithers*, the Minnesota Supreme Court considered a consolidated appeal of two cases involving prosecutions under a drug induced homicide felony murder statute.[18] In one of the two cases, the defendant "went by herself to buy the heroin" but it was "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." *Id*. at 621. The court held that the joint-user defense applied because the defendant's husband constructively possessed the heroin as soon as it was purchased. The court reasoned that, when a person is buying drugs on behalf of another, "[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." *Id*. at 622. Accordingly, the joint-user defense applied and the court upheld dismissal of the felony murder charges.[19]

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[18] *See* Minnesota v. Carithers, 490 N.W.2d 620, 620 (Minn. 1992) ("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.")

[19] 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

Consider the New Jersey Supreme Court's multi-factor “fact-sensitive” test for determining whether users simultaneously acquired possession. *Morrison*, *supra*, 188 N.J. 2 at 19. Although physical presence was one of the factors in the test, 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. *Ibid*.

iii. 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. Most 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 doctrine.

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. In other contexts, the government construes it broadly in order to support a prosecution.

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may apply only to *spouses* who jointly purchase drugs. *State v. Schnagl*, No. A16-1509, 2017 WL 6418215, at *7 (Minn. Ct. App. Dec. 18, 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.”)

For instance, in *People v. Konrad*, 449 Mich. 263, 273 (1995), the Michigan Supreme Court held that the defendant constructively possessed cocaine where the evidence showed he "had paid for the drugs and that they were his—that is, that he had the intention and power . . . to exercise control over them." 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." *Ibid.* 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. This is because a person "may constructively possess substances that their agents have *bought* for them." *Id.* at 274 (emphasis in original).

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. 490 N.W. 2d at 622. 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 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 also required and taken to the extreme. In *Weldon v. United States*, 840 F.3d 865 (7th Cir. 2016),

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. *United States v. Swiderski*, *supra*, 548 F.2d at 448; *United States v. Speer*, 30 F.3d 605, 608–09 (5th Cir. 1994).

Id. at 867. The Seventh Circuit did not elaborate on the question of what it means for both users to have been "participants in the same transaction," however, because of the posture of the case—a motion to vacate a guilty plea as a result of ineffective assistance of counsel.

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 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*, supra, 188 N.J. at 18-19:

> 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." *N.J.S.A.* 2C:35–1.1(c). 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." *N.J.S.A.* 2C:35–1.1(d). 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, *N.J.S.A.* 2C:35–9(a) and 2C:43–6(a)(1), the maximum term for possession of heroin is only five years, *N.J.S.A.* 2C:35–10(a)(1) and 2C:43–6(a)(3). The Legislature expected the criminal culpability of parties to bear some proportion to their conduct.

See also, e.g., *Swiderski, supra*, 548 F.2d at 449 (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").

2. Causation

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

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

Burrage v. United States, 134 S.Ct. 881, 887 (2014) (citations omitted). Accordingly, defense counsel may choose to litigate the traditional causation requirements—including the actual (or but-for) causation and the legal (or proximate) causation—in drug-induced death prosecutions.

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

a. *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.'" *Burrage v. United* States, 134 S.Ct. 881, 888 (2014) (citation omitted). But-for causation requires the prosecutor to prove that, but for the defendant's acts, the harm would not have occurred when it did. Although but-for causation is easily met in most traditional homicide prosecutions, it is often in dispute in drug-induced death prosecutions.

In *Burrage*, the United States Supreme Court resolved the question of whether but-for causation applies to the federal drug-induced death statute. The law levies heavy mandatory minimum penalties in some controlled-substance prosecutions—including, in some situations, life sentences for individuals previously convicted of drug felonies—"if death or serious bodily injury results from the use of" the substance. 21 U.S.C. §§ 841(b)(1); 960(b)(1) to (3). 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. In *Burrage*, the Supreme Court held that but-for causation is required under the federal statute.

Burrage involved the death of Joshua Banka, “a long-time drug user.” *Burrage*, 134 S. Ct. 881. On the day Banka died, he smoked marijuana and then injected crushed oxycodone pills he had stolen from a roommate. Later, Banka and his wife bought one gram of heroin from Burrage. Burrage injected some of the heroin and was found dead by his wife a few hours later. The police found a number of drugs in Banka's house and car, including alprazolam, clonazepam, oxycodone, and hydrocodone. At Burrage's trial, two medical experts testified that the heroin was a contributing factor in Banka's death. But neither was able to say “whether Banka would have lived had he not taken the heroin.” *Burrage*, 134 S. Ct. 881. The trial court declined to give Burrage's requested jury instructions on causation and denied his motion for judgment of acquittal. Burrage was convicted and sentenced to 20 years under § 841(b)(1)(C)'s. The Eighth Circuit affirmed.

The Supreme Court reversed Burrage's conviction and held that the “results from" language in the statute “imposes a requirement of but-for causation.” *Burrage*, 134 S. Ct. at 889. In reaching this conclusion, it reasoned that it had previously held similar language requires but-for causation in other contexts. 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.” *Burrage*, 134 S. Ct. at 891. 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.” *Burrage*, 134 S. Ct. at 892. But-for causality must be proven beyond a reasonable doubt, which is a heavy burden for the prosecution.

A note of caution: If you are defending in state court, the usefulness of *Burrage* will depend on whether the language of the relevant state drug-induced death statute uses "but-for" or "contributes to" language. 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." *Burrage*, 134 S.Ct. at 891 (citing Ala.Code § 13A–2–5(a); Ark.Code Ann. § 5–2–205; Me.Rev.Stat. Ann., Tit. 17–A, § 33; N.D. Cent. Code Ann. § 12.1–02–05; Tex. Penal Code Ann. § 6.04); *see also, e.g., People v. XuHui Li*, 67 N.Y.S.3d 1, 6 (N.Y. App.Div. 2017) (declining 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"). 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.

b. *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 "that 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." *United States v. Hatfield*, 591 F.3d 945, 948-49 (2010). Proximate cause requires proof that death was a reasonably foreseeable consequence of the defendant's conduct.

However, some statutes use a strict liability approach. Most circuits have concluded that the federal drug-induced death statute does not require proof of proximate cause. See *United States v. Alvarado*, 816 F.3d 242, 250 (4th Cir. 2016) ("[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."); *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 provision requires only proof of but-for causation."); *United States v. Webb*, 655 F.3d 1238, 1250 (11th Cir. 2011) (collecting cases and noting that "some focus on foreseeability and others on proximate cause").

Because the United States Supreme Court has not addressed the issue,[20] litigants should continue to request a proximate causation instruction if only to preserve the issue. For a thorough and reasoned argument that the federal statute requires proof of foreseeability, *see Burkholder*, *supra*, 816 F.3d at 621 (Briscoe, J., dissenting) (arguing that the statute should be read to include a proximate cause requirement; "I am not persuaded that Congress clearly intended to impose strict liability on a criminal defendant for any death resulting from his drug-trafficking offense.").

c. *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. 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." H.L.A. Hart and Tony Honoré, Causation and the Law 326 (2d ed. 1985).

[20] 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." 134 S. Ct. at 886. However, the court "[found] it necessary to decide only" the question of actual causation. Id. at 887.

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. However, courts have generally been skeptical of the idea, with at least one going so far as to state that suicide would not defeat causation under the federal drug-induced death statute. *See Zanuccoli v. United States*, 459 F. Supp. 2d 109, 112 (D. Mass. 2006) ("Suicide through heroin overdose meets the statute's terms, because it is a 'death resulting from the use of' the heroin, irrespective of the victim's state of mind.").

Even so, there is 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. *See also United States v. Rodriguez*, 279 F.3d 947, 951 n.5 (11th Cir. 2002) (observing that "[w]hile 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" and finding that "[i]n 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 committed 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."

United States v. Hatfield, 591 F.3d 945, 950 (7th Cir. 2010). Accordingly, as with proximate cause above, defenders should consider requesting an intervening cause instruction if only to preserve the issue.

III. Challenging the Scientific Evidence[21]

This section provides examples of possible ways defenders can challenge the scientific claims upon which DIH prosecutions are based. Recall that if your jurisdiction uses a but-for test, *Burrage* requires prosecutors charging drug-induced homicide cases to prove beyond a reasonable doubt that the distributed drug was the "but-for" cause of death. 134 S. Ct. 881 (2014). The experts at trial were unable to prove this when the decedent was on a cocktail of other drugs. *Burrage*, 134 S. Ct. at 887-91. Accordingly, the "but-for" test requires the states that use 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 specific tactics to consider using.

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 such an exclusive "but-for" finding if there are other drugs or supplements in the decedent's blood stream. A forensic pathologist/medical examiner may be able to challenge the autopsy finding by looking at the medical history of the decedent to determine whether an alternate cause of death might exist.

[21] Drafted by Valena Beety; adopted and excerpted from her essay, *Homicide Charges for Opioid Overdoses: The Role of County Coroners and Local Prosecutions*, ___ GA. ST. U. L. REV. ___ (2018).

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

Federal Rule of Evidence 702's expert witness admissibility requirement,[22] expounded upon by the *Daubert* decision, requires that experts offer some kind of specialized knowledge, that their testimony be based on sufficient facts or data, and that it be the product of reliable methodology that has been properly applied to the present case. *Daubert* requires trial judges in both civil and criminal proceedings to determine "whether the reasoning or methodology underlying the testimony is scientifically valid . . . ." *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 592–93 (1993).

Ask 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. Query about underlying health conditions, herbal supplements, the toxicology report, 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). Finally, as discussed below, consider challenging the state expert's expertise and/or impartiality. If a coroner determined the cause and/or manner of death, that means a lay person—likely with no scientific background—determined the death was an overdose and a homicide.

Some jurisdictions have *Frye*[23] 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 the

[22] "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."

[23] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

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

Does your jurisdiction have a coroner or a medical examiner (ME)? In a coroner system or a mixed Medical Examiner/Coroner system, the coroner may have decided the manner of death (homicide, suicide, accident, natural, or undetermined), and may also have determined the cause of death: overdose. Coroners and MEs are very different positions.

A medical examiner is a physician who is appointed to determine cause and manner of death; the ME also determines whether an autopsy should be conducted. A medical examiner is often a forensic pathologist who has received training in anatomical or clinical pathology and received formal training in forensic pathology in a fellowship program. 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."[24]

By contrast, a coroner is a typically a county elected official, tasked with investigating deaths and with determining what the manner of death was, whether an autopsy is necessary, and in some jurisdictions, identifying the cause of death. However, given 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.[25] In

[24] Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science: A Path Forward,* National Research Council (2009), p. 256.

[25] *Strengthening Forensic Science* 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...").

extreme examples, in Indiana two seventeen-year-old high school seniors were appointed deputy coroner.[26] Accordingly it should come as no surprise that the continuation of the coroner system has been repeatedly and increasingly questioned.

Indeed, the push for the elimination of the coroner system and replacement by scientifically trained individuals began in the 1920s.[27] Yet the coroner system remains today in some states. 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 inappropriate.[28] And that determination is vital to the existence of any criminal investigation or prosecution that follows.

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[26] *Strengthening Forensic Science* at 247. ("Jurisdictions vary in terms of the required qualifications, skills, and activities for death investigators…. Recently a 17-year old high school senior successfully completed the Coroner's examination and was appointed a Deputy Coroner in an Indiana jurisdiction."). That deputy coroner was appointed by her father, the county coroner. "Amanda Barnett, Indiana's youngest death investigator," May 18, 2007, https://www.wthr.com/article/amanda-barnett-indianas-youngest-death-investigator. Another teen was appointed more recently. The only academic training required was a 40-hour course. "High school senior works as Clark County's youngest deputy coroner," February 17, 2018, http://www.wave3.com/story/37527919/high-school-senior-works-as-clark-countys-youngest-deputy-coroner/

[27] *See, for example,* Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in A Coroner System*, NAELA J., Fall 2011, at 199, 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."). *See also* Alex Breitler, *'Too much power': Rethinking sheriff-coroner role*, Recordnet.com (December 9, 2017) available at http://www.recordnet.com/news/20171209/too-much-power-rethinking-sheriff-coroner-role ("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.").

[28] Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in A Coroner System*, NAELA J., Fall 2011, at 199, 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. Query the scientific basis of death certificates and medical examiner autopsy reports

a. Query Determination of Cause of Death as Overdose

Coroners and even MEs are increasingly playing fast and loose with determinations of overdose as the cause of death without even having conducted a toxicology analysis. Was one performed in your case?

Importantly, coroners in some jurisdictions determine the cause of death as well as the manner of death. In Pennsylvania, where county coroners determine both the manner and cause of death, "determining causation related to overdoses is subjective and can vary widely depending on the investigative efforts/abilities of the coroner and the evidence available for review, which results in inherent difficulties in making causation decisions."[29] Some deaths in Pennsylvania have been reported as overdoses with no toxicology reports.[30] Indeed, coroners and medical examiners increasingly find cause of death – overdose – without eliminating other causes.[31]

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

[29] Drug Enforcement Administration Intelligence Report, *Analysis of Drug-Related Overdose Deaths in Pennsylvania, 2015,* 28 (July 2016). At the time, Pennsylvania ranked eighth in the country for drug overdose deaths, according to the Centers for Disease Control and Prevention.

[30] *Id.* at 28.

[31] *But see* The Watchdogs, *Kratom, health supplement targeted by FDA, linked to 9 deaths in Cook County*, Chicago Sun Times (March 5, 2018) available at: https://chicago.suntimes.com/news/kratom-health-supplement-targeted-by-fda-linked-to-8-deaths-in-cook-county/ ("According to Cook County medical examiner's records, there have been nine cases since 2016 in which mitragynine was listed as a cause of death — in each instance along with at least one drug, often opioids such as heroin or fentanyl."); See also https://www.propublica.org/article/measuring-the-toll-of-the-opioid-epidemic-is-tougher-than-it-seems.

Medical examiners and some coroners can legally determine the manner of death for an overdose to be an accident *or* a homicide. Under the National Association of Medical Examiners (NAME) standards, an overdose can be determined as an accident or a homicide. If the death certificate names the death a homicide, query and raise the existence of bias on the part of the medical examiner or coroner (ME/C) as biased, even to the extent of being a de facto "member of the prosecution team." Without a clear toxicology report to comply with *Burrage*, a death certificate of homicide – rather than accident – is valuable support for a drug-induced homicide prosecution.

Importantly, it is NAME's position that "medical examiner and coroner independence is an absolute necessity for professional death investigation."[32] But there are many strong influences on ME/Cs.

One is politics. Recall that coroners are elected officials. "Coroners are independent of law enforcement and other agencies, but as elected officials they must be responsive to the public, and this may lead to difficulty in making unpopular determinations of the cause and manner of death."[33] Politics may shape or even predetermine the finding.

Another is personal experience and 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, when a friend's son died of an overdose, he changed his policy to identify all heroin overdose deaths as homicides to send a message. "If you chose to sell heroin, you're killing people and you're

[32] *NAME Position Paper 2013 at 94.*

[33] *Strengthening Forensic Science* at 247.

murdering people. You're just as dead from a shot of heroin as if someone puts a bullet in you.… Calling these accidents is sweeping it under the rug."[34]

A powerful influence on ME/Cs comes from prosecutor and law enforcement. Even though NAME deems medicolegal death investigations to be public health rather than criminal justice functions,[35] there are few restrictions on prosecutors or law enforcement involvement presence in death investigations.[36] In rural counties, the coroner may be likely to see himself on the team of the police and prosecutors, sharing their goals—a form of cognitive bias known as "role effects." Indeed, some of the investigative staff for the coroner may be former police officers,[37] or in the extreme case case of Nevada, Montana, and California, the coroner may

[34] *Lycoming County coroner starts ruling heroin overdose deaths as homicides*, THE ASSOCIATED PRESS (March 25, 2016) *Available at* https://www.delcotimes.com/news/lycoming-county-coroner-starts-ruling-heroin-overdose-deaths-as-homicides/article_02fa165c-65bb-5a3d-b315-40e1770f5103.html*; Heroin overdoses aren't accidents in this county. They're now homicides,* Washington Post (March 30, 2016), available at https://www.washingtonpost.com/news/true-crime/wp/2016/03/30/heroin-overdoses-arent-accidents-in-this-county-theyre-now-homicides/?utm_term=.63df566e1f4c.

[35] Judy Melinek, Lindsey C. Thomas, William R. Oliver, Gregory A. Schmunk, Victor W. Weedn, and the National Association of Medical Examiners Ad Hoc Committee on Medical Examiner Independence. *National Association of Medical Examiners Position Paper: Medical Examiner, Coroner, and Forensic Pathologist Independence.* Acad. Forensic Pathol. 3(1): 97 (2013) ("Unlike with crime laboratory examinations, which are usually generated to determine guilt or innocence, the medicolegal death investigation is primarily a public health effort.").

[36] *See, for example, An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, Drug Policy Alliance, p. 25 (Nov. 2017), *available at: https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf* (Describing the U.S. Attorneys 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."). *See also* Mark A. Broughton, *Homicide Defense Strategies: Leading Lawyers on Understanding Homicide Cases and Developing Effective Defense Techniques*, 2014 WL 1573043, at *12 ("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.").

[37] Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL'Y REV. 275, 304 (2015).

also be the sheriff.[38] As the Minnesota Supreme Court said when reversing a conviction where the prosecutor interfered with the defense expert forensic pathologist, "some police and prosecutors tend to view government-employed forensic scientists . . . as members of the prosecution's 'team'."[39]

A survey of NAME members found that 70 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.[40] 22 percent of responding pathologists had "experienced political pressure to change death certificates from elected and/or appointed political officials."[41] 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."[42] Furthermore, "[t]o promote competent and objective death investigations: A1.1 Medico-legal death investigation officers *should operate without any undue influence from law enforcement agencies and prosecutors*."[43]

It is important to keep in mind that ME/Cs, "aware of the desired result of their analyses, might be influenced—even unwittingly—to interpret ambiguous data or fabricate results to support

[38] See, for example, California Senate Bill No. 1189, Chapter 787, Legislative Counsel's Digest (2016) available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1189
("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.").

[39] *Minnesota v. Beecroft*, A09-0390, A10-1604 (Minn. 2012).

[40] *NAME Position Paper 2013 at 94.*

[41] *Ibid.*

[42] Forensic Autopsy Performance Standards, National Association of Medical Examiners; cited in *NAME Position Paper 2013* at 94.

[43] *Ibid*.

the police theory."[44] "Tunnel vision has been shown to have an effect in the initial stages of criminal investigations and this is a significant issue because all subsequent stages of the investigation will potentially be impacted by the information generated at this initial stage."[45]

5. A Final Thought

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.[46] When a death certificate says homicide, that finding is assumed to be the result of an independent determination, separate and apart from the role of the police and prosecutor in the criminal investigation. Similarly, when an autopsy report determines the manner of death as overdose, the report is viewed as scientific evidence of a higher status than most of the non-scientific evidence that will be presented against the defendant at trial.[47] These notions of absolute impartiality, as hopefully clarified above, are quite false.

[44] Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL'Y REV. 275, 306 (2015) ("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.").

[45] Sherry Nakhaeizadeh, Itiel E. Dror, Ruth M. Morgan, *The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations,* 4 BRIT. J. AM. LEGAL STUD. 527, 534–42 (2015).

[46] Sherry Nakhaeizadeh, Itiel E. Dror, Ruth M. Morgan, *The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations*, 4 BRIT. J. AM. LEGAL STUD. 527, 534–42 (2015).

[47] *See id.*

IV. Public Policy Considerations

There are numerous problems with DIH prosecutions from a policy perspective. These include being counterproductive to their stated goals of reducing overdose deaths, targeting the wrong defendants, and disproportionately targeting people of color.

1. DIH Prosecutions Actually *Increase* Risk of Overdose Deaths

The ostensible purpose of DIH prosecutions is to reduce overdose deaths. As Attorney General Jeff Sessions stated, “Synthetic opioids like fentanyl killed more Americans than any other kind of drug in 2016. In response, the Department of Justice tripled our fentanyl prosecutions in 2017.”[48] However the deterrence approach to problematic drug use is not very effective. As demonstrated in study after study, tough law enforcement practices do not curb problematic drug use on a large scale. To make matters worse, DIH prosecutions are actually counterproductive to the goal of reducing overdose deaths. On the contrary, they increase the risk.

a. For individuals experiencing Opioid Use Disorder, incarceration increases their risk of death from overdose

Because get-tough federal laws prevent Medicaid from funding health care in federal and state correctional facilities, few are able to afford evidence-based treatment, particularly those including the use of medication. This matters because people experiencing Opioid Use Disorder (OUD) who are sentenced to facilities that offer only abstinence-based programming

[48] "Federal, state authorities step up fentanyl prosecutions as drug drives spike in overdoses," Washington Post, June 7, 2018, https://www.washingtonpost.com/national/federal-state-authorities-step-up-fentanyl-prosecutions-as-drug-drives-spike-in-overdoses/2018/06/07/5631edd0-69c0-11e8-bf8c-f9ed2e672adf_story.html?noredirect=on&utm_term=.d6f7ac0a6721

or force inmates to go "cold turkey" will lose their accumulated tolerance to opioids while serving their sentences—but their brain chemistry will not reset to the point of losing cravings.

If these individuals reenter society without being provided evidence-based treatment immediately, there is a very high risk that their brain chemistry's cravings, combined with the emotional and social trauma of reentry, will lead them to consume opioids. Without their physical tolerance to the drugs, and with the increased potency of heroin and the increased lacing of heroin and other drugs with illicitly-produced fentanyl, the risk of accidental overdose and death increases astronomically. Particularly during the critical first weeks after release, even from mere jail terms, overdoses are staggeringly common, and the risk of death from heroin overdoses jumps as high as 74 times greater than the general public.[49]

The only plausible interpretation of this data is that incarceration due to DIH arrests and prosecutions leads to actual deaths. It also raises the specter of even relatively short terms of incarceration effectively becoming a death penalty.

b. DIH arrests and prosecutions undermine Good Samaritan laws, increasing overdose deaths

If medicine is administered, overdoses don't have to turn into deaths. Unfortunately, overdose witnesses are reluctant to dial 911 for fear of legal consequences—more than 50 percent according to research—because the witness is often a fellow user and a 911 call brings out the police as well as emergency medical personnel. Recognizing this, over two-thirds of

[49] See, e.g., Shabbar I. Ranapurwala et al. “Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015”, American Journal of Public Health 108, no. 9 (September 1, 2018): pp. 1207-1213 (summarized at https://sph.unc.edu/sph-news/former-inmates-at-high-risk-for-opioid-overdose-following-prison-release/) (overall risk of accidental overdose death in first two weeks after release 40 times higher than general public, based on North Carolina research).

states have passed Good Samaritan Laws. These laws aim to alleviate the fear by eliminating or reducing the criminal penalties to the caller.

Unfortunately, the public has fairly low awareness and understanding of these laws. On the flip side, there is strong media coverage of DIH policy, arrests, and prosecutions. Law enforcement agencies see DIH as effective signaling devices, and while that is a mistaken perception as to reducing problematic drug use and overdoses, it is accurate in terms of putting the word out that witnesses may well get arrested and charged. The increasingly common practice of treating every overdose scene as a crime scene becomes well known among users. Even if they are overestimating the legal risk of calling 911, it has a chilling effect that may help explain the relatively anemic impact of Good Samaritan laws on help-seeking observed thus far. If fellow users witnessing an overdose do not call 911—and presuming that they have not been trained and provided with naloxone to administer themselves—then entirely avoidable deaths will inevitably follow.

2. Most defendants are not drug dealers

Law enforcement agencies may reap some political dividends for appearing tough on opioid users, but in practice most arrests and prosecutions are not of dealers or producers or "kingpins"—but of fellow users. This runs counter to the general approach to American drug laws of distinguishing between distribution and mere possession for personal use. It also runs counter to the public statements made by some prominent officials, such as former Ocean County, NJ, Prosecutor Joseph Coronato, that “[i]f 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.”

Research shows that a majority of DIH cases prosecute mere users, not members of the drug trade. Our analysis of prosecutions reported in the media indicates that prosecutors usually

charge friends and romantic partners of the overdose victim.[50] Another similar study conducted by the Drug Policy Alliance had similar findings.[51]

Accordingly, if prosecutors are trying to "send a message" to people in the drug trade but are only targeting end users, this strategy is bound to fail. It is made all the worse by basing the strategy in law on predicate distribution charges that make little sense in light of the joint-user doctrine.

3. Disparate impact on people of color

Our preliminary analysis of the limited data available suggests that drug-induced homicides prosecutions disproportionately target people of color. People of color accused of drug-induced homicide or similar crimes are sentenced to 2.1 years more, on average, than whites.[52] This pattern harkens back to one of the most egregious elements of the War on Drugs.

From the Public Health perspective, the racial dynamics of these prosecutions highlight the problem of the low access to health care that is disproportionately experienced by people of color. Ironically, in areas where criminal justice institutions and actors are striving to bring increased access to services, these prosecutions may further undermine trust in police among people of color, steering them away from even beneficial police contact, inadvertently worsening disparities in access to care.

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[50] Leo Beletsky, "America's Favorite Antidote: Drug-Induced Homicide, Fatal Overdose, and the Public's Health"; Zach Siegel, https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7/

[51] https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf

[52] Beletsky, *America's Favorite Antidote* at 71.

V. Additional Resources

News articles

- New York Times feature by Rosa Goldensohn
- New York Times Q&A for readers by Rosa Goldensohn
- You Want to Get Them While the Teardrops are Warm by Zach Siegel
- Despite Public Health Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides by Zach Siegel
- The Opioid Crisis Is Blurring the Legal Lines Between Victim and Perpetrator by Dan Denvir

Relevant Law Review and Other Articles

- "America's Favorite Antidote: Drug-Induced Homicide, Fatal Overdose, and the Public's Health" by Leo Beletsky
- "The Overdose/Homicide Epidemic" by Valena Beety
- 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 INTL. J. DRUG POL 82, 82-89 (2017)

White Papers

- Drug Policy Alliance, An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane (2017)

Please let us know of other resources this Toolkit should include.

VI. Possible Additional Sections Coming Soon

- Cell phone warrantless search elements, outcome of *Carpenter* 16-402

- Jury instructions considerations
- Good Samaritan laws can provide mitigating circumstances or affirmative defense
- Accomplice and conspiracy charges
- Legislative intent (e.g. *Carithers* in MN)
- Legislative applicability (NYS)
- Ethical or other challenges to strict liability approach
- Use of public resources
- Language of Addiction

Please let us know of other topics this Toolkit should include.

VII. Contact Us

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