



# STRATEGIES FOR **PROSECUTING DRUG-INDUCED HOMICIDE CASES**



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## Opioid overdose deaths claim over 100 deaths daily, most victims obtain narcotics illegally

The opioid<sup>1</sup> epidemic is surging in America—both prescription and synthetic. Prescription opioids work to alleviate chronic pain in the short-term, but if not carefully regulated, can cause dependency and addiction among prescription holders and people who obtain the drugs illegally.<sup>2</sup> In the past decades, more Americans are using prescription opioids, both legally and illegally. According to the Centers for Disease Control and Prevention (CDC), sales of lawfully prescribed opioids quadrupled from 1999 to 2014, but not necessarily because Americans report more pain.<sup>3</sup> CDC data shows that thirteen states have more opioid prescriptions than people residing in these states.<sup>4</sup> According to the CDC, opioids caused 33,091 reported deaths in 2015, and opioid overdoses have quadrupled since 1999.<sup>5</sup> The CDC also noted statistically significant rises in overdose deaths from 2014–2015 in nineteen states.<sup>6</sup> Unreported deaths (e.g. when the drug is not listed as a cause of death on a death certificate) would likely make overdoses from opioids and heroin jump to around 50,000 deaths per year. According to a University of Virginia study, “Nationally, corrected opioid and heroin involved mortality rates were 24% and 22% greater than reported rates” for heroin and opioid overdoses.<sup>7</sup> The study found that unreported deaths varied across states, but the largest numbers of unreported deaths occurred in Pennsylvania, Indiana, and Louisiana.<sup>8</sup> Under-estimation is also expected for numbers of non-fatal overdoses and users struggling with opioid addictions, as most data related to these numbers is self-reporting.<sup>9</sup>

The CDC reports that Methadone,<sup>10</sup> Oxycodone (OxyContin), and Hydrocodone (Vicodin) are the most common drugs involved in overdose deaths,<sup>11</sup> along with commonly prescribed Oxycodone and Codeine. Alarming, only 27% of opioids are obtained through a prescription.<sup>12</sup> The rest are obtained illegally through friends or relatives (53%) or through third party dealers (15%). But, “Those at highest risk of overdose are about four times more likely than the average user to buy the drugs from a dealer or other stranger.”<sup>13</sup> Dealers sell cough syrup laced with codeine, Oxycontin, Percocet, Demerol, and other opioids by street names including Captain Cody, China White, Hillbilly Heroin, Percs, Juice, and Dillies.<sup>14</sup>

<sup>1</sup> Opioids and opiates are used interchangeable in this article. “At one time, ‘opioids’ referred to synthetic opiates only... now the term Opioid is used for the entire family of opiates including natural, synthetic, and semi-synthetic.” See “Opiates/Opioids”, The National Alliance of Advocates for Buprenorphine Treatment. Accessed 23 August 2017 from [naabt.org](http://naabt.org).  
<sup>2</sup> “Guideline Information for Patients” CDC. Accessed July 3, 2017, from: <https://www.cdc.gov/drugoverdose/prescribing/patients.html>

<sup>3</sup> “Prescribing Data” CDC. Accessed July 3, 2017, from: <https://www.cdc.gov/drugoverdose/data/prescribing.html>

<sup>4</sup> *Id.* The graph depicts thirteen states with 96-143 opioid prescriptions per 100 people. The states: Michigan, Indiana, Ohio, Kentucky, West Virginia, Tennessee, North Carolina, South Carolina, Oklahoma, Arkansas, Louisiana, Mississippi, and Alabama.

<sup>5</sup> “Drug Overdose Death Data.” The Center for Disease Control (CDC). Accessed 23 August 2017 from <https://www.cdc.gov/drugoverdose/data/statedeaths.html>.

<sup>6</sup> *Id.* Connecticut, Florida, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Washington, and West Virginia.

<sup>7</sup> Ruhm, Christopher J. “Geographic Variation in Opioid and Heroin Involved Drug Poisoning Mortality Rates” Frank Batten School of Leadership and Public Policy, University of Virginia. *The American Journal of Preventative Medicine*. June 2017. Accessed 24 August 2017 from: [http://www.ajpmonline.org/article/S0749-3797\(17\)30313-6/fulltext](http://www.ajpmonline.org/article/S0749-3797(17)30313-6/fulltext)

<sup>8</sup> *Id.*

<sup>9</sup> Milwaukee County completed an “Opiate-Related Overdose Report: 2012-2016” discussing the rise of opioid deaths in the county, as well as the effect of non-fatal opioid use in the County, and the limitations of self-reporting which cause under-reporting. The Report was accessed on August 24, 2017 and is available at: <https://mkecope.files.wordpress.com/2017/06/milwaukee-county-opioid-related-overdose-report-6-21-171.pdf>

<sup>10</sup> Methadone is used largely to treat heroin overdoses. However, it can also lead to overdoses when combined with certain painkillers including: Oxycontin, Vicodin, or morphine. The U.S. National Library of Medicine. “Methadone Addiction.” Accessed 24 August 2017 from: <https://medlineplus.gov/ency/article/002679.htm>

<sup>11</sup> “Prescription Opioid Overdose Data” CDC. Accessed July 4, 2017 from: <https://www.cdc.gov/drugoverdose/data/overdose.html>

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, citing, Daubresse M, Chang H, Yu Y, Viswanathan S, et al. Ambulatory diagnosis and treatment of nonmalignant pain in the United States, 2000 – 2010. *Medical Care* 2013; 51(10): 870-878. <http://dx.doi.org/10.1097/MLR.0b013e3182a95d86>

<sup>14</sup> “Opioids and Morphine Derivatives” The Foundation for a Drug Free World. Accessed July 5, 2017 from: <http://www.drugfreeworld.org/drugfacts/prescription/opioids-and-morphine-derivatives.html>

“Those at highest risk of overdose are about four times more likely than the average user to buy the drugs from a dealer or other stranger.”

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Prescription opioids are just a part of the problem of the surging opioid epidemic. Recently, prosecutors, including Ocean County New Jersey Prosecutor Joseph Coronato, are seeing more overdose deaths from fentanyl, a synthetic opioid with 40 variations; one street version is 1,000 times stronger than heroin. Coronato has seen an overall uptick in opioid related deaths since he was appointed to office in 2013. In that year 112 people overdosed, compared to the previous year when 56 people overdosed. In 2016, the numbers almost doubled, with 209 overdose deaths. New Jersey is one of a few jurisdictions that have a strict liability drug-induced homicide statute; Mr. Coronato’s office is currently investigating seven drug-induced homicide cases arising from overdoses occurring in 2017. They have also charged over 30 cases since the end of 2013. Although the state had a strict liability drug-induced homicide statute since the 1986, most arrests and prosecutions were infrequent until recently.

The Drug Enforcement Agency (DEA) noted in its 2016 National Drug Threat Assessment Survey that, “Over the past 10 years, the drug landscape in the United States has shifted, with the tripartite opioid threat (controlled prescription drugs, fentanyl, and heroin) having risen to epidemic levels, impacting significant portions of the United States.”<sup>15</sup> The 2016 DEA survey noted that “Drug poisoning deaths are currently at their highest ever recorded level and, every year since 2009, drug poisoning deaths have outnumbered deaths by firearms, motor vehicle crashes, suicide, and homicide.”

## Criminal liability for suppliers and dealers of narcotics

State legislators are beginning to focus on who should be held accountable for overdose deaths. To date, twenty states enacted statutes for drug-induced homicides. The statutes differ broadly: charges may range from manslaughter to first degree murder; sentences range from the court’s discretion to life imprisonment; some statutes use strict liability, whereas others require a proximate cause of death analysis or a hybrid of the two; defendants may be the last known dealer, to all dealers in a chain, and even the manufacturer (for non-pharmaceutical street drugs such as heroin and cocaine). Three states require the victim to be a minor. Note that most states have separate statutes that define controlled substances within their respective jurisdictions. Note that on January 14, 2014, the United States Supreme Court clarified unanimously in *Burrage v. United States*, that a federal defendant cannot be sentenced to the mandatory minimum of 20 years under The Controlled Substances Act, unless the drugs from the dealer actually caused the death or serious bodily injury—a “cause in fact” analysis. The Court’s decision overturned a sentence where the defendant’s supplied drugs were proven to be only the contributing cause of the victim’s death.<sup>16</sup>

<sup>15</sup> “2016 National Drug Threat Assessment” The U.S. Department of Justice Drug Enforcement Administration. Executive Summary, v. Accessed July 5, 2017 from: <https://www.dea.gov/resource-center/2016%20NDTA%20Summary.pdf>  
<sup>16</sup> *Burrage v. U.S.* 571 U.S. \_\_\_\_ (2014)

## Statutory Analysis of Drug-Induced Homicide for 20 Jurisdictions

State	Statute	Crime	Mens rea requirement of defendant	Death causation analysis	Drugs covered	Age of victim requirement	Relevant case law
Alaska	§ 11.41.120 (a)(3)	Manslaughter	Knowingly manufacturers or delivers	"direct result" that does not require a culpable mental state	Controlled substances		
Colorado	Colo. Rev. Stat. § 18-3-102(e)	Murder in the First Degree	Unlawful distribution, dispensation, or sale of a controlled substance	Death caused by use of the controlled substance	Controlled substances	Victims must be under 18 and the sale must occur at school	
Florida	Fla. Stat. § 782.04(1)(a)(3)-(4)	Murder	Unlawful distribution of a controlled substance	Proximate cause of death	Any controlled substance defined by statute, also cocaine, opium, or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone		
Illinois	720 Ill. Comp. Stat. 5/9-3.3	Homicide	Unlawfully distributing a controlled substance to another	Death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance	Controlled substances		
Louisiana	La. Rev. Stat. Ann. § 14:30.1(3)	Second degree murder	Unlawfully distributes or dispenses a controlled dangerous substance	Direct cause of the death of the person who ingested or consumed the controlled dangerous substance	Schedules I through V of the Uniform Controlled Dangerous Substances Law		
Massachusetts	Mass. Gen. Laws Ann. Ch. 265 §13	Manslaughter	sellers liable for manslaughter because overdose is a foreseeable consequence of selling drugs "wanton and reckless"	Proximate cause	Controlled substances including cocaine, heroin, and methadone		<i>Commonwealth v. Osachuk</i> , 681 N.E.2d 292 (Mass. App. Ct. July 1, 1997)  <i>Commonwealth v. Catalina</i> , 556 N.E.2d 973 (Mass. July 3, 1990)
Michigan	Mich. Comp. Laws Ann. §750.317a	A felony punishable for life or any amount of years	Delivery of a controlled substance (other than marijuana)	Consummation causing the death	Schedule I or II control substances		
Minnesota	Minn. Stat. § 609 195(b)	Murder in third degree	Directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance	Proximately causes the death (intent not required)	Schedule I or II substances		
Nevada	N.R.S. § 200.070	Second degree felony murder or involuntary manslaughter	Unlawful sale of drug resulting	Felonious intent (Felony murder) or unlawful act provision (involuntary manslaughter)	Controlled substances		<i>Clark Cty. v. Morris</i> , 99 Nev. 109, 111, 659 P.2d 852, 854 (1983)

State	Statute	Crime	Mens rea requirement of defendant	Death causation analysis	Drugs covered	Age of victim requirement	Relevant case law
New Hampshire	N.H. Rev. Stat. Ann. § 318-B:26(IX)	Felony with maximum penalty of life imprisonment	Strictly liable for manufacturing, selling, or dispensing drugs resulting in death	Cause of death- The injection, inhalation or ingestion of the substance is an antecedent but for which the death would not have occurred. For purpose of strict liability: The death was not: 1) Too remote in its occurrence as to have just bearing on the person's liability; or: 2) Too dependent upon conduct of another person which was unrelated to the injection, inhalation or ingestion of the substance or its effect, as to have a just bearing on the person's liability	Methamphetamine, lysergic acid, diethylamide phencyclidine (PCP) or any other controlled drug classified in schedules I or II, or any controlled drug analog thereof		
New Jersey	N.J. STAT. ANN. § 2C:35-9	Crime of the first degree	Strictly liable for manufacturing, selling, or dispensing drugs resulting in death	Cause of death- The injection, inhalation or ingestion of the substance is an antecedent but for which the death would not have occurred. For purpose of strict liability: The death was not: 1) Too remote in its occurrence as to have just bearing on the person's liability; or: 2) Too dependent upon conduct of another person which was unrelated to the injection, inhalation or ingestion of the substance or its effect, as to have a just bearing on the person's liability	Methamphetamine, lysergic acid, diethylamide phencyclidine (PCP) or any other controlled drug classified in schedules I or II, or any controlled drug analog thereof		
North Carolina	N.C. Gen. Stat. Ann. § 14-17 (b)(2)	Murder in first and second degree	Acting with knowledge or knowledge of inherent dangerousness (malice)	The murder is one that was proximately caused by the unlawful distribution of the controlled substance resulting in the death of the user.	Controlled substances including: opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance, or methamphetamine		<i>State v. Limer</i> , 391 S.E.2d 820 (N.C. Ct. App. June 5, 1990)  <i>State v. Parlee</i> , 703 S.E.2d 866 (N.C. Ct. App. Jan. 4, 2011)
Pennsylvania	18 Pa. Cons. Stat. Ann. §2506	Felony in the first degree	intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance	Death of user	Any controlled substance or counterfeit controlled substance		

State	Statute	Crime	Mens rea requirement of defendant	Death causation analysis	Drugs covered	Age of victim requirement	Relevant case law
Rhode Island	R.I. Gen. Laws first degree felony murder (§11-23-1) and Controlled substance transaction resulting in the death of a minor (§11-23-6) for minors-	Felony murder, felony with life imprisonment (for minors)	Felony murder statute (§11-23-1): distribution of a controlled substance  (§11-23-6): knowingly providing a controlled substance for sale, delivery or distribution to a minor and death has resulted to the minor because of the ingestion orally, by injection, or by inhalation of the controlled substance	Death of user	Controlled substances	Enhanced mandatory life sentence penalty for selling to minors that results in death of the minor	
Tennessee	§39-13-210 (a)(2)	Second degree murder/Class A felony	Unlawful distribution	Proximate cause of death	Schedule I and II controlled substances		
Vermont	Vt. Stat. Ann. tit. 18 §4250	A violation with sentence ranges from 2-20 years	Selling or dispensing of regulated drug	Proximate cause of death	Controlled substances		
Washington	Wash. Rev. Code. Ann. §69.50.415	Homicide by controlled substance	Unlawfully delivering	Subsequent use by User resulting in death	Controlled substances		
West Virginia	W. Va. Code Ann. §60A-4-401; §61-2-1	First degree murder	Unlawfully manufacture or delivery of controlled substance	Death	Controlled and counterfeit controlled substances		<i>State v. Jenkins</i> , 729 S.E.2d 250 (W.Va. June 21, 2012)
Wisconsin	Wis. Stat. § 940.02(2)(a)	Class C Felony	Manufacturing, distributing, or delivery of a controlled substance. Each person in the supply chain is liable.	Death from use. <i>Note: irrelevant whether the death is the result of itself or its mixture or combination with any other controlled substance.</i>	Schedule I, II, or III drugs or ketamine or flunitrazepam		
Wyoming	Wyo. Stat. Ann. § 6-2-108 (	Drug-induced homicide	Unlawful delivery of a controlled substance	Death	Controlled substance	Adult at least four years older than minor victim	



### *Proving Strict Liability and Proximate Cause*

Each drug homicide statute requires varying levels of proof. The main difference between strict liability and proximate cause is that under strict liability, the dealer creates an inherently dangerous condition by selling the drug, irrespective of the victim's current health condition. Conversely, in proximate cause jurisdictions, such as Massachusetts, the victim's overdose must be a "foreseeable consequence" of selling the drugs, and the victim cannot have any other health issues that contributed to death (such as diabetes, heart, or liver problems). North Carolina requires the malice standard of "acting with knowledge or knowledge of inherent dangerousness." See chart, *supra*. As shown in the chart above, five states<sup>17</sup> use the harder to prove proximate standard when prosecuting drug-induced homicides.

Essex County First Assistant District Attorney John T. Dawley prosecuted his office's first drug-induced homicide case in 2008 under Massachusetts' proximate cause standard. The defendant was charged with drug distribution and manslaughter, after the defendant sold the victim and three other work colleagues fentanyl patches (from a stolen prescription) at a party. The victim licked his patch and died. The other three victims administered the patches on their arms and lived. Mr. Dawley's theory of the manslaughter charge was that the defendant sold what he knew was an inherently dangerous drug at a party where he knew users would be already intoxicated from alcohol and marijuana— thus leaving them susceptible to harm. The jury heard testimony from a Medical Examiner (ME) who testified to the amount of the fentanyl in the victim's blood. To prove proximate cause of death, the ME also had to show that the victim had no prior health issues- such as diabetes, heart or liver problems, or any other health condition that would have contributed to his death. The ME testified that the fentanyl was the sole and only cause of death, a hurdle which can be hard to overcome says Mr. Dawley, especially since many drug users and addicts have these health issues from ingesting drugs over time. Mr. Dawley also used an expert witness from the Drug Enforcement Agency (DEA) to discuss the dangerous opioid epidemic, as well as another expert witness who testified how dangerous medicinal fentanyl is, even while being made in pharmaceutical manufacturing labs (by employees wearing hazmat suits and wearing layers of protection). At the end of the case, the jury came back and found the defendant guilty of distribution, but not guilty of manslaughter. Comments by jurors after trial showed they could not find the defendant guilty of manslaughter because of the victim's assumption of risk: the victim chose to buy the drug, and improperly administered it orally causing his own death when the other three users who used it as a patch survived. Mr. Dawley says this is the first drug-induced homicide case his office has tried because the proximate cause standard is "so strict and difficult to overcome." However, his office is open to reviewing cases and evidence where manslaughter charges for these crimes might be appropriate.

Although drug-induced homicides are tough to prosecute in any jurisdiction, especially in a proximate cause jurisdiction, they can lead to convictions. In Berkshire County, another jurisdiction with Massachusetts, First Assistant Paul Caccaviello successfully prosecuted a drug-induced homicide case that led to a manslaughter conviction. This victim also died after orally ingesting a fentanyl patch. In this case, the defendant knew the victim personally, and was privy to knowledge that the victim was susceptible to overdosing; as her acquaintance, the defendant learned the victim became addicted to opioids after undergoing surgery a couple years before her death. This piece of information was key to overcoming the "foreseeable consequence" requirement of death under Massachusetts' proximate cause standard. Mr. Caccaviello also relied on third-party witnesses who testified the defendant admitted to them she sold the fentanyl patch that killed the victim. Mr. Caccaviello also relied on a psychiatrist, used as an expert witness, to discuss opioid drug dependency, addiction, and acute withdrawal symptoms of opioids to show the victim could not control her addiction.

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<sup>17</sup> Florida, Massachusetts (proximate cause and foreseeable consequence standard), Minnesota, Tennessee, and Utah

In practice, both proximate cause and strict liability statutes require prosecutors to prove that the time between the ingestion and the death was not too remote in its occurrence, and that the death was not dependent on the acts of another third party or the victim. Prosecutors should know that each victim may react differently to the type of drug (e.g. depressants such as opioids cause the body to slowly shut down, whereas stimulants such as amphetamines may cause a quicker death spurred on by difficulty breathing and sudden unconsciousness.) In addition, each user may have differing tolerances due to a variety of reasons, including previous abstinence, less overall usage of the drug in the past, recent drug rehabilitation that may lower tolerance, or mixing the drug with other potentially dangerous combinations of other stimulants, depressants, or alcohol.<sup>18</sup> Each drug may also have side effects, ranging from mild, dangerous, to life threatening. Therefore, it may be tricky to prove remoteness of death or other intervening, independent factors. Thus, prosecutors must educate themselves on the type of narcotic used by the victim, the victim's previous usage of controlled substances (through family members, rehabilitation counselors, etc.) and how any other intervening factors, such as alcohol or mixtures of other controlled substances from other suppliers played a role in the user's death. The coroner or medical examiner is a critical witness, and the prosecutor should educate herself with questions to ask the medical examiner to learn about the death and prepare for trial. Of note, one coroner in one Pennsylvania jurisdiction is beginning to rule heroin overdoses as homicides.<sup>19</sup>

### *Prosecuting the Manufacturers*

Four states<sup>20</sup> impose criminal liability not to just suppliers and distributors, but also the manufacturers (if two separate actors) of street drugs such as heroin and cocaine. This is generally a strict liability crime when available, thus easier to prove than the proximate cause standard required of many dealers. The theory of assigning strict liability for manufacturers of street opioids is that the manufacturers understand the inherent danger of the drugs and the risk of death from overdose. Wisconsin's statute permits prosecution of every actor transferor in the supply chain of the drug's creation to the victim's death.

## Strategies for Prosecuting Drug-Induced Homicide Cases

### *1. Quickly Investigate Overdose Scenes as Homicide Scenes within 48 hours of Death*

County Prosecutor Coronato explains quick and thorough investigations are necessary to prosecute these cases. "Once we come across the dead body we call all hands-on deck—an overdose death must be worked immediately, within 24–48 hours. We plan an attack. First, we look at where the victim got the drugs. We look at scene of the death, then we determine who the person was initially with, as many drug users usually buy with someone else. Then we look at the victim's phone, especially the last text messages sent. Ideally, we need to look at party or dealer within 24-48 hours. We use a Confidential Informant (CI) or cooperating witness ([sometimes a person who bought the drugs in the same transaction as the deceased victim]) to try and purchase the same drugs that killed the victim from that dealer." If the CI can buy the same drugs from the dealer, the case is strengthened. An investigation by Ocean County investigators found drug baggies labeled by the dealer near the victim's body. Later, a CI purchased the same drug in the same bag from the dealer. Mr. Dawley's early investigation of the case led him to quickly understand how the victim in his case died— a witness pantomimed to law enforcement that the victim licked his fentanyl patch. This early piece of necessary evidence helped pave the way for investigating the rest of the case.

<sup>18</sup> "Overdose Basics." *International Overdose Awareness Day*. Accessed July 5, 2017 from <https://www.overdoseday.com/resources/overdose-basics/>

<sup>19</sup> Beauge, John. "Heroin overdoses will now be considered homicides, coroner says." *Pennsylvania Real Time News*. March 23, 2016. Accessed July 6, 2017 from: [http://www.pennlive.com/news/2016/03/lycoming\\_county\\_coroner\\_listin.html](http://www.pennlive.com/news/2016/03/lycoming_county_coroner_listin.html)

<sup>20</sup> Alaska, New Jersey, West Virginia, and Wisconsin



Early investigations also spot dead ends, such as lack of evidence, that allow prosecutors to avoid investing further resources on these cases. Elie Honig, the Director of the New Jersey Attorney General's Criminal Division explains that in a strict liability jurisdiction such as New Jersey, "every overdose scene becomes a homicide scene, and not just a medical scene, so there has to be and has been a cultural shift to investigating these types of cases." Similarly to Mr. Coronato, Mr. Honig says the first step in these investigations is to identify who provided the drug, determine who the victim was near during the final hours of life, reconstruct the scene, complete a phone analysis, and determine the cause of death from the medical examiner.

## *II. Finding Key Witnesses: The Victim's Inner Circle*

The CDC statistics suggest more than 50% of drug-overdose victims receive the drugs from friends or family members. Therefore, many of the defendants from drug homicide cases will be friends and families of the victim. This familial relationship presents additional unique challenges for prosecutors, as many witnesses will not want to incriminate friends and family members of their own or of the victim. Furthermore, in addition to challenges of investigating a dealer who was a friend or family member to the victim, many friends and family members of the victim may also be friends and family of the dealer. Friends and family members may have ingested the drugs with victim shortly before the death, failed to report the death, and are now afraid of being prosecuted themselves. Therefore, Mr. Coronato explains that the best time to speak to these witnesses is right at the beginning of the investigation, "striking while the iron is hot." He explains that these people may decide to speak to law enforcement while in an emotional state, persuaded that their words may prevent another future overdose victim or avenge this victim's death. However, as the investigation progresses, these witnesses may cool down, be less emotional, and not as likely to discuss the case.

Even if these witnesses cannot pinpoint a dealer, establish a time of death, or describe the drug used by the victim immediately prior to death, they may help build a timeline for other parts of the investigation by detailing: the victim's tolerance for drugs, prior frequency of use, if someone else close to the victim would have known the victim's risk of overdose. All these factors play important roles in proving proximate cause or strict liability for death.

## *III. Focus on Victimology*

Mr. Dawley says it is important for prosecutors to explain to the jury that even though the victim knowingly bought the drug from a dealer, she could not appreciate her own acts. This strategy may help avoid jury nullification based on the victim's assumption of risk. For example, if the dealer sells to a victim at a party, when he already knows the victim is intoxicated or using other drugs, the dealer should have known he was creating an inherently dangerous risk through the transaction. Prosecutors should also focus on whether the dealer knew the victim was a novice user. For example, the victim in Mr. Dawley's case orally consumed an entire fentanyl gel pack that killed him within hours (Mr. Dawley's evidence showed that although the victim ingested pills and smoked marijuana and hashish on prior occasions, this was his first time using fentanyl). More experienced illegal drug users understand that gel packs are not to be consumed orally—in fact, Mr. Dawley explained that many seasoned users buy a gel pack to be shared between a group. Also, Mr. Dawley explained that many dealers understand the problems with selling to first time users; oftentimes a drug such as fentanyl can "shock a first time user into cardiac arrest. Prosecutors must shift blame away from the victim and focus on portraying dealers in a way that shows they understood the inherent risk of selling dangerous drugs to the victim. Mr. Caccaviello explains in these cases it is important to "shift the onus away from the victim and to the defendant." As mentioned earlier, one of his strategies was to call a psychiatrist, used as an expert witness, who testified about heightened, organic withdrawal symptoms opioid users face when trying to quit opioids. This testimony allowed the jury to see the addiction was out of the victim's control, and that blame should not be placed on the victim, but rather the defendant who sold her the fentanyl patch.

#### **IV. Using Expert Witnesses to Explain the Science and Detail the Problem**

Specifically, for his case-in-chief, Mr. Caccaviello's expert witness, trained as a psychiatrist, discussed: drug dependency and addiction, how some people are more genetically disposed to drug addiction, especially with opioids; withdrawal symptoms of fentanyl; how fentanyl, a class two-drug, is usually only used for severe pain, and administered only by physicians who prescribe it for cancer patients, and anesthesiologists who administer it during surgery; how fentanyl patches are typically used—as a 3 day supply of pain medication; how fentanyl causes death from respiratory depression; and that fentanyl, measured in micrograms, is more potent than heroin, measured in milligrams.

Mr. Dawley explains it is important for prosecutors to educate the jury about what fentanyl and other opioids are. Ideally, the prosecutor should have a chemist testify how the drug can be used appropriately in certain medical settings (such as prescription pain management). The chemist would also explain to the jury how easily opioids can be abused and how easily an opioid, like fentanyl, can kill someone without proper medical oversight. The chemist can also paint a picture of an opioid's dangerousness by explaining how it is carefully made in a lab with trained technicians covering their bodies with multiple layers of protection. Mr. Dawley also recommends an expert witness from the DEA, who can put the opioid epidemic in perspective for the jury. Finally, MEs are necessary to prove cause of death. Their testimony is especially critical in proximate cause jurisdiction as they must be able to testify that the victim's death was solely attributable to the drug- and not from a predisposed contributing health problem, such as diabetes or a weakened heart or liver. Mr. Dawley recommends prosecutors not just use the ME to explain that the victim died because of the drug, but also to explain the percentage of the drug found in the deceased's blood. For example, if the ME testifies that the victim died with 500 mcgs of fentanyl in her blood, have the ME explain when fentanyl is used for medicinal purposes, doctors generally limit a patient's exposure to 12–100 mcgs per hour.

#### **V. Making Smart Charging Decisions**

Mr. Honig explains that prosecuting these types of cases is "difficult", and his office is focusing on targeting the distributors using strict liability. This year in Ocean County, New Jersey, 76 overdose cases were reported. The Prosecuting Attorney's Office is investigating just seven cases under Strict Liability drug-induced homicide. Prosecutor Coronato explains that many times overdose cases cannot be prosecuted beyond a reasonable doubt as drug induced homicides due to a variety of factors: poor evidence; lack of witnesses; the victim's prior bad health condition; the Medical Examiner's inability to determine the cause of death, especially when other factors—such as alcohol and other drugs were in the victim's system at the time of death, etc. However, Mr. Dawley explained that although the jury came back with a not-guilty for the manslaughter charge in his case, the judge still sentenced the defendant to a hefty sentence for drug distribution.

Mr. Honig's office recently indicted two medical doctors under New Jersey's strict liability drug-induced homicide statute. One doctor<sup>21</sup> was prosecuted after prescribing Oxycontin to the son of another defendant in his drug ring. The doctor was also charged with supplying Oxycontin and other drugs to patients he had never treated. A second doctor is being prosecuted for drug-induced homicide after a man's oxycodone overdose. That doctor is also being charged with prescribing pain pills to other patients who had no medically prescribed need for them, including patients he knew were drug addicts or dealers.<sup>22</sup>

<sup>21</sup> "Indictments Allege Doctor and 7 Others Operated Ring That Illegally Distributed Tens of Thousands of Pills of Addictive Opiate Oxycodone." The State of New Jersey, Department of Law and Public Safety, Office of the Attorney General Press Release. August 16, 2016. Accessed July 20, 2017 from: <http://www.nj.gov/oag/newsreleases16/pr20160816a.html>

<sup>22</sup> "Doctor Indicted on Charges He Sold Oxycodone Prescriptions to Patients with No Legitimate Need for the Addictive Opioid Pills, Including Patients He Knew Were Drug Addicts or Drug Dealers." The State of New Jersey, Department of Law and Public Safety, Office of the Attorney General Press Release. March 2, 2017. Accessed July 20, 2017 from: <http://nj.gov/oag/newsreleases17/pr20170302a.html>

## **VI. Collaborating on Preventative Measures with Law Enforcement and Public Health Care Agencies to Curb Opioid Abuse and Overdoses**

"[Law enforcement practitioners]...need to start looking at the [opioid] problem from a public health perspective. When our communities are suffering such great losses, it is critical that we find new ways to help."<sup>23</sup> "...In places where people from the public safety and public health sectors have come together to collaborate, share information, and learn from one another, real progress is being made. People are going into treatment instead of the criminal justice system. They are being connected to mental health care, housing, employment, and other support services."<sup>24</sup> Findings from the Police Executive Research Forum suggest the following practices, with collaboration from health care agencies, may help curb the opioid overdoses as part of a focus away from the suppliers: Increased access to treatment and recovery services; law enforcement's usage of Naloxone (a drug used to treat narcotic overdoses in emergencies); mitigating the consequences of injection drug use through injection sites; and, improving access to data and intelligence.<sup>25</sup> Furthermore, as a proactive measure, prosecutors' offices should collaborate with law enforcement and health care agencies for preventative education of overdose deaths. The collaboration should, among other things, stress that well-meaning family members and friends may be criminally liable for producing prescription opioids.

## **VII. Law Enforcement Using NARCAN<sup>26</sup>**

In 2014, law enforcement in Ocean County, New Jersey began using NARCAN to combat synthetic opioids such as fentanyl. Five hundred sprays were administered that year. County Prosecutor Coronato explains the cost of NARCAN is subsidized through the county's drug forfeiture funds. His office provides NARCAN trainings on their website, and have trained law enforcement agencies across New Jersey. Read more about how law enforcement in Ocean County, New Jersey, implements it "NARCAN Project" here: <http://oceancountyprosecutor.org/narcan/>

In addition to efforts in New Jersey, NARCAN use has been adopted nationally. The National Sheriffs' Association (NSA) has developed a pilot program to provide Naloxone training and overdose kits to law enforcement, and the Association states the use of Naloxone has doubled since 2013.<sup>27</sup> Since November 2015, NSA, partnering with Purdue Pharma, has distributed over 500 kits, each equipped with two doses of Naloxone to twelve law enforcement agencies in eight states. NSA also trained more than 600 deputies and officers to administer naloxone and has distributed kits to a dozen law enforcement agencies and offices, and continually offers training and technical assistance to nine law enforcement agencies in six states. The agency reports their effort has saved more than 120 lives.<sup>28</sup>

## **VIII. Train Law Enforcement and other First Responders**

The New Jersey Attorney General's office has seen the highest amount of arrests for drug-induced homicides in 2016—all attributable to increases in addiction, overdoses, but also due to increased training from law enforcement and first responders, according to Mr. Honig. Thus, training helps combat recent increases in opioid usage—both by assisting law enforcement on how to make arrests, but also on how to preserve evidence to present a viable case. Prosecutors should be adept at training

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<sup>23</sup> "Building Successful Partnerships between Law Enforcement and Public Health Agencies to Address Opioid Use." Police Executive Research Forum. 2016. Introduction, page 13. COPS Office Emerging Issues Forums. Washington, DC: Office of Community Oriented Policing Services. Accessed July 7, 2017 from: <http://www.iaclea.org/visitors/PDFs/BuildingSuccessfulPartnerships-COPS.pdf>

<sup>24</sup> *Id.* at page 88.

<sup>25</sup> "Building Successful Partnerships between Law Enforcement and Public Health Agencies to Address Opioid Use." Police Executive Research Forum. 2016. COPS Office Emerging Issues Forums. Washington, DC: Office of Community Oriented Policing Services. Accessed July 7, 2017 from: <http://www.iaclea.org/visitors/PDFs/BuildingSuccessfulPartnerships-COPS.pdf>

<sup>26</sup> NARCAN, or Naloxone, is an emergency treatment used to block the effects of an opioid overdose. Read more about it here: <http://stopoverdoseil.org/narcan.html>

<sup>27</sup> "Pilot Program to Provide Naloxone Training and Overdose Kits." The National Sheriffs' Association. Accessed 24 August 2017 from: <http://www.sheriffs.org/content/pilot-program-provide-naloxone-training-and-overdose-kits>

<sup>28</sup> "May 2017 REPORT – Law Enforcement and Purdue Pharma: Saving Lives" The National Sheriffs' Association. Accessed 24 August 2017 from: <http://www.sheriffs.org/sites/default/files/Narcan%20Report%20FINAL.pdf>

the trainers: Ocean City prosecutors train and work with officials from other police departments and the other twenty county prosecutors offices. Then, state police are equipped to train other troopers about investigative skills unique to these cases. In Ocean City, there are 32 police departments, ranging from 40 to 163 officers. The Prosecutor's office made sure every officer received NARCAN training- which took about three months. The Office "consistently" trains the trainers, (prosecutors and law enforcement) on the following topics: strict liability for drug-induced homicides (a 4-5 hour course) offered four times since 2015; crisis intervention; veterans' diversion; and mental health.

### *IX. Building Blocks and Recommendations to Prevent Further Opioid Abuse*

County Prosecutor Coronato explains there are three "tools in a toolkit" to prevent drug abuse: education; strong law enforcement and prosecution; and breaking the cycle of addiction. "All three blocks need to be in place to prevent drug overdose deaths."

#### *Education*

The first tool in the toolkit is education. Coronato meets with school superintendents in his jurisdiction once a month. He brings in K-9 units to schools, and his prosecutors teach pupils about the dangers of drugs and addiction. His office produces the "Right Turns" series, targeted at children and young adults to prevent crimes, including dealing opioids. The videos usually feature local and national celebrities from the jurisdiction, along with actors from local high school drama departments. The office also distributes locker magnets, complete with a scannable phone app that allows students (and other citizens) to film crimes and upload them directly onto the Ocean County New Jersey Prosecutor's website. More information about the "Right Turns" series is available at the office's Media Page, here:

<http://oceancountyprosecutor.org/news/media-page/>

#### *Law Enforcement and Prosecution*

County Prosecutor Coronato's second tool to prevent drug abuse is "strong law enforcement that holds dealers liable." This includes treating every overdose as a homicide, completing an immediate and thorough investigation within the first 48 hours of the death, and prosecuting dealers through the strict liability drug-induced homicide statute. Although the New Jersey statute has been in place since the 1980s, many deaths were not prosecuted until recently.

#### *Breaking the Cycle of Drug Addiction*

Ocean City New Jersey has two programs geared at breaking addiction cycles: the Opioid Overdose Recovery Program (OORP) and the Blue Heart Heroin Addiction Response and Treatment (HART). In 2016, New Jersey Department of Human Services, Division of Mental Health and Addiction Services; the Governor's Council on Alcoholism and Drug Abuse; and, the Department of Children and Families launched OORP. The program targeted opioid users who ended up in hospitals after seeking medical treatment.<sup>29</sup> County Prosecutor Coronato applauded the program, but recognized drug users should have the option of receiving help before medical intervention: thus, HART was launched in 2017 to allow users to turn themselves in to a local police precinct and be enrolled in a zero-cost drug treatment program and with no arrest. In the first five weeks of the program, 62 users turned themselves in and received services.<sup>30</sup>

<sup>29</sup> "Opioid Overdose Recovery Program: Battling the Opioid Epidemic" <http://www.barnabashealth.org/Specialty-Services/Behavioral-Health/The-Institute-for-Prevention/Programs/Opioid-Overdose-Recovery-Program.aspx>

<sup>30</sup> Alexander, Dan. "Another Chance for Ocean County drug addicts to get help." *New Jersey 101.5*. February 23, 2017. Accessed July 20, 2017 from: <http://nj1015.com/another-chance-for-ocean-county-drug-addicts-to-get-help/>