

Seeking Justice and Solutions: A Prosecutor's Guide to Opioid Overdose Investigations

January, 2021



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“[We] spent a lot of time [...] overcoming the stigma. And, you know, you run the risk, if you will, of looking soft on crime in certain circles. But that’s what the challenge has been to us: to [...] explain that this is an illness, and it needs to be treated as such. But also it has a criminal justice aspect that has to be [...] tough when the deal is for profit.”

– District Attorney Michael McMahon, Richmond County, NY

“[E]very single dollar I make is a taxpayer’s dollar. [S]o what should the return be on a prosecutorial agency or on a law enforcement agency in fighting this problem? It should be to treat people and to save lives. Right? And it should be to stem the very destructive and highly potent fentanyl problem.”

– ADA Andre Gaudin, New Orleans Parish, LA

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Introduction

The Opioid Crisis

Overdoses involving at least one opioid have claimed more than 450,000 lives since 1999 – more than the entire population of Portland, Oregon, or Tucson, Arizona.¹ The epidemic has come in three “waves”: first, a flood of prescription opioids resulting from profit-driven misleading marketing and uncontrolled distribution by pharmaceutical manufacturers and distributors as well as over-prescription by physicians²; next, a turn toward heroin as state regulators and law enforcement succeeded in narrowing channels for prescription opioids³; finally, the dominance of potent, synthetic opioids such as fentanyl, bringing more sudden and frequently irreversible overdoses.⁴

After nearly three decades of staggering increases in the death tolls every year, 2018 offered a slim hope when drug overdose deaths decreased by 5%. And yet: 68,000 people still died. Unfortunately, hope faded fast. In early July 2020, the Centers for Disease Control and Prevention (CDC) released drug overdose statistics for 2019⁵: almost 72,000 dead. This year (2020) is on track to exceed the death toll of 2019 by a staggering 13%, due to the combined effects of fentanyl and COVID-19.⁶

The approach to the drug crisis had evolved in these decades as well. Conscious and unconscious biases about race and poverty influenced earlier attitudes toward drug users and “drug-prone locations”. Those addicted to heroin or cocaine were considered “junkies”: they were treated as criminals and second-class citizens, receiving scant sympathy or medical attention. During the crack and heroin epidemics of the 1970s and

1 Centers for Disease Control and Prevention (CDC), *Opioid Data Analysis and Resources*, <https://www.cdc.gov/drugoverdose/data/analysis.html> (last visited 8/21/20).

2 See Scott Higham, Sari Horwitz and Steven Rich, *76 billion opioid pills: newly released federal data unmasks the epidemic*, Washington Post, July 16, 2019, (https://www.washingtonpost.com/investigations/76-billion-opioid-pills-newly-released-federal-data-unmasks-the-epidemic/2019/07/16/5f29fd62-a73e-11e9-86dd-d7f0e60391e9_story.html) (last visited 8/21/20)

3 See Steven Rich, Meryl Kornfield, Brittany Renee Mayes and Aaron Williams, *How the Opioid Epidemic Evolved*, Washington Post, Dec. 23, 2019, <https://www.washingtonpost.com/graphics/2019/investigations/opioid-pills-overdose-analysis/> (last visited 8/21/20)

4 Centers for Disease Control and Prevention (CDC), *Opioid Data Analysis and Resources*, <https://www.cdc.gov/drugoverdose/data/analysis.html> (last visited 8/21/20).

5 Centers for Disease Control and Prevention (CDC), *Vital Statistics Rapid Release: Provisional Drug Overdose Death Counts*, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last visited 8/21/20).

6 Josh Katz, Abby Goodnough and Margot Sanger-Katz, *In Shadow of Pandemic, U.S. Drug Overdose Deaths Resurge to Record*, The New York Times, July 15, 2020, <https://www.nytimes.com/interactive/2020/07/15/upshot/drug-overdose-deaths.html> (last visited 8/21/20).

1980s, poor neighborhoods became battlegrounds in the war on drugs, leading to high incarceration rates of people of color with little or no available substance use disorder-treatment.⁷

The rising rates of addiction and overdose within white, middle-class communities, however, prompted a shift in the perspectives of community members, law enforcement and elected officials.⁸ While pharmaceutical executives perpetuated the view that addiction was a moral failure, blaming “abusers” and “reckless criminals” for OxyContin abuse,⁹ the families of overdose victims leveraged their socio-economic status and political clout to shift the conversation toward treatment and diversion.¹⁰

The shift was necessary but long overdue. Prosecutors are adapting and learning – and spearheading innovative approaches to this complex issue.

Substance Use Disorder

According to the National Institute on Drug Abuse, substance use disorder (SUD) is chronic and relapsing. “It is characterized by compulsive drug seeking, continued use despite harmful consequences, and long-lasting changes in the brain. It is considered both a complex brain disorder and a mental illness. Addiction is the most severe form of a full spectrum of substance use disorders, and is a medical illness caused by repeated misuse of a substance or substances.”¹¹

It is increasingly recognized that repeatedly arresting individuals who are using drugs, overdosing on drugs or committing petty crimes to support their habit does not solve the epidemic of addiction and overdose.¹² Instead, a drug user’s contact with law enforce-

7 Julie, Netherland & Helena Hansen, The War on Drugs That Wasn’t: Wasted Whiteness, “Dirty Doctors,” and Race in Media Coverage of Prescription Opioid Misuse, *Cult Med Psychiatry* 40(4): 664–686, 12/2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5121004/> (last visited 08/20/2020).

8 Taylor Santoro & Jonathan Santoro, *Racial Bias in the US Opioid Epidemic: A Review of the History of Systemic Bias and Implications for Care*, *Cureus* 10(12): e3733, 12/14/2018, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6384031/> (last visited 8/20/2020)

9 First Amended Complaint and Jury Demand, 59, *Commonwealth of Massachusetts, v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Super. Ct. Suffolk, Mass.) <https://assets.documentcloud.org/documents/5716943/Massachusetts-AGO-Amended-Complaint-2019-01-31.pdf>

10 Katharine Seelye, In Heroin Crisis, White Families Seek Gentler War on Drugs, *The New York Times*, 10/30/2014, https://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html?_r=0 (last visited 8/21/2020).

11 National Institute on Drug Abuse, The Science of Drug Use and Addiction: The Basics, <https://www.drugabuse.gov/publications/media-guide/science-drug-use-addiction-basics> (last visited 8/21/20).

12 “[...W]e can all agree that it is time to seriously reassess our strategies concerning America’s insatiable demand for drugs, our war on drugs, and the resulting lack of border security. This report highlights the Committee’s hearings on America’s insatiable demand for drugs, including the Committee’s four field hearings across the country. The report examines the effect that America’s insatiable demand for drugs has had on U.S. national and border security, closely scrutinizes the current opioid epidemic in the Unit-

ment may be an opportunity to save their life – not just in that moment, but in the long term, by redirecting them away from the criminal justice system toward treatment or harm reduction. This approach is often dependent on available resources and will require stakeholders with different perspectives and experiences to work on finding common ground. It must be also be managed in a manner consistent with public safety. The changes that result, however, are lasting and transformational for individuals and communities.

Drug Trafficking

Drugs are big business. The roots of the opioid epidemic are in cartel operations and inside pharmaceutical corporate boardrooms, where a ruthless drive to profit has spawned networks of distributors as well as extensive lobbying operations often involving corrupt practices.¹³ As of 2016, the profits generated from the United States for Mexican drug cartels alone was estimated to range between \$19 and \$29 billion, and the global prescription opioid market was believed to be worth \$24 billion dollars.¹⁴

Most local prosecutors do not encounter the big business of opioids. Instead, they are confronted with regional gangs, street sales, dirty doctors and overdose fatalities. To overcome these challenges, it is increasingly recognized that everyone benefits from pooling intelligence and re-

ed States and considers possible approaches to curb illicit drug use and addiction. At multiple Committee hearings, witnesses testified that an “all of the above” approach is needed—prevention, treatment, and law enforcement—to tackle this public health crisis. [...] While there is no silver bullet solution to curb the demand for drugs in this country, one thing is clear: our current approach is not working.” America’s Insatiable Demand for Drugs: The Public Health and Safety Implications for our Insecure Border, A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs United States Senate, September 1, 2016, <https://www.hsdl.org/?view&did=795132> (last visited 8/28/2020).

¹³ Sam Quinones, *Dreamland: The True Tale of America’s Opiate Epidemic*; Gale AH, *Drug Company Compensated Physicians Role in Causing America’s Deadly Opioid Epidemic: When Will We Learn?* *Mo Med*. 2016; 113(4): 244-246; Van Zee A. *The promotion and marketing of oxycontin: commercial triumph, public health tragedy*. *Am J Public Health*. 2009; 99(2):221-227.

¹⁴ See United States of America-Mexico Bi-National Criminal Proceed Study, Joint Message from Assistant Secretary John Morton, U.S. Immigration & Customs Enforcement, and Director Garyling G. Williams, DHS Office of Counternarcotic Enforcement, available at <https://www.ice.gov/doclib/cornerstone/pdf/cps-study.pdf>. Dina Gusovsky, *Americans consume vast majority of the world’s opioids*, April 27, 2016, <https://www.cnbc.com/2016/04/27/americans-consume-almost-all-of-the-global-opioid-supply.html> (last visited 8/28/2020).

sources. A consistent, fact-driven, thorough approach to opioid overdose investigations can save individual lives, generate actionable intelligence and contribute to regional and national efforts to reduce both the supply and demand of opioids.

Goal of the Paper: Advancing an Integrated Approach to Opioid Overdoses

The epidemic has presented prosecutors with new challenges and questions. “We can’t arrest our way out of this problem” is the new tagline of the opioid epidemic. Though the opioid crisis may be the result of criminal actions by pharmaceutical companies, profit-driven drug sellers and corrupt physicians, modern prosecutors acknowledge that addiction itself is not a crime and that addiction is a medical condition. The prosecutor is faced with decisions on two fronts, how to address the criminal activity of drug sellers and how to treat the medical issues of drug users.

There is no simple answer. In uncertain times, faced with public health and safety crises, prosecutors are called upon to marshal existing laws to address criminal conduct, receive and digest community feedback, evaluate treatment programs and assess that justice is done in a fair and equitable way. It is a hard task. The communities prosecutors serve also have variances in law enforcement resources, drug trafficking methods, data sources, treatment options, public health approaches, public sentiment and legal constraints. Despite these differences, the current crises have triggered a new alignment of law enforcement, public health experts and community members.

The goal of this article is to provide options and to highlight innovative, effective strategies for improving prosecutors’ response to opioid overdose deaths. This response ranges from providing access to treatment to prosecuting overdose deaths as homicides.

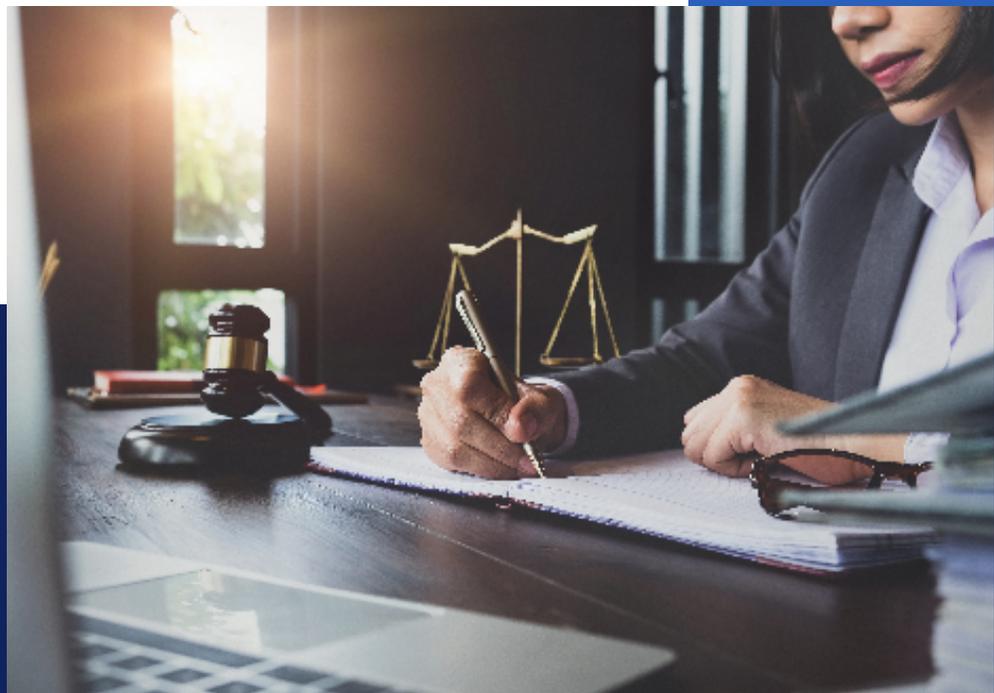
Content and Structure of the Paper

The core research for this paper consisted of interviews with experienced prosecutors and their team members from the following prosecutor offices: Richmond County (Staten Island), New York; Worcester County, Massachusetts; Shelby County (Memphis), Tennessee; Milwaukee County, Wisconsin; Montgomery County, Pennsylvania; East Baton Rouge Parish, Louisiana; Wayne County (Detroit), Michigan; and Orleans Parish, Louisiana. Their experiences and views offer only a sampling of the many opioid-related initiatives undertaken by prosecutors.

Research also included county-level data analysis relating to opioid overdose deaths and trends, press coverage of notable opioid overdose investigations and prosecutions,

an analysis of cases and statutes and reviews of local law enforcement manuals for opioid overdose investigations.

The paper is in four parts. The first part considers prosecutorial roles, goals and policies in addressing the opioid epidemic. The second part discusses the charging decisions that prosecutors can make in these complex cases. The third part provides practical guidance on processing overdose death scenes and conducting overdose investigations. The fourth part details the approach taken by Richmond County District Attorney's Office in Staten Island, New York (RCDA) approach, illustrating many of the issues raised in this paper. Finally, the Appendix includes a survey that can assist prosecutors to evaluate their many options, assess available resources and decide how to proceed. The Appendix also includes an Opioid Investigation Worksheet and charts of Drug Delivery and Good Samaritan statutes.



Executive Summary

Getting Started

Setting Goals

Modern prosecutors are asking what part they can play in saving lives, while still holding drug traffickers accountable. When saving lives is the first concern¹⁵, new approaches reveal themselves. Prosecutors cannot go it alone or apply the usual playbook. The opioid epidemic calls for adopting complex, multi-disciplinary approaches that provide solutions to the opioid crisis on a case-by-case basis, ranging from treatment to homicide prosecutions. Once a goal is set, the prosecutor office should undergo a review of its current procedures regarding when to prosecute, whom to prosecute and which charges to pursue. See the Appendix for a self-survey designed to assist prosecutors in evaluating their current conditions and resources, identifying potential partners and initiating discussions about goals

Staffing

Once the mission and goals of an office are established, the office can assess the available staffing, resources and needs -- and get to work on developing written protocols. The following is a list of staff that can be hired or designated, if resources are available. In some instances, existing staff can be given these roles and in other instances the staffing needs can be filled by partnering with other agencies. Ideally, staff should include:

- A prosecutor liaison
- An addiction specialist
- A peer advocate
- An analyst/paralegal/researcher

Law Enforcement Partnerships

Partnerships with law enforcement are necessary at every step: at the scene of the overdose; in managing county-level overdose data; outreach to overdose survivors and victims' families; coordinating enforcement strategies with other jurisdictions; making charging decisions and working to prevent more overdoses.

Prosecutors cannot undertake opioid overdose investigations without a dedicated and

¹⁵ See Part 4 for an outline of how this approach is used by the Staten Island District Attorney's Office, New York.

expert investigation partner who can respond to the actual scene of an overdose. In certain jurisdictions, partnerships stemmed from serendipitous encounters between concerned prosecutors and a single officer or investigator determined to make a dent in the local epidemic statistics; in others, partnerships are intentionally cultivated through training programs and assignments.

These partners should also include United States Attorney's Offices and federal law enforcement agencies, such as the Drug Enforcement Agency and The Bureau of Alcohol, Tobacco, Firearms and Explosives.

Data Collection

Accurate and timely data, from a variety of sources, is crucial to an effective, informed response. This can be challenging as the data may be collected and stored in a variety of places including police departments, hospitals and emergency response providers, medical examiner offices, federal law enforcement and social service agencies. Prosecutors should work with law enforcement and government agencies to coordinate the accurate collection of data.

The type of data to collect includes:

- The number of deaths and yearly trends
- The principal substance involved in county overdoses
- The point of origin and channels for distribution
- The demographics of overdose victims and Narcan "saves"
- Demographics of drug sale defendants

One tool that has proven to be highly beneficial in the real-time, accurate reporting and surveillance of fatal and nonfatal overdoses is the Overdose Detection Mapping Application Program¹⁶ (ODMAP). ODMAP is a free web software platform that aims to provide near real-time data to public safety and public health agencies, to encourage the mobilization of responses to overdoses as efficiently and quickly as possible. The software presents overdose data within and across jurisdictions to assist local, federal and tribal agencies including licensed first responders and hospitals, to identify overdose spikes and clusters.

Treatment Programs

Prosecutors should do a survey of treatment programs serving their jurisdiction and assess their effectiveness. With this knowledge, prosecutors can coordinate and support treatment programs in partnership with substance use disorder treatment providers, law enforcement, the courts and the defense bar.

¹⁶ Overdose Detection Mapping Application Program, ODMAP Fact Sheet, <http://www.odmap.org/Content/docs/training/general-info/ODMAP-Fact-Sheet.pdf>, (last visited 8/20/2020).

Communicating with Family Members

Prosecutors may not be able to meet with family members of every overdose victim, but they should strongly encourage law enforcement to provide families with information and key updates *in every single case*, whether an arrest is made or not. Prosecutors should meet with family members in the cases that they decide to pursue, as early as possible, to explain the process, outline the likely outcomes and hear the families' positions.

Public Health Experts and Researchers

While prosecutors and police officers benefit from reliable, accurate, immediate notification and comprehensive data, they are not experts at collecting or analyzing public health information. Government, nonprofit, private and academic public health teams, however, can serve as the research arm for opioid overdose task forces offering a measure of accountability. They are also often experienced grant writers that can assist with applying for funds.

Community Outreach

The word “community” is an inadequate shorthand for a complex network of families, businesses, professionals, educators, full and part-time residents, homeless individuals, incarcerated people and legislators. Many members of a community may be struggling with addiction, grief, helplessness, drug-related disturbances, as well as unsafe conditions due to drug-related activity. Community members on the front lines of the epidemic also may be seeking support or purpose after shattering loss. Prosecutors can find formidable partners among the community groups who dedicate tremendous energy and research to the cause of addressing the opioid crisis.

Funding

Securing predictable, additional resources is a fundamental element of sustainability. In 2018, the federal government increased its funding by more than 120% for programs to combat the opioid epidemic, reaching more than seven billion dollars.¹⁷ These funds include grants for state and local government entities as well as nonprofit organizations. One resource specifically for prosecutors is the Innovative Prosecution Solutions Grants (IPS Grants) from the U.S. Department of Justice's Bureau of Justice Assistance.¹⁸ State and local resources for treatment, law enforcement, data collection and prosecution may also be available.

¹⁷ The Bipartisan Policy Center, *Tracking Federal Funding to Combat the Opioid Crisis*, March 2019, <https://bipartisanpolicy.org/wp-content/uploads/2019/03/Tracking-Federal-Funding-to-Combat-the-Opioid-Crisis.pdf> (last visited 8/28/2020). See also, <https://cossapresources.org/Program/SiteGrants> (last visited 11/7/2020)

¹⁸ The Bureau of Justice Assistance, *Innovative Prosecution Solutions*, <https://bja.ojp.gov/program/innovative-prosecution-solutions/overview> (last visited 8/20/2020).

Charging Decisions

Drug Sale Charges and the “Grey Area”

The first challenge in overdose investigations is distinguishing between “users” and “dealers” in the delivery chain. Prosecutors rely to a great extent on this distinction to determine who should be charged with a crime and who should be offered treatment and diversion. However, prosecutors also recognize that there is a “grey area,” which makes the exercise of discretion more complicated and particularly important.

The criteria often applied by prosecutors to identify drug dealers focus on a suspect’s profit motivation, business practices, marketing strategies and volume of sales. However, prosecutors also take into consideration whether a dealer is selling to support their own habit. These defendants fall in the “grey area” between drug seller and drug user and this calls for a more nuanced inquiry that balances public safety against the medical needs of the defendant.

Homicide Charges

Some or all of the following factors may support a homicide charge.¹⁹ Most of these criteria apply whether the prosecutor’s state has a Death by Delivery statute or not.

- **Nexus between suspect and victim:** A nexus between the suspect and the victim that satisfies the statutory requirements, i.e. the suspect delivered the substance directly to the victim or there is evidence of the supply chain between the suspect and the victim.
- **Suspect does not have SUD:** The suspect does not appear to have a criminal or medical history indicative of substance use disorder.
- **Suspect knew the nature of the drug sold:** The suspect knew the composition and potency of the drug sold and that it created a risk of overdose.
- **Suspect marketed the drug based on potency:** The suspect marketed the product based upon its composition and/or potency.
- **Suspect knew the risks to the victim:** The suspect made statements to the victim, about the victim or in relation to the victim’s death demonstrating knowledge of the risks to the victim.
- **Suspect was aware of the victim’s vulnerabilities:** The suspect was aware of any of the victim’s unique vulnerabilities, such as recent detoxification, earlier

¹⁹ In most states, sentencing may be a consideration only for prosecutors, since juries are not allowed to learn, let alone consider, the range of punishment for the alleged crimes. In Louisiana, however, mandatory life sentences are an acceptable topic for *voir dire* in second degree murder death by delivery cases. Sentencing considerations, whether out of a concern for the availability of drug treatment in prison, equity concerns or jury trials, may therefore weigh on prosecutors’ decisions as well, in the choice between murder and manslaughter charges, or sale charges rather than homicide.

overdoses or suboxone treatment.

- **Suspect is part of a drug distribution organization:** The suspect is part of an organized drug distribution network that has supplied highly potent substances resulting in overdoses.
- **Suspect is high on the distribution chain:** The suspect is at or near the top of that distribution chain.
- **Suspect did not assist the victim:** The suspect deliberately failed to obtain assistance for the victim.
- **Suspect misdirected the investigation:** The suspect attempted to misdirect the investigation.

Death by Delivery Statutes

Death by Delivery laws allow prosecutors to seek homicide charges when a drug transaction results in death and certain other factors exist. Roughly half of states have adopted them with varying elements, standards of causation and sentencing requirements. These statutes have been around for some time but have not been used frequently: between 2011 and 2016, however, there was a 300% increase in drug-induced homicide charges.²⁰

Good Samaritan Laws

Fear of prosecution may prevent fellow drug users, drug suppliers, overdose witnesses or even uninvolved bystanders to leave someone overdosing without calling for help. Fear may even incite witnesses to destroy evidence at the scene of an overdose. Understanding Good Samaritan laws, which provide varying levels of immunity for bystanders who call for assistance, can help prosecutors develop public education messages and make appropriate charging decisions.²¹

Opioid Overdose Response Protocol

This paper provides detailed guidance on investigating the crime scene, obtaining relevant medical information and interviewing witnesses including the overdose survivor.

²⁰ See Zachary A. Siegel, *Despite “Public Health” Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides*, The Appeal, 11/08/2017, <https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7/> (last visited 08/19/2020).

²¹ See Appendix for chart of Good Samaritan laws.

Case Example: Richmond County District Attorney's Office

In 2016, the Richmond County District Attorney's office (RCDA), also known as the Staten Island District Attorney's Office, saw it as their obligation to make help available, promote accountability, provide closure to survivors and grieving families and enforce the law. They have joined forces with the federal HIDTA task forces, DEA, FBI, public health authorities, nonprofit public health organizations, universities and treatment providers to maximize the resources and expertise dedicated to ending the opioid epidemic.

Now, four years later, DA Michael McMahon, his team and their partners have a "fine-tuned operation"²² with a crystal-clear goal: overdose prevention. The Chief of Investigations at the Richmond County District Attorney's Office has a whiteboard on the wall behind his desk, where he tracks fatal and nonfatal overdoses in his county, daily. Those numbers are there for a reason. Declining numbers are not a measure of success, he explained: "I want there to be zero overdoses."²³

This paper gives an overview of the various facets of their program.



22 Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney's Office, New York. Notes on file with PCE. (07/01/2020).

23 Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney's Office, New York. Notes on file with PCE. (07/01/2020).

Part 1 - Getting Started

Part 1- Getting Started

The opioid crisis has spurred prosecutors to re-think their approach to drug crime, drug addiction and drug overdoses. Prosecutors are faced with a broad array of options on how to address these issues ranging from diversion to homicide prosecution. This paper will guide prosecutors toward a collaborative, data-driven approach emphasizing timely, thorough investigations of opioid overdose deaths, partnerships with law enforcement and collaborations with treatment programs and public health providers.

Setting Goals

Sadly, there may be very few, if any, prosecutor offices that are untouched by the opioid epidemic and opioid overdoses, whether through their cases or by personal loss. Important conversations and changes can arise simply from acknowledging these losses and taking stock: What is the prosecutor's role in addressing this epidemic? What are the prosecutor's goals and priorities?

Modern prosecutors are broadening their goals and asking what part they can play in saving lives, while still holding drug traffickers accountable. When saving lives is the first concern²⁴, new approaches reveal themselves. Prosecutors cannot go it alone or apply the usual playbook. The opioid epidemic calls for adopting complex, multi-disciplinary approaches that provide solutions to the opioid crisis on a case-by-case basis, ranging from treatment to homicide prosecutions.

Once a goal is set, the prosecutor office should undergo a review of its current procedures regarding when to prosecute, whom to prosecute and which charges to pursue. This assessment is needed to ensure that office practices are aligned with the stated goal and to strike the right balance between the keystone values of equal justice, public safety and accountability. See the Appendix for a self-survey designed to assist prosecutors in evaluating their current conditions and resources, identifying potential partners and initiating discussions about goals.

Though prosecutorial offices may be constrained by limited resources, *every office has the ability to do something.*

²⁴ See Part 4 for an outline of how this approach is used by the Staten Island District Attorney's Office, New York.

Staffing

Once the mission and goals of an office are established, the office can assess the available staffing, resources and needs -- and get to work on developing written protocols. The following is a list of staff that can be hired or designated, if resources are available. In some instances, existing staff can be given these roles and in other instances the staffing needs can be filled by partnering with other agencies.

- **Prosecutor Liaison:** Designate an Assistant District Attorney to oversee opioid overdose investigations, review cases, network with local, state and federal stakeholders, and supervise any homicide prosecutions.
- **Addiction Specialist:** Hire a licensed clinician and/or social worker to oversee diversion programs, advise the chief prosecutor on policies and coordinate outreach to opioid overdose survivors or overdose victims' families. Staff from a local treatment provider may be able to fill this role.
- **Peer Advocate:** Hire a credentialed 'peer advocate' to respond to all opioid-related arrests, obtain permission from defense attorneys to speak to defendants about treatment options and conduct outreach to opioid overdose survivors and victims' families. A peer advocate with personal experiences of addiction and recovery may be particularly effective. Partnering with a local treatment provider may be an avenue to provide these kinds of service.
- **Analyst/Paralegal/Researcher:** Hire a crime analyst, paralegal or graduate student from a local university who can gather, clean and analyze the needed data and develop regular reports on emerging trends.

Creating Partnerships with Law Enforcement

"[Y]ou got to have the three "P"s on board to solve anything: ... prosecutors, ... the police and the people. You've got to have all three working together on any issue that you want to address, whether it's crime, or whether it's dealing with overdoses. You've got to have the buy in from all three, working together for that fourth "P," which is a partnership [...]."

– ADA Tom Ridges, Executive ADA for Investigations, Richmond County

As the central law enforcement figure in many jurisdictions, prosecutors are well positioned to coordinate partnerships. Prosecutors are problem solvers: they are unafraid of hard realities, linked to all key players in local, state and federal government and entrusted with the mission of doing justice for all. They should take the lead in bringing

together law enforcement, hospitals, treatment providers, community agencies, schools, community members and families.

Partnerships with law enforcement are necessary at every step: at the scene of the overdose; in managing county-level overdose data; outreach to overdose survivors and victims' families; coordinating enforcement strategies with other jurisdictions; making charging decisions and working to prevent more overdoses.

Examples of various essential partnerships follow.

Local Law Enforcement and Investigators

Prosecutors cannot undertake opioid overdose investigations without a dedicated and expert investigation partner who can respond to the actual scene of an overdose. In certain jurisdictions, partnerships stemmed from serendipitous encounters between concerned prosecutors and a single officer or investigator determined to make a dent in the local epidemic statistics; in others, partnerships are intentionally cultivated through training programs and assignments.

As can be seen in the examples below, prosecutors have formed partnerships with law enforcement in a variety of ways – and where local law enforcement does not have the resources to serve as the primary partner in opioid overdose investigations, prosecutors have developed other solutions.

Montgomery County District Attorney's Office, Pennsylvania

Population: 850,000

Number of Prosecutors: 53

In Montgomery County, PA, a county with 46 municipal police departments, the District Attorney's office developed their own Opioid Overdose Task Force, staffed by officers on 24-month assignment from their local departments who are trained to investigate opioid overdoses as homicide cases and supervised by an experienced homicide unit Lieutenant. Through a cross-designated Special Assistant United States Attorney from the DA's office, cases involving gang activity, significant quantities of drugs or cross-border trafficking are flagged to federal agencies such as the United States Attorney's Office, the FBI, the Drug Enforcement Administration and Homeland Security as needed.

Worcester County District Attorney's Office, Massachusetts

Population: 830,000

Number of Prosecutors: 88

In Worcester County, Massachusetts, a county with sixty police departments, the State Police operates two detective units within the District Attorney's Office. One of these units is tasked with investigating overdose deaths within the county at large. In the city of Worcester, however, the police department investigates all overdose deaths. The District Attorney's Office applied grant funds to appoint a Community Prosecutor who focuses on opioid overdose investigations and community outreach. The prosecutors rely upon the State and Worcester police to process every overdose death as a crime scene and conduct lawful searches of any electronic devices.

Orleans Parish District Attorney's Office, Louisiana

Population: 390,000

Number of Prosecutors: 57

In Orleans Parish, Louisiana, local police departments were overwhelmed with violent homicides and felonies, leaving insufficient resources and personnel for overdose death scene investigations. Prosecutors applied federal grant funds to ensure consistent processing of overdose death scenes, in partnership with the Coroner's Office. As a result, a specialized overdose investigator is dispatched to every death scene by the Coroner's Office, with the mission and authority to document the scene and take custody of any evidence.

Federal Prosecutors and Task Forces

For local prosecutors, forming partnerships with the U.S. Attorney's Office can result in a significant expansion of resources. In Orleans Parish, Louisiana, Shelby County, Tennessee and Montgomery County, Pennsylvania, specialized ADAs have been cross designated as Special Assistant United States Attorneys. In that role, they identify state- or county-level narcotics cases that may be deemed eligible for federal prosecution, investigate them and take them to trial.

Shelby County District Attorney General's Office, Tennessee

Population: 930,000

Number of Prosecutors: 110

With cross-designation to the U.S. Attorney's Office as a Special Assistant United States Attorney, a Shelby County Assistant District Attorney has security clearance to receive and communicate law enforcement sensitive and secret-level materials; accordingly, he is able to review and identify cases suitable for various federal and state task forces depending on the location and nature of the arrests. As a member of the Shelby County High Intensity Drug Trafficking Area (HIDTA) Task Force, the District Attorney's Office also contributes to and benefits from ODMAP, the regional data collection and overdose tracking initiative described below. Joining HIDTA has benefits beyond access to the ODMAP software. As members of their local HIDTA network, local prosecutors work with the DEA, Homeland Security and the FBI to share information about large drug trafficking organizations and decide how to divide up the work.

Data Collection

Accurate and timely data, from a variety of sources, is crucial to an effective, informed response. This can be challenging as the data may be collected and stored in a variety of places including police departments, hospitals and emergency response providers, medical examiner offices, federal law enforcement and social service agencies. Prosecutors should work with law enforcement and government agencies to coordinate the accurate collection of data.

Initially some groups may be reluctant to share data, but prosecutors have identified reliable systems and compelling arguments. The clout of the prosecutor's office can often be used to bring people to the table and achieve consensus around sharing information. One effective argument for the collaboration is that accurate, immediate notification and data collection can be used to obtain needed funding and resources for the problem. Real-time data is particularly useful as it allows for a timely response and reinforces the cultural shift. As one example, Richmond County's Executive ADA for Investigations, Tom Ridges says²⁵:

"I get notified on every overdose, every overdose, it doesn't matter what time it happens day, night, weekend. And it doesn't matter whether it's a save or a fatality, I get notified, the DA gets notified. So when you're getting these notifications, you realize they're not just alerts: they're people."

25 Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney's Office, New York. Notes on file with PCE. (06/23/2020).

Type of Data to Collect

For all of these categories of data, reliability and timeliness are essential. Ideally the type of data a prosecutor should collect includes:

- **The number of deaths and yearly trends:** A recent study on the under-reporting of opioid-related death rates suggests that some of the counties most affected by the opioid epidemic present significantly underestimated opioid death rates, which put them at a disadvantage in their efforts to obtain funding.²⁶
- **The principal substances involved in county overdoses:** Understanding the mix and relative prevalence of substances in the community allows prosecutors, law enforcement and public health partners to tighten their aim. The prevalence of fentanyl in the community requires a different focus than, for instance, prescription opioids. In a jurisdiction facing an uptick in fentanyl-related deaths, overdose survivors are important sources of information about the appearance and origin of bad batches.
- **The point of origin and channels for distribution:** Discovering how the drugs are entering the jurisdiction is another crucial step in developing a strategy. Are traffickers connected to cartels or organizations transporting large amounts into the county? Are shipments coming in by the mail? Can those shipments be connected to websites or regional sources? Has law enforcement recruited the assistance of package delivery services? Are local, independent dealers in the county sourcing the drugs elsewhere and then reselling into their communities? Are residents traveling outside the county to buy drugs? Understanding the source, pricing and composition of substances allows the prosecutor's staff to hone their response.
- **The demographics of overdose victims and Narcan "saves":** Prosecutors must be able to see clearly the patterns, demographics and causes of overdose in order to devote appropriate resources to all overdose victims, regardless of their race, socio-economic status or neighborhood.
- **Demographics of drug sale defendants:** How do the demographic patterns of local drug sale arrests compare to those of overdose victims? Are all defendants screened for substance use disorder? What proportion of drug sale defendants are drug users? Does race or socio-economic status appear to be associated with different case dispositions?

ODMAP

One tool that has proven to be highly beneficial in the real-time, accurate reporting and surveillance of fatal and nonfatal overdoses is the Overdose Detection Mapping Applica-

²⁶ Olga Khazan, *The Opioid Epidemic Might Be Much Worse Than We Thought*, The Atlantic, 02/27/2020, <https://www.theatlantic.com/health/archive/2020/02/more-people-have-died-opioids-us-thought/607165/> (last visited 08/20/2020); citing Andrew Boslett et. al., *Using Contributing Causes of Death Improves Prediction of Opioid Involvement in Unclassified Drug Overdoses in US Death Records*, Society For The Study Of Addiction, 02/27/2020, <https://onlinelibrary.wiley.com/doi/abs/10.1111/add.14943> (last visited 08/20/2020).

tion Program²⁷ (ODMAP). It is a tool launched in 2017 by the Washington/Baltimore High Intensity Drug Trafficking Area (HIDTA), a federal task force that brings local, state and federal actors together to develop comprehensive strategies.

ODMAP is a free web software platform that aims to provide near real-time data to public safety and public health agencies, to encourage the mobilization of responses to overdoses as efficiently and quickly as possible. The software presents overdose data within and across jurisdictions to assist local, federal and tribal agencies including licensed first responders and hospitals, to identify overdose spikes and clusters.

ODMAP relies on first responders and public health practitioners to enter HIPAA-neutral data about suspected overdoses in near real-time and allows such data to be shared with essential stakeholders to implement a variety of rapid-response actions. ODMAP also serves as a warning system for overdose spikes. The spike alerts can warn the public, hospitals, and responders of bad batches of drugs to reduce fatalities and prompt the mobilization of resources to combat the spike. Additionally, the near-time alerts can be used to warn neighboring jurisdictions about spikes. The data also allows counties to target areas for naloxone distribution, harm reduction efforts, educational outreach or treatment programs.

The more counties sign on to ODMAP, the more useful it becomes. The system provides safeguards to encourage its approval by local governments: for instance, ODMAP does not require first responders to capture HIPAA-protected material, such as names or exact addresses. Partnerships with local public or nonprofit health organizations may also reassure local lawmakers that prosecutors are not simply amassing information to enhance their surveillance capacity.

In counties where ODMAP is not utilized by prosecutors, awareness of non-fatal overdoses may depend on paper notifications, which are not readily available remotely during the pandemic and may delay awareness of ‘hot spots.’

As ODMAP extends into more regions, the hope is that it may result in improved responses on county, regional and national levels.



27 Overdose Detection Mapping Application Program, ODMAP Fact Sheet, <http://www.odmap.org/Content/docs/training/general-info/ODMAP-Fact-Sheet.pdf>, (last visited 8/20/2020).

Impact of the Pandemic

The COVID-19 pandemic is a dark chapter of the opioid epidemic. According to the New York Times, 2020 is on track for the “sharpest increase in annual drug deaths since 2016, when a class of synthetic opioids known as fentanyl first made significant inroads in the country’s illicit drug supply.”²⁸

Prosecutors have drawn important lessons from the pandemic. First, social isolation, economic vulnerability and fentanyl are a particularly lethal combination. The potency and unpredictability of fentanyl, which has been deliberately or unknowingly mixed into other substances or pressed into deceiving pill shapes, renders individual users even more vulnerable. Even when help is summoned, fentanyl may require different dosing of Narcan, and may surge again to cause a second and possibly fatal overdose.

Treatment Programs

Prosecutors should do a survey of treatment programs serving their jurisdiction and assess their effectiveness. With this knowledge, prosecutors can coordinate and support treatment programs in partnership with substance use disorder treatment providers, law enforcement, the courts and the defense bar. Certain jurisdictions have systems in place, ranging from pre-indictment outreach programs where defendants are offered treatment when they are first taken into custody,²⁹ to specialized drug courts that monitor a defendant’s treatment following the entry of a guilty plea.³⁰ The full range, operational details, staffing requirements and success metrics of these programs are beyond the scope of this paper, but there is general consensus that early, repeated and meaningful intervention is a critical piece of a prosecutor’s approach to the opioid epidemic.³¹



28 Joseph Katz, *In Shadow of Pandemic, U.S. Drug Overdose Deaths Resurge to Record*, The New York Times, 7/15/2020, <https://www.nytimes.com/interactive/2020/07/15/upshot/drug-overdose-deaths.html> (last visited 8/20/2020).

29 See Buffalo Opioid Intervention Court, <http://www.buffalo.edu/content/dam/www/ria/events/Fulbrightpres/Hannah%20Keynote%204.27.19.pdf> (last visited 8/28/2020).

30 See New York State Criminal Drug Treatment Courts, http://ww2.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml (last visited 8/28/2020)

31 Center for Court Innovation, *The 10 Essential Elements of Opioid Intervention Courts*, 2019, https://www.courtinnovation.org/sites/default/files/media/documents/2019-07/report_the10essentialelements_07092019.pdf (last visited 8/28/2020).

Communicating with Family Members

Prosecutors may not be able to meet with family members of every overdose victim, but they should strongly encourage law enforcement to provide families with information and key updates *in every single case*. There may be hundreds of overdose deaths a year in a county, but for each family, the incident is a unique, devastating, life-changing incident that can leave too many unanswered questions. Families also may be able to provide information to law enforcement about substances and suppliers.

Prosecutors should meet with family members in the cases that they decide to pursue, as early as possible, to explain the process, outline the likely outcomes and hear the families' positions. The prosecutors interviewed for this article hear tough questions from families about the viability of homicide charges and sometimes requests for more lenient dispositions: these are important conversations. It remains the prosecutor's duty and prerogative to set realistic expectations and make charging decisions based upon the law and the evidence. However, family members may have valuable knowledge of a supplier's own substance use disorder that can provide valuable context for prosecutorial decisions.

Prosecutors also can offer connections to grief support and reliable information about substance use disorder. Timely, truthful and compassionate outreach can save more lives, minimize resentment towards the victim and stop enabling behavior for any other family members suffering from addiction. In fact, asking family members to share information and providing safe options for them to do so (such as anonymous tip lines) can also prevent the spread of addiction.

Public Health Experts and Researchers

While prosecutors and police officers benefit from reliable, accurate, immediate notification and comprehensive data, they are not experts at collecting or analyzing public health information. Government, nonprofit, private and academic public health teams, however, can serve as the research arm for opioid overdose task forces offering a measure of accountability. They are also often experienced grant writers that can assist with applying for funds.

Universities are uniquely positioned to help combat this epidemic because of the faculty and student body who need opportunities for research and publication. Where a prosecutor's office does not have a pre-existing partnership, the best first step is a direct call to the chair of the relevant university department. The prosecutor should approach the meeting with a vision for what the partnership looks like, including the allocation of re-

sponsibilities, staffing needs and overall goals. For instance, if a district attorney’s office is seeking to participate in ODMAP, the researchers can propose to examine the data for predictive risk factors.

East Baton Rouge District Attorney’s Office, Louisiana

Population: 450,000

Number of Prosecutors: 54

The East Baton Rouge District Attorney’s Office expanded their long-standing partnership with Louisiana State University (LSU) in their successful request for funds to scrutinize and prevent local overdose deaths. LSU joined the grant application, and as a result, three PhD researchers at LSU now track the narcotics causing fatal overdoses within the parish. With this expert data analysis, the office may be more intentional in its investigations and community outreach.

Community Outreach

The word “community” is an inadequate shorthand for a complex network of families, businesses, professionals, educators, full and part-time residents, homeless individuals, incarcerated people and legislators. Many members of a community may be struggling with addiction, grief, helplessness, drug-related disturbances, as well as unsafe conditions due to drug-related activity. Community members on the front lines of the epidemic also may be seeking support or purpose after shattering loss. Prosecutors can find formidable partners among the community groups who dedicate tremendous energy and research to the cause of addressing the opioid crisis.

This paper does not do justice to the number, variety and significance of community partnerships across the nation that are dedicated to preventing overdose deaths and supporting survivors of the epidemic. The example below reveals how one county overcame stigma and long-standing resistance to harm reduction efforts to expand the reach of overdose prevention programs.



Shelby County District Attorney General's Office, Tennessee

Population: 930,000

Number of Prosecutors: 110

In Shelby County, TN, an opioid overdose death led to a program for hope and an unlikely alliance. When a local artist died of an overdose on Christmas Day in 2016, his friends and family came together to provide support for people struggling with addiction and their families. Their organization, "A Betor Way" overcame red tape and stigma to obtain permission for their needle exchange program, which is now supported by the prosecutor's office as part of a comprehensive community outreach initiative.³² In addition, a Shelby County prosecutor assigned as a Special Assistant United States Attorney leads the Street Team for Opioid Prevention (STOP). Their mission is to distribute Narcan, train county residents on its use and direct individuals suffering from substance use disorder into treatment.³³ In order to do so, STOP partners with substance use disorder treatment providers in the county and holds events to share information.

Creating Sustainable Partnerships and Programs

In all partnerships, whether for treatment, research or overdose death scene processing, prosecutors can draft simple protocols to outline confidentiality rules, respective responsibilities, access to data, job descriptions, public communication guidelines, core values, charging standards and investigative strategies. These written agreements can serve to clarify difficult issues and the nature of partnerships. One of the most important recommendations of the prosecutors interviewed for this article was to create sustainable systems, which can be particularly challenging when there is change in leadership and no written protocols.

32 A Betor Way, <https://abetorway.org/blog/> (last visited 08/21/20). Zoom interview with Joseph Griffith, Special Assistant United States Attorney, Western District of Tennessee, United States Attorney's Office, Tennessee. Notes on file with PCE. (07/22/2020).

33 Zoom interview with Joseph Griffith, Special Assistant United States Attorney, Western District of Tennessee, United States Attorney's Office, Tennessee. Notes on file with PCE. (07/22/2020).

Wisconsin Overdose Fatality Review

In 2016, the Wisconsin Department of Health Services and Wisconsin Department of Justice launched a pilot Overdose Fatality Review (OFR) program, supported by funding from the Bureau of Justice Assistance Comprehensive Opioid, Stimulant and Substance Abuse Program (COSSAP) grants.³⁴ Locally-based teams, usually covering one county, were tasked with reviewing two randomly-selected fatalities per month, with the goal of identifying programmatic gaps or opportunities for intervention in order to prevent future deaths. The local teams are composed of representatives from the Coroner or Medical Examiner's Office, law enforcement, the Department of Corrections, the District Attorney's Office and other key stakeholders. The teams receive technical assistance and training from the Wisconsin Medical College and operate under the guidance of a statewide, multidisciplinary Advisory Board. The program has expanded beyond the pilot and now includes 15 teams covering 18 counties and is now seeking the support of state legislators to clarify existing Public Health laws in order to permit data exchanges and preserve the confidentiality of sensitive mental health treatment information.³⁵

Funding

Securing predictable, additional resources is a fundamental element of sustainability. In 2018, the federal government increased its funding by more than 120% for programs to combat the opioid epidemic, reaching more than seven billion dollars.³⁶ These funds include grants for state and local government entities as well as nonprofit organizations. One resource specifically for prosecutors is the Innovative Prosecution Solutions Grants (IPS Grants) from the U.S. Department of Justice's Bureau of Justice Assistance.³⁷

State and local resources for treatment, law enforcement, data collection and prosecution may also be available. Applying for grants in partnership with local nonprofits, universities or research centers should also be considered. A full review of these opportunities is beyond the scope of this paper.

34 Zoom Interview with Constance Kostelac, PhD, Assistant Professor, Medical College of Wisconsin, Amy Parry, MPT, MPH, Program Manager, Medical College of Wisconsin and Chelsea Thompson, Assistant District Attorney, Milwaukee County District Attorney's Office, Wisconsin. Notes on file with PCE. (11/11/2020).

35 See Overdose Fatality Review Overview, <https://www.mcw.edu/departments/epidemiology/research/overdose-fatality-review> (last visited 11/12/2020).

36 The Bipartisan Policy Center, *Tracking Federal Funding to Combat the Opioid Crisis*, March 2019, <https://bipartisanpolicy.org/wp-content/uploads/2019/03/Tracking-Federal-Funding-to-Combat-the-Opioid-Crisis.pdf> (last visited 8/28/2020). See also, <https://cossapresources.org/Program/SiteGrants> (last visited 11/7/2020)

37 The Bureau of Justice Assistance, *Innovative Prosecution Solutions*, <https://bj.a.ojp.gov/program/innovative-prosecution-solutions/overview> (last visited 8/20/2020).

Part 2 - Charging Decisions

With notification of overdoses and information about the drug source(s) comes a crucial decision for the prosecutor: to prosecute or not to prosecute, and if so, what to charge? In some jurisdictions, only the supplier(s) of the substances that caused the overdose may be targeted for arrest and prosecution. In others, even an overdose survivor may be prosecuted for possessory crimes.

Identifying and prosecuting drug traffickers saves incalculable numbers of lives. Seeking appropriate accountability for individuals affected by substance abuse disorder has clinical and social value. Accurate data collection, a thorough investigation and previously established criteria will support fair and equitable prosecutorial decisions, thus benefiting public safety and the interests of the community.

Drug Sale Charges and the “Grey Area”

As much as prosecutors need to know their victims, they also need to know their suspects.

The first challenge in overdose investigations is distinguishing between “users” and “dealers” in the delivery chain. Prosecutors rely to a great extent on this distinction to determine who should be charged with a crime and who should be offered treatment and diversion. However, prosecutors also recognize that there is a “grey area,” which makes the exercise of discretion more complicated and particularly important.

The criteria often applied by prosecutors to identify drug dealers focus on a suspect’s profit motivation, business practices, marketing strategies and volume of sales. However, prosecutors also take into consideration whether a dealer is selling to support their own habit. These defendants fall in the “grey area” between drug seller and drug user and calls for a more nuanced inquiry that balances public safety against the medical needs of the defendant.

Prosecutors gain valuable insights from licensed clinicians who can help them to evaluate the existence or severity of substance use disorder. Clinicians rely on the Diagnostic and Statistical Manual of Mental Disorders (DSM) to identify symptoms and categorize the disorder on a scale of mild to severe. The DSM instructs clinicians to evaluate the presence and severity of the following symptoms: opioids used in greater quantities or for a longer time than intended; use continued despite attempts to reduce or stop; time spent to obtain opioids; cravings; use interfering with professional or home responsibilities; continued use despite interference with social relationships and activities; continued use despite risks; continued use despite awareness of problems caused or worsened by the habit; drug tolerance; withdrawal or the use of opioids to avoid withdrawal. One criterion was eliminated during the latest revision of the DSM: the recurrence of

legal problems or arrests related to opioid use.³⁸

Prosecutors may obtain critical information from other experts and stakeholders as well. Defense attorneys are part of the equation: they must be willing to provide prosecutors with information about the defendant's history of substance abuse, as well as any pre-existing diagnoses. Other sources of information can be the defendant's previous participation in diversion programs, input from family and friends, information found at the overdose scene, or other facts and circumstances discovered during the investigation. Having a deeper understanding of the defendant will help to inform the complex prosecutorial decisions.

Accountability is a key component of both substance use disorder treatment and criminal justice. In the 'grey area' of drug users who supply substances to overdose victims, there are no easy solutions. On the one hand, incarceration is generally incompatible with medication-assisted treatment, which is considered to be the most effective in reducing drug use and mortality.³⁹ In fact, not only do most jails require complete withdrawal from opioids, but sudden withdrawal in a correctional environment involves significant suffering⁴⁰ and incarceration is a risk factor for future fatal overdoses.⁴¹ On the other hand, some drug dealers that are also drug users can present a serious risk to public safety. There is no specific formula for making these decisions: however, prosecutors can create a consistent, thorough and collaborative process to make sure decision-making is informed and equitable. A deeper analysis of this issue is beyond the reach of this paper.



38 Substance Abuse and Mental Health Services Administration. Impact of the DSM-IV to DSM-5 Changes on the National Survey on Drug Use and Health [Internet]. Rockville (MD): Substance Abuse and Mental Health Services Administration (US); 2016 Jun. 2, Substance Use Disorders, Table 2.1 <https://www.ncbi.nlm.nih.gov/books/NBK519702/> (last visited 8/27/20)

39 The American Society of Addiction Medicine (ASAM), *National Practice Guideline for the Use of Medications in the Treatment of Addiction Involving Opioid Use*, https://www.asam.org/docs/default-source/practice-support/guidelines-and-consensus-docs/asam-national-practice-guideline-supplement.pdf?sfvrsn=96df6fc2_24 (last visited 8/28/2020).

40 Mitchell, Shannon Gwin et al. "Incarceration and opioid withdrawal: the experiences of methadone patients and out-of-treatment heroin users." *Journal of psychoactive drugs* vol. 41,2 (2009): 145-52. doi:10.1080/02791072.2009.10399907 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2838492/> (last visited 11/5/2020)

41 Substance Abuse and Mental Health Services Administration ("SAMHSA"), *Medication-Assisted Treatment (MAT) in the Criminal Justice System: Brief Guidance to the States*, March 2019, download available at <https://store.samhsa.gov/product/Medication-Assisted-Treatment-MAT-in-the-Criminal-Justice-System-Brief-Guidance-to-the-States/PEP19-MATBRIEFCJS>.

Homicide Charges

Considerations for Homicide Charges

While law enforcement officers and prosecutors are investigating drug sellers and the overdose death, they may uncover facts that warrant consideration of more serious charges. Some or all of the following factors may support a homicide charge.⁴² Most of these criteria apply whether the prosecutor's state has a Death by Delivery statute or not.

- **Nexus between suspect and victim:** A nexus between the suspect and the victim that satisfies the statutory requirements, i.e. the suspect delivered the substance directly to the victim or there is evidence of the supply chain between the suspect and the victim.
- **Suspect does not have SUD:** The suspect does not appear to have a criminal or medical history indicative of substance use disorder.
- **Suspect knew the nature of the drug sold:** The suspect knew the composition and potency of the drug sold and that it created a risk of overdose.
- **Suspect marketed the drug based on potency:** The suspect marketed the product based upon its composition and/or potency.
- **Suspect knew the risks to the victim:** The suspect made statements to the victim, about the victim or in relation to the victim's death demonstrating knowledge of the risks to the victim.
- **Suspect was aware of the victim's vulnerabilities:** The suspect was aware of any of the victim's unique vulnerabilities, such as recent detoxification, earlier overdoses or suboxone treatment.
- **Suspect is part of a drug distribution organization:** The suspect is part of an organized drug distribution network that has supplied highly potent substances resulting in overdoses.
- **Suspect is high on the distribution chain:** The suspect is at or near the top of that distribution chain.
- **Suspect did not assist the victim:** The suspect deliberately failed to obtain assistance for the victim.
- **Suspect misdirected the investigation:** The suspect attempted to misdirect the investigation.

While it may be extremely useful to know whether a suspect can provide information

⁴² In most states, sentencing may be a consideration only for prosecutors, since juries are not allowed to learn, let alone consider, the range of punishment for the alleged crimes. In Louisiana, however, mandatory life sentences are an acceptable topic for *voir dire* in second degree murder death by delivery cases. Sentencing considerations, whether out of a concern for the availability of drug treatment in prison, equity concerns or jury trials, may therefore weigh on prosecutors' decisions as well, in the choice between murder and manslaughter charges, or sale charges rather than homicide.

about higher-level suppliers, homicide charges should not be brought simply to obtain leverage for cooperation agreements or to encourage a plea.

Death by Delivery Statutes

Death by Delivery laws allow prosecutors to seek homicide charges when a drug transaction results in death. Roughly half of states have adopted them with varying elements, standards of causation and sentencing requirements. See Appendix for a chart of Death by Delivery and related statutes. These statutes have been around for some time but have not been used frequently: between 2011 and 2016, however, there was a 300% increase in drug-induced homicide charges.⁴³

Pennsylvania's Death by Delivery statute was the result of legislative action after the Montgomery County District Attorney's Office convened a 20-month special grand jury to consider the opioid epidemic.⁴⁴ The Pennsylvania statute does not require proof of malice or any particular state of mind for the dealer.⁴⁵ Instead, heroin and fentanyl are considered so dangerous that intent to distribute them establishes foreseeability of the user's death, making Pennsylvania's law resemble a strict-liability scheme.

Since 2016, Montgomery County prosecutors have investigated 482 cases under the statute and have charged drug delivery resulting in death in 29.⁴⁶ The majority of those cases are resolved in plea bargains.

Causation

Death by Delivery laws can present a number of challenges. One common issue is the level of causation required by the statute. Some require that the opioids delivered to the victim were the 'but-for' cause of their death, meaning that had the victim not consumed the drugs delivered by the defendant, they would still be alive. Toxicology reports that report the presence of multiple substances in a sample, that could have come from several sellers, can immediately create a barrier to charging Death by Delivery in some states where 'but-for' causation is required. In Wisconsin and Michigan, by contrast, a substance does not have to be the sole cause of the victim's death for the purpose of supporting a homicide charge. In fact, Michigan only requires that the drug consumed be considered a contributing factor to the death, while Wisconsin requires that the substance be identified as a "substantial factor."⁴⁷

43 See Zachary A. Siegel, *Despite "Public Health" Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides*, The Appeal, 11/08/2017, <https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7/> (last visited 08/19/2020).

44 The Montgomery County Investigating Grand Jury Report: The Opioid Epidemic, May 15, 2017, <https://www.montcopa.org/DocumentCenter/View/17774/Booklet--The-Montgomery-County-Inves-Grand-Jury-Report--The-Opioid-Epidemic?bidId=> (last visited 8/21/20).

45 18 Pa.C.S. § 2506

46 Zoom Interview with Tonya Lupinacci, Assistant District Attorney, Montgomery County District Attorney's Office, Pennsylvania Notes on file with PCE. (7/13/2020).

47 Mich. Comp. Laws Ann. §750.317a; Wis. Stat. §940.02(2)(a).

Targets

In Wisconsin, prosecutors can charge anyone who transferred the drug *at any point* in the line of distribution. Similarly, opioid distributors in Pennsylvania may be charged with Drug Delivery Resulting in Death (DDRD) even when the supplier does not know the victim. Based upon this expansive definition of “delivery,” prosecutors can exercise discretion to target high-level suppliers.⁴⁸



Prosecuting Overdose Deaths Under General Homicide Statutes

In states where lawmakers have not passed a Death by Delivery statute, existing homicide laws may capture egregious conduct by for-profit dealers.

Manslaughter charges require proof of recklessness; specifically, that the defendant was aware of and recklessly disregarded a substantial risk of death.⁴⁹ The elements of the crime are a strong fit for cases in which prosecutors have evidence of profit-driven behavior and indifference to human life. In a doctor pill mill case, prosecutors may marshal evidence of a physician’s training, credentials and knowledge (of substances, human physiology and the specific patient’s vulnerability) as part of their proof. This type of proof is not as readily available for illicit drug transactions, though text messages, de-

48 Zoom Interview with Patricia Daugherty, Assistant District Attorney, Milwaukee County District Attorney’s Office, Wisconsin. Notes on file with PCE. (7/9/2020).

49 In a 2019 decision, the New York State Court of Appeals paved the way for manslaughter charges in drug delivery cases without compromising the prosecution’s substantial burden of proof: “There is no basis to conclude that the legislature intended to exclude from the ambit of the homicide statutes the prosecution of a defendant who, with the requisite mens rea, engages in conduct through the sale or provision of dangerous drugs that directly causes the death of a person. The fact that the legislature has separately criminalized the illegal sale of controlled substances does not require a different conclusion [...]. We agree with the Appellate Division that “all that was needed for the manslaughter charge to be sustained was for the People to satisfy its elements.” *People v. Li* – citation omitted

fendant statements and other evidence indicating the seller’s knowledge of their product and/or customer may exist. The manslaughter bar may be high and requires a detailed review of the evidence, but homicide is a weighty charge, carrying significant sentences.

Criminally negligent homicide is another recourse for prosecutors, for instance where fentanyl is present in a substance without the seller or user’s knowledge. Felony murder statutes may or may not be applicable, depending on several factors: whether drug sale is a qualifying offense; whether the death must occur *during* the commission of the felony (rather than as a result of it); and whether the statute may apply to poly-substance overdoses.⁵⁰

Regardless of the charge, the essential question is causation: what does the statute and case law require? Does the statute anticipate or allow for multiple causes of death? Must the substance be a ‘but-for’ cause of death? The U.S. Supreme Court recently set a ‘but-for’ standard for sentence enhancement in federal criminal cases where death “results” from drug trafficking.⁵¹

Richmond County District Attorney’s Office, New York

Population: 477,000

Number of Prosecutors: 78

On December 23, 2016, Stephen Cummings agreed to sell a particularly potent batch of fentanyl to an insistent customer, who died of an overdose within a few hours. Police officers processed the overdose scene as a homicide and launched an investigation involving undercover drug buys and wiretaps. During recorded calls, Cummings bragged about the potency of the fentanyl he had sold, referring to his customer’s death as proof of the product’s strength. Cummings’ knowledge of the substance’s potency and those recorded calls after the overdose were decisive factors in the decision to prosecute Cummings for second-degree manslaughter. In January 2019, Cummings pleaded guilty to the charge, after the 11-month investigation resulted in the takedown of his 15-member heroin, suboxone, cocaine and fentanyl distribution network.⁵²

50 NAGTRI Journal » Volume 3, Number 1 » Prosecuting Drug Overdose Cases: A Paradigm Shift; <https://www.naag.org/publications/nagtri-journal/volume-3-number-1/prosecuting-drug-overdose-cases-a-paradigm-shift.php>

51 21 US Code 841; *Burrage v US*, 134 S. Ct. 881 (2014).

52 Esha Ray, *Dealer pleads guilty to manslaughter in fatal heroin-fentanyl overdose*, New York Daily News, January 2, 2019, <https://www.nydailynews.com/new-york/nyc-crime/ny-metro-heroin-overdose-fentanyl-20190102-story.html> (last visited 08/21/20); Zoom interview with Michael McMahon, District Attorney, Richmond County District Attorney’s Office, New York. Notes on file with PCE. (06/01/2020).

Broome County District Attorney's Office, New York

Population: 190,000

Number of Prosecutors: 23

On July 20, 2017, Richard Gaworecki sold five blue packets of heroin to a customer. Within an hour of the sale, Gaworecki texted, "I told you bro. I hooked you up. Just be careful." Two days later, his customer was found dead of a heroin overdose. At the scene, police officers found the blue packaging, as well as different heroin packaging from an unknown source. A Grand Jury charged Gaworecki with reckless manslaughter, but the defendant successfully moved for dismissal of that count, arguing that the People must do more than prove that the defendant sold a dangerous drug. An appellate court reinstated the charge, but the case is now slated for review by the New York State Court of Appeals to determine whether sufficient additional circumstances existed to warrant the manslaughter charge, which until now has been considered inapplicable to illegal narcotics sellers.⁵³

Good Samaritan Laws

Fear of prosecution may prevent fellow drug users, drug suppliers, overdose witnesses or even uninvolved bystanders to leave someone overdosing without calling for help. Fear may even incite witnesses to destroy evidence at the scene of an overdose. Understanding Good Samaritan laws, which provide varying levels of immunity for bystanders who call for assistance, can help prosecutors develop public education messages and make appropriate charging decisions. See Appendix for chart of Good Samaritan laws.

One year after the adoption of a Good Samaritan law, a 2011 study from Washington State confirmed that, 88% of respondents were now more likely to contact emergency services in the event of an overdose.⁵⁴ More recently, a 2018 New York State study demonstrated that awareness of the Good Samaritan law is associated with 911 calls for overdose assistance.⁵⁵ The challenge and mission of modern prosecutors is to reinforce the positive power of Good Samaritan laws while working toward accountability for drug traffickers.

State statutes all have the same intention of encouraging medical assistance requests,

⁵³ *People v. Gaworecki*, 2019 NY Slip Op 05725 (App. Div. 3d Dep't 2019); *People v Pinckney*, 38 AD2d 217, 218 [1972], affd 32 NY2d 749 [1973].

⁵⁴ See University of Washington Alcohol & Drug Abuse Institute, *Washington's 911 Good Samaritan Drug Overdose Law: Initial Results*, Info Brief, 11/2011, <https://adai.uw.edu/pubs/infobriefs/adai-ib-2011-05.pdf>

⁵⁵ Jakubowski A, Kunins HV, Huxley-Reicher Z, Siegler A, *Knowledge of the 911 Good Samaritan Law and 911-calling behavior of overdose witnesses*, *Subst Abus.* 2018; 39(2):233-238. Abstract available at <https://pubmed.ncbi.nlm.nih.gov/28972445/> (last visited 8/28/2020). Article on file with PCE.

but the extent to which they do so can differ greatly. For instance, the Tennessee Good Samaritan law establishes immunity from prosecution for “drug violations,”⁵⁶ covering simple possession, casual exchange, or drug paraphernalia. However, the statute only protects individuals experiencing their *first* overdose.⁵⁷ This limitation is not present in the Massachusetts Good Samaritan statute. Additionally, Massachusetts treats immunity differently. Unlike Tennessee, Massachusetts does not protect individuals from being charged with “distribution or possession of a controlled substance with intent to distribute.”⁵⁸ Meanwhile, Michigan’s Good Samaritan law exempts individuals seeking medical assistance only when “he or she possesses or possessed an amount sufficient only for personal use.”⁵⁹

Good Samaritan laws can evolve. An earlier version of the Wisconsin Good Samaritan statute provided immunity to persons calling 911 seeking medical assistance for someone experiencing an opioid overdose, but not the individual experiencing the overdose.⁶⁰ To combat the rising number of opioid deaths in the state, Wisconsin expanded their Good Samaritan law to protect the individual actually experiencing the overdose. Now, if someone receives medical treatment for an overdose, they are offered a Deferred Prosecution Agreement (DPA), conditioning dismissal of the charges upon completion of substance use disorder treatment.⁶¹

Although Good Samaritan laws vary in how much immunity they provide for drug possession or sale charges, none provide immunity for offenses arising from overdose-related deaths.



56 See T. C. A. § 63-1-156. Defining “drug violation” as simple possession or casual exchange (as in § 39-17-418), or drug paraphernalia (as in § 39-17-425).

57 T. C. A. at § 63-1-156(b). “This immunity from being arrested, charged, or prosecuted shall apply to the person experiencing a drug overdose only on the person’s first such drug overdose.”

58 M.G.L.A. 94C § 34A(d).

59 M.C.L.A. 333.7403(3)(a)-(b).

60 See Bruce Vielmetti, *Mom who overdosed on her first heroin use is facing a felony, while her supplier gets a break*, Milwaukee Journal Sentinel, 10/23/2018, <https://www.jsonline.com/story/news/crime/2018/10/23/opioid-epidemic-good-samaritan-law-no-help-wisconsin-overdose-mom/1651551002/>

61 Zoom Interview with Patricia Daugherty, Assistant District Attorney, Milwaukee County District Attorney’s Office, Wisconsin. Notes on file with PCE. (07/09/2020). (Discussing W.S.A. 961.443(2)(b)2).

Part 3: A Practical Guide to Opioid Overdose Investigations

Part 3: A Practical Guide to Opioid Overdose Investigations

Prosecutors do not regularly respond to overdose scenes; however, they can work with law enforcement to develop written standards for conducting an opioid overdose investigation.⁶² Prosecutors also can conduct training sessions for local law enforcement on handling overdose death scenes.⁶³

With a consistent, clear protocol for the collection of relevant evidence, prosecutors will have facts to consider, leads to follow and evidence to marshal if charges are appropriate. However, processing of overdose death scenes does much more than facilitate prosecution of drug suppliers: it acknowledges the value of each life, allows for rapid tracing of bad batches of drugs and offers opportunities to identify other at-risk individuals.

Opioid Overdose Response Protocol

Conducting an opioid overdose investigation draws on traditional investigative techniques, but also requires specific knowledge about opioid abuse and trafficking. The following guide based upon the work of ADA Patricia Daugherty from the Milwaukee County District Attorney's Office, Wisconsin, presents practical tips for investigating an opioid overdose scene, many of which apply to both fatal and non-fatal overdose scenes.

General crime scene techniques apply to the processing of opioid overdose scenes, including preserving chain of custody, documenting and photographing the scene and properly preserving evidence. The following provides guidance that is specifically applicable to opioid overdose scenes.

Crime Scene Evidence

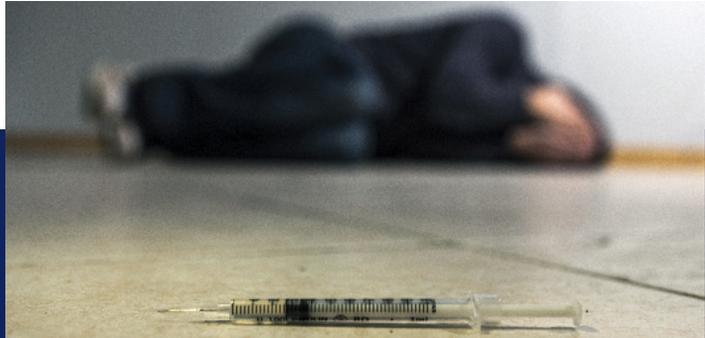
Search and Seizure

A search warrant will probably be needed to search for and recover many of the items discussed below. In some circumstances, there may be exceptions to the warrant re-

⁶² See Appendix for the Staten Island District Attorney's Office ODTF Worksheet

⁶³ Zoom interview with Joseph Griffith, Special Assistant United States Attorney, Western District of Tennessee, United States Attorney's Office, Tennessee. Notes on file with PCE. (07/22/2020).

quirement, including consent, contraband evidence in plain view and exigent circumstances. If the police are responding to a non-fatal overdose, the emergency exception may allow them to search in order to ascertain what substances were consumed by the victim and properly render aid. In addition to searching the scene of the overdose, it might be necessary to search the victim's vehicle for these items as well. A complete review of search and seize law applicable to these cases is beyond the scope of this article. All the suggestions below assume that law enforcement has the right lawfully to search and seize the item mentioned.



Photographing the Scene

A first step in evidence collection is to photograph the scene before it is searched or otherwise disturbed. The scene of the overdose should be photographed and adequately described in documentation. It is important to note whether the scene appears to have been cleaned up so that paraphernalia or packaging has been removed. As the search commences, photos should be taken of evidentiary items in the place where they were found. Photographs of drugs, prescription drugs and drug paraphernalia are particularly useful. It is common for persons who overdose to fall on top of items of evidence, such as drug paraphernalia, syringes, and controlled substances. If so, photographs should be taken of the items and their position relative to the body. Photographic evidence that the victim was overcome so quickly that the victim collapsed on top of the drugs may indicate which drug caused the death.

If possible, it can be helpful to photograph any people found on scene, including whether they have signs of drug use. If photographs are not possible, officers should obtain contact information for anyone present and note any indicia of drug use.

Electronic Devices

The importance of electronic communication devices cannot be overstated. Drug purchasers frequently utilize cell phones and other electronic devices to contact their source of supply. This can be the best avenue for identifying the person from whom the victim obtained the drugs.

With the proper authority, police should recover from the scene all relevant cell phones,

tablets, computers, game consoles and other devices that can be used to communicate with others. Once obtained, a warrant or consent may be needed to search the devices for emails, text messages, call logs, photos, videos, contact lists, chat records, social media content, GPS information, Apps, search history and documents.

Of greatest interest is the victim's most recent contacts, as this may include the drug supplier. The victim's electronic devices can establish the timeline of events leading up to the overdose, identify the victim's drug contacts and potentially lead to the drug supplier. *See also* section below on Electronic Devices: Tracking, Tapping and Extraction

Controlled Substances

It is important to know what drugs or prescription medications the victim may have possessed or consumed. In some instances, a victim may have overdosed from a mixture of drugs.

Police should recover all evidence of drugs used including powders, pills, residue, and trace amounts in syringes, cooker tins, etc. Each quantity of controlled substance should be packaged separately. Officers should wear gloves to preserve DNA and fingerprints on the packaging material and to prevent exposure to potentially dangerous drugs.

Testing of the substances recovered can help to identify the substance consumed by the victim. Some labs can also test for the precise "cut" involved, which can then be compared with substances sold by the supplier in subsequent controlled buys.

Prescription Drugs

Prescription pill bottles, labels, unmarked pill containers, keychain containers, etc. should be recovered. The patient name, drug dispensed (and NDC #), doctor and clinic name, pharmacy name, date filled, number of pills prescribed, and number of pills remaining in the bottle should be recorded and photographed.

Information regarding prescribing physicians can help identify patterns of unsafe prescribing practices. If a particular doctor's patients are frequently overdosing, law enforcement can encourage that doctor to enact measures to reduce abuse among patients. Alternatively, repeated and unabated overdose of a doctor's patients can be a signal to law enforcement that the physician is engaged in unprofessional or criminal prescription writing.

Prosecutors should request or confirm that the Medical Examiner's Office has spoken to every doctor whose prescription forms or controlled substance prescriptions are found at the scene to (1) request a copy of the patient's chart (2) inform the physician, without providing any additional detail, that the patient is deceased. If not already part of the protocol, prosecutors should request that the Medical Examiner make these calls and document the conversation.

Drug Paraphernalia and Packaging Materials

Drug paraphernalia can include syringes, tourniquets and belts, hose clamps or other grinders, snorting straws and bills, snorting or cutting plates, cooking tins and spoons, corner cut baggies, foil folds, paper folds, burnt foil, gem packs, scales, pill bottles, pill cutters, cocaine pipes, etc. It can be found in trash in any room, toilets, pockets, under the bed, purses and backpacks, vehicles and trash containers outside the location. It is common for co-users to clean up and remove evidence prior to leaving the scene.

Packaging found at the death scene can be compared to packaging recovered from a suspect at another time. Similar packaging may be some evidence that the drugs came from a similar source. However, to avoid being connected by similar packaging material, some dealers carry heroin in one large bag and then put a quantity of heroin directly into the user's hand or into packaging brought by the user. This also thwarts the ability to test packaging for DNA or prints.

Fingerprints and DNA from drug packaging can help identify individuals who may have handled the packaging, sold the drugs or used the drugs with the victim. This may provide a lead to the supplier of the drugs.



Evidence of Narcan

Narcan (Naloxone) is a drug that blocks the effects of opioids in the body by preventing them from attaching to the opioid receptors in the person's brain. Narcan is effective for approximately 30-90 minutes but does not remove the drugs from the person's system. Therefore, it is possible for the person to "rebound" back into an overdose after a period of time once the Narcan wears off. As such, if a co-user administers Narcan to an overdosing subject and then leaves the scene, believing that the subject is okay, the person still might overdose and die – especially if the victim ingested fentanyl, which is far more potent than other opioids.

Many users, as well as members of the public, possess a quantity of Narcan in order to treat overdoses. It is not uncommon for community health advocates to provide Narcan to users. Look for evidence to determine if Narcan was used on the victim prior to arrival of medical personnel. If Narcan was administered and the victim is still alive, it may need to be administered again; if Narcan was administered and the victim died, it will have given the body more time to metabolize the substances. This will be reflected in the toxicology report and must be discussed with the toxicologist.

Paper Records

Paper records such as ledgers, drug notes, date books, calendars, prescriptions, pharmacy paperwork, journals, notepads, treatment facility records can be very helpful. For example, the victim may have been involved in “doctor shopping,” where they visit multiple doctors for the same alleged ailment in order to obtain quantities of narcotics from each doctor. To keep this information straight, many will keep records showing doctor appointments, professed reasons for treatment, and quantities of drugs obtained. Drug ledgers can also assist law enforcement in locating the subject’s supplier(s), customers or co-users.

Dark Web

Some drug dealing has moved to the Dark Web. Information at the scene, either in paper records or electronically may provide Dark Web sites and passwords used to buy drugs.⁶⁴

Surveillance Videos

Many drug transactions occur at public places, such as grocery stores and parking lots. Once the potential location of the transaction is determined, the surrounding businesses should be immediately contacted to ascertain if video was recorded. Even if the detail is not sufficient to identify the parties, the recording can still assist with the timeline and perhaps confirm the vehicles involved.



64 See example, <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/press-releases/dark-web-fentanyl-trafficker-known-drug-llama-sentenced-13-years-federal-prison>

Electronic Devices: Tracking, Tapping and Extraction

The many complexities of legally obtaining electronic devices, downloading their content devices, searching the content, and obtaining additional information from service providers apply to all criminal investigations and are beyond the scope of this article. In this section, items of particular significance in overdose death cases are highlighted.

A few cautionary notes are useful. First, if resources are limited, prosecutors should focus on the victim's electronic devices to obtain the most recent calls, texts or emails. Second, prosecutors should send a preservation letter to the provider in order to prevent the needed information from being deleted. Finally, prosecutors should take the time and care to determine whether additional search warrants are needed to extract information not just from the phone, but also social media sites or email accounts.

Tracking & Tapping

The same tools that prosecutors use to conduct narcotics investigations may be applied to overdose death investigations. These include pen registers, trap and trace orders for real-time access to numbers called or received by a target phone; cell tower records to estimate the location of an electronic device and its owner; GPS devices to monitor the location of target vehicles; wiretaps to listen to conversations involving a targeted device. Obtaining orders for these types of surveillance differs from state to state, as well as between state and federal prosecutorial agencies. The complexities of obtaining these orders, monitoring their use and partnering with federal authorities to obtain evidence are outside the subject of this paper.

Extraction

Some police departments have purchased portable Cellebrite machines that can rapidly extract significant data from a smart phone and certain apps. If the witness provides consent or a search warrant is obtained quickly, phone data can be downloaded at the scene in about an hour and then returned to the witness. The rapid extraction is more limited than a full extraction possible in a laboratory, but it can nevertheless capture much relevant information.

Medical and Prescription Information

Detailed documentation of the overdose scene, through photographs and reports, should permit follow-up with physicians, hospitals and public health authorities to verify pre-

scriptions and provide adequate notice of the overdose. Various statewide or local agencies additionally have information that could prove useful in an investigation.

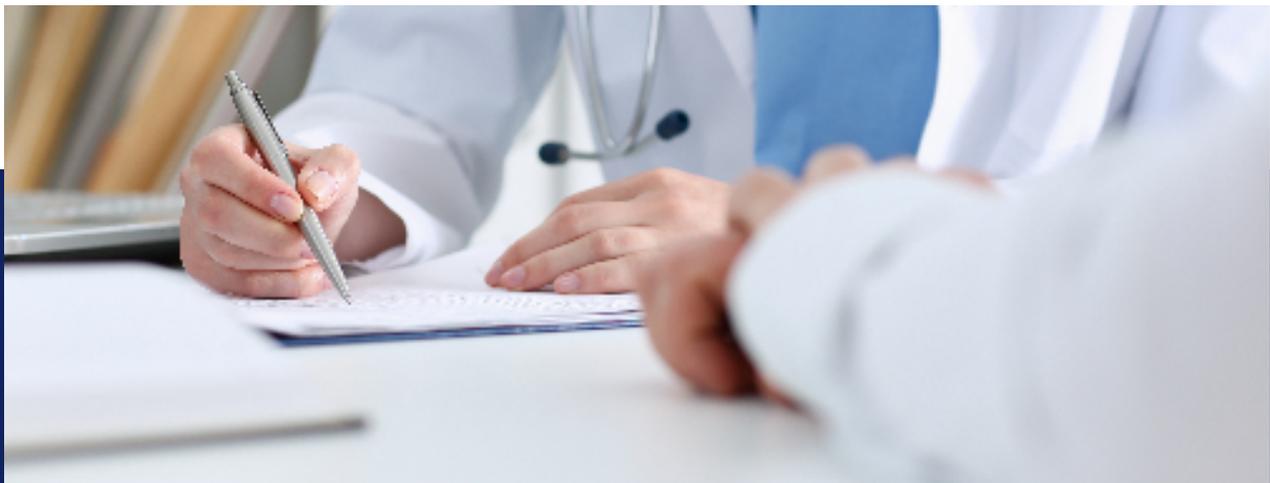
Prescription Drug Monitoring Program (PDMP)

Prescription Drug Monitoring Program databases are in place in 49 states. A PDMP is a central state database that gathers information from doctors and pharmacies about every controlled substance prescription and purchase. Certain states also may require that law enforcement report overdoses to the PDMP. Depending on the state's regulatory agency rules, prosecutors may obtain a person's prescription history, including the date and location of where the prescription was filled, the quantity and drug dispensed, and the prescribing doctor.

PDMP records will indicate whether the victim obtained the same, or other, prescription drugs from other physicians. For example, if a suspect is believed to have provided a prescription drug to the victim, the PDMP record can provide information about the source of the prescription and the person to whom it was prescribed. It also can be useful to see if the victim had other drug prescriptions, even if no prescription bottles are located on scene.

State Oversight Authorities

In the event of prescription drug overdoses, prosecutors can check whether the state health department, state Medicaid program or medical oversight agency sends notifications to physicians when patients have obtained controlled substances from multiple physicians, received treatment for substance use disorder, were hospitalized following an overdose or died of an overdose. This may be important to demonstrate that a physician was or was not aware of the patient's addiction, potential misuse and vulnerability to the substance.



Medical Examiners

Medical examiners (ME) should contact physicians for medical records when prescription bottles are found at the scene of a fatal overdose. Prosecutors can request that medical examiners systematically notify the physician of any patient deaths, document such a call in their reports and provide the reports to prosecutors. It may be necessary to establish notice of death to the prescribing physician, in situations involving pill mills or physicians who may be responsible for multiple overdoses.

Autopsy and Toxicology

A drug overdose death requires a toxicologist to test the victim's biological fluids to determine whether controlled substances are present and, if so, in what concentrations. The pathologist will review the toxicology report and determine whether the drugs were the cause of the person's death. Under certain Death by Delivery statutes crimes, a schedule I or II drug must be a *substantial factor* in the victim's death in order for the supplier to be charged with such a homicide. Prosecutors should be mindful of the statute's requirements with respect to poly-substance overdoses.

Timing of Autopsy Report

In cases of fatal overdose, it will likely be several weeks or months before the Medical Examiner's Office will finalize an official cause of death. This should not delay the investigation. It is incumbent upon the investigator assigned to the case to keep in close contact with the ME's Office while the cause of death determination is pending. Once the final report is completed, the investigator should obtain a copy for the file. The investigator must also obtain a copy of the toxicology report and the report of the ME investigator who responded to the scene of the death, along with any photographs or reports they may have.

Interview with Medical Examiner

In cases where a Death by Delivery homicide may be charged; it is useful to speak with the pathologist who conducted the autopsy to discuss the cause of death.⁶⁵ The ME will have to determine, to a reasonable degree of medical certainty, that the drug delivered by the suspect was an independently

65 Gilson TP, Rendon C, Pinjuh J, *Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions - The Burrage Decision*, Acad Forensic Pathol. 2017, abstract available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6474483/pdf/10.23907_2017.010.pdf (last visited 8/28/2020).

sufficient cause of the victim's death (the causation standard may vary depending on the relevant statute). This is particularly necessary in the case where multiple drugs contributed to the person's death. The investigator should memorialize this interview in a police report and provide it, along with the remainder of the materials, for the prosecutor's review. The investigator should also obtain from the ME's Office, the names and titles of all persons involved in the autopsy and toxicological analysis, including the technicians and chemists who collected, processed, and preserved the biological materials, as they may be needed to establish chain of custody.

Metabolization of Opioids

Most likely, heroin will not appear in the toxicology report, but will present as one or both of the heroin metabolites: morphine and 6-monoacetylmorphine (6MAM). As the body metabolizes heroin, it first turns into 6MAM and then into morphine. Depending on the timing of death, only morphine may remain in the body. If so, the medical examiner will call this a morphine overdose and cannot opine on whether the victim used heroin or a prescription opiate prior to death.

Poly-Substance Overdoses

In the event of poly-substance overdoses, prosecutors must determine the time of death, metabolites, toxic ranges, sources of blood samples and the effect of any pooling on toxicological analyses. In the case of prescription drug overdoses, prosecutors must ask about therapeutic ranges and half-lives for each of the prescribed and detected substances. These facts are essential to determine the viability of homicide charges.

Interviewing Witnesses

Officers should also speak with all persons present at the scene. When possible, these interviews, custodial and non-custodial, should be recorded, particularly in the case of a likely criminal suspect. Caution is advised: as the investigation may reveal that the witness has criminal liability, so Miranda warnings should be given. The following are suggested questions when interviewing witnesses to a fatal opioid overdose.

- Obtain full pedigree information for witnesses, including their phone numbers, addresses, work, contact information for friends and family.
- What did they see?
- How do they know the victim and for how long?
- Did they witness the drug consumption or purchase?
- Who else was present?
- How did the victim traditionally consume the drugs, e.g. snorting, IV, etc.?
- Prior to the overdose, when did they last see the victim? What was the victim's appearance?

- What was the timeline leading up to and immediately following the overdose?
- Were they using drugs with the victim that day?
- Did they purchase drugs with the victim?
- Did they supply the victim with the drugs?
- Do they know the history of the victim's drug use, and if so, how long and what kind of drugs?
- Who did the victim use drugs with?
- Where did the victim get the drug from and how did the victim contact that person?
- Has the victim previously overdosed?
- Does the victim get prescription medication?
- What is the victim's source of money?
- If they are cooperative, ask for consent to search their phone for all content, or at least content relating to the victim and drug use.
- Photograph and notate any recent contact with the victim seen on the phone. If any incriminating contacts are discovered, e.g. recent drug-related text messages, the phone could be seized for a complete download.

If the witness knows the supplier, the interviewer should obtain as much information about the supplier as possible, including:

- Names or alias, physical description, phone numbers, vehicle(s) description, addresses and neighborhoods associated with supplier.
- The manner of drug transactions, for example: how the street deals occur; if supplier allows customer in supplier's vehicle; or whether the supplier allow customers inside a residence.
- Details about prices, amounts sold, packaging, potency of product.
- Names of any associates or "runners" involved.
- Means of communication with buyers, such as Facebook Messenger, texting, voice calls only.
- Whether the seller presents any officer safety concerns.

The interviewer should also form a hypothesis about whether the witness uses drugs, based upon any visible signs of drug use or criminal history. If available, trained substance use disorder counselors or treatment providers can assist with determining whether the witness is suffering from

withdrawal or is unable to participate in decisions impacting their legal rights. Witnesses with suspected substance use disorders should be connected to community health and substance use disorder treatment providers: it is a medical condition that may require immediate care.

Special Considerations for Overdose Survivors

Overdose survivors face multiple, serious health risks in the twelve months following the incident, requiring thoughtful coordination of medical, psychiatric and substance use disorder treatment.⁶⁶

Immediate intervention after an overdose, with resources for harm reduction and treatment, may save their life. However, prosecutors cannot assume that overdose survivors have experienced the incident as catastrophically as their family, friends and community – or that overdose survivors see it as a turning point for them. Survivors retain little – if no – memory of the overdoses.⁶⁷ A peer advocate, particularly if they have themselves walked the path of recovery, has the capacity to help an overdose survivor realize what happened and how to take next steps toward harm reduction and treatment.



⁶⁶ JAMA Psychiatry, Causes of Death After Nonfatal Opioid Overdose, June 20, 2018, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6143082/> (last visited 01/18/2021)

⁶⁷ Zoom interview with Amanda Wexler, LCSW, CASAC-T Clinical Director of Diversion & Victim Services, Richmond County District Attorney's Office, New York. Notes on file with PCE. (06/05/2020).

Part 4: Case Example: Staten Island

Part 4: Case Example: Staten Island District Attorney, New York

After a 22-year-old man collapsed and died on his parents' front porch in 2016, one of 116 opioid overdose deaths on Staten Island alone that year, DA Michael McMahon and his team rallied the police department and community to brainstorm a new approach.

They made saving lives their primary goal. The Richmond County District Attorney's office (RCDA), also known as the Staten Island District Attorney's Office, saw it as their obligation to make help available, promote accountability, provide closure to survivors and grieving families and enforce the law. They have joined forces with the federal HIDTA task forces, DEA, FBI, public health authorities, nonprofit public health organizations, universities and treatment providers to maximize the resources and expertise dedicated to ending the opioid epidemic.

Now, four years later, DA McMahon, his team and their partners have a "fine-tuned operation"⁶⁸ with a crystal-clear goal: overdose prevention. The Chief of Investigations at the Richmond County District Attorney's Office has a whiteboard on the wall behind his desk, where he tracks fatal and nonfatal overdoses in his county, daily. Those numbers are there for a reason. Declining numbers are not a measure of success, he explained: "I want there to be zero overdoses."⁶⁹

The opioid epidemic on Staten Island affected the entire community, across geographical, racial, age and socio-economic differences.⁷⁰ The county's response now reflects the entire community's commitment to preventing more overdose deaths by investing in coordinated referrals and thorough investigations.

Staten Island's initiative involves several components: dedicated, experienced staff and partners; a written protocol for overdose death scene processing; a rigorous filtering process for potential homicide cases; a pro-active outreach program; and established alternatives to incarceration for defendants with substance use disorder.

68 Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney's Office, New York. Notes on file with PCE. (07/01/2020).

69 Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney's Office, New York. Notes on file with PCE. (07/01/2020).

70 Columbia University School of International and Public Affairs, Staten Island Needs Assessment: Opioid Addiction Prevention and Treatment Systems of Care, pp. 25-34, Spring 2017, <https://www.sipa.columbia.edu/academics/capstone-projects/staten-island-needs-assessment-opioid-addiction-prevention-and-treatment> (last visited 08/28/2020).

Partnerships and Staffing

The RCDA benefited from early buy-in from the New York City Police Department (NYPD). The NYPD formed an Overdose Task Force (ODTF) staffed with full-time detectives. The police unit receives immediate notification of overdoses, responds to all death scenes and processes them according to a written protocol.

ODTF officers work closely with a designated prosecutor, who serves as their liaison to the RCDA. The designated prosecutor reviews all overdose cases and may work with the ODTF to develop investigations based upon leads generated from the incident. For instance, in the event of overdose spikes, the ODTF and the prosecutor may decide to introduce or activate a confidential informant in the area to determine whether a new substance has been introduced or search for other links between fatalities. The prosecutor has the potential to assign cases to other line assistants.

The Office hired a licensed social worker who is a Credentialed Alcoholism and Substance Abuse Counselor (CASAC), Amanda Wexler, to supervise the diversion program. DA McMahon encourages the program director to share her knowledge and insights with the Office's prosecutors and staff, to the extent compatible with her ethical obligations. For instance, she can alert prosecutors to an individual's history of overdoses or their susceptibility to severe withdrawal during court proceedings or incarceration.⁷¹

The Office also hired Tiana Stowers Pearson, a law school graduate, to lead the programmatic aspects of the of the Heroin Overdose Prevention and Education (HOPE) Program during its launch. The program is described in greater detail below.

The Office created a Peer Advocate position, to speed outreach for newly arrested defendants and ensure follow-up with overdose survivors as well as the families of overdose victims. The current Peer Advocate, Floyd Miller, is trained in Comprehensive Alcohol and Substance Abuse Treatment (CASAT) and draws from his own experience with sobriety to connect with defendants suffering from substance use disorder, opioid overdose survivors, their families and the families of the deceased. While the advocate consults with the Executive ADA for Investigations to make sure he is not interfering with any active cases, he is not out to collect intelligence on behalf of the RCDA. Instead, his job is to introduce – and re-introduce, and re-re-introduce – the opportunity for treatment. In that respect, Miller's own experience gives him necessary insight and patience for individuals whom he may encounter over and over again.

⁷¹ Zoom interview with Amanda Wexler, LCSW, CASAC-T Clinical Director of Diversion & Victim Services, Richmond County District Attorney's Office, New York. Notes on file with PCE. (06/05/2020).

Every member of the team has their zone of expertise, but real-time notifications of overdoses, powered by ODMAP, ties them together. From ODTF officers to the Peer Advocate and the District Attorney himself, everyone knows what is expected of them and jumps into action when an overdose occurs.



Written Protocol for Overdose Death Scenes

The Opioid Task Force investigators follow a detailed checklist – the “Overdose Response Worksheet” – for both fatal and non-fatal incidents.⁷² The worksheet, which is completed and shared with the team within 24 hours, includes the following: pedigree information for the victim and witnesses; all relevant police storage and case numbers for all tracking systems and units (Task Force, Medical Examiner, EMT); contact information for responding personnel; weather; prognosis; Narcan administration details; video recovery; evidence present at the scene; victimology (OD history, prior arrests, probation status and outstanding warrant check); OD circumstances; family notification; next of kin; and dependent children in need of assistance.

ODTF detectives process every overdose death scene like a homicide and complete this comprehensive report within 24 hours for fatal and non-fatal overdoses. Immediate notification and information sharing with the RCDA is key to an effective prosecutorial and public health response: the RCDA becomes involved at the earliest possible moment in stemming potential spikes, catching bad batches of drugs⁷³ and quickly identifying active suppliers.

⁷² See Appendix.

⁷³ Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney’s Office, New York. Notes on file with PCE. (07/01/2020).

Outreach to Overdose Survivors

Real-time notifications of overdoses allows the RCDA's Peer Advocate to contact overdose survivors or their family members promptly.

Before undertaking a visit to an overdose survivor, the Peer Advocate contacts the Chief of Investigations, to make sure the survivor is not a person of interest in a pending investigation. Additionally, as an ethical matter, the Peer Advocate may not visit survivors who have an open case with the RCDA. In either of those instances, however, the Peer Advocate makes a note of the overdose in the case file, so that the prosecutor handling the case becomes aware of the incident.

RCDA has identified survivor outreach as an opportunity for significant and unique impact. An honest and timely conversation may allow overdose survivors to realize that a bad batch may continue to endanger others, or that they no longer want to buy drugs from the same source. The Peer Advocate gives the survivor a choice of whether to provide information and options for how to do so without compromising their safety.⁷⁴ Most importantly, overdose survivors and individuals who decide to invest in treatment are not asked to provide intelligence to the RCDA: the Office is committed to sending a consistent signal that they will respect the treatment process.

Peer Advocates who themselves recovered from Substance Use Disorder know from experience that it may take time for overdose survivors to consider treatment, let alone follow through. The RCDA staff follows up several times with overdose survivors and family members as their priority is to allow those seeking help to find it.

Criminal Charges

The Office maintains robust and resourceful drug investigation and prosecution activities, in partnership with local, state and federal law enforcement. Overdose death scene investigations have led to major drug prosecutions, including Damien Rice, a notorious heroin dealer who ran a long-standing operation with his son and was linked to eight fatal

⁷⁴ Zoom interview with Amanda Wexler, Executive Assistant District Attorney, Investigations, Richmond County District Attorney's Office, New York. Notes on file with PCE. (07/01/2020).

overdoses.⁷⁵ In a paradoxical indication of the county’s success in reducing the supply of drugs, the RCDA recently realized that Staten Island drug users were traveling to nearby New Jersey for their supply.

However, the RCDA has only charged manslaughter in one case, where the dealer, Stephen Cummings, made incriminating statements on a recorded phone call. (See Section 2 for a description of the case). In that case, the Office secured the state’s first guilty plea to second-degree manslaughter for a dealer of inherently dangerous illicit substances. While the RCDA remains vigilant and prepared to address other egregious cases, success “is not just about convictions.”⁷⁶

Alternative Sentencing and Treatment

In 2017, the Office of the Special Narcotics Prosecutor⁷⁷ and the RCDA retained a graduate student research team from Columbia University’s School of International and Public Affairs to assess the county’s addiction prevention and treatment programs.⁷⁸ The research confirmed that overdoses were occurring Staten Island-wide; that there were gaps in service to some residents depending on their geographic location; that referrals to treatment can occur in any phase of the criminal justice process; that RCDA shared a commitment with the NYPD to save lives; and that the entire team coordinates to facilitate the process of treatment. Consistent with the report’s findings and the RCDA’s shared commitment with the NYPD to save lives, referrals to treatment can occur in any phase and the entire team coordinates to facilitate the process.

For instance, the police may notify the RCDA that an individual involved in an investigation is at particularly high risk of another overdose. In those cases, the RCDA may scale back or interrupt its investigation to speed and facilitate the individual’s access to treatment.⁷⁹

⁷⁵ John Annese, *Staten Island heroin kingpin linked to 8 fatal ODs will get 16 years behind bars*, New York Daily News, October 3, 2019, <https://www.nydailynews.com/new-york/nyc-crime/ny-staten-island-drug-kingpin-pleads-guilty-20191004-apwk6zafmvfs5ffdcjoxrqkoxq-story.html> (last visited 08/28/2020).

⁷⁶ Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney’s Office, New York. Notes on file with PCE. (07/01/2020).

⁷⁷ The Office of the Special Narcotics Prosecutor (SNP) is an independent prosecutors’ office with New York City-wide jurisdiction. It is responsible for felony narcotics investigations and prosecutions in the five boroughs of New York City. Founded in 1971, it is the only agency of its kind in the United States. Bridget Brennan, the Special Narcotics Prosecutor, is a national expert on the opioid epidemic. See, <http://www.snpnyc.org/about-us/> (last visited 10/04/2020)

⁷⁸ Columbia University School of International and Public Affairs, *Staten Island Needs Assessment: Opioid Addiction Prevention and Treatment Systems of Care*, Spring 2017 Capstone Research Report, <http://www.snpnyc.org/wp-content/uploads/2017/09/CU-SIPA-Opioid-Capstone-2017.pdf> (last visited 11/2/2020).

⁷⁹ Zoom interview with Thomas Ridges, Executive Assistant District Attorney, Investigations, Richmond County District Attorney’s Office, New York. Notes on file with PCE. (7/1/20).

The Heroin Overdose Prevention and Education (HOPE) Program is a fundamental part of the RCDA's comprehensive approach to combatting the opioid epidemic. The post-arrest, pre-arraignment diversion program relays low-level offenders with substance use disorder to community-based treatment programs and services, serving as an alternative to incarceration.⁸⁰ The program, which began in January 2017, operates as a partnership between law enforcement, city and state health agencies, and community providers to work to reduce overdoses and improve public safety.



Individuals arrested on Staten Island for low-level drug possession who fit the NYPD's criteria for a non-incarceratory Desk Appearance Ticket are eligible for the HOPE program. The arresting officer contacts the RCDA HOPE director during arrest processing, who dispatches a peer mentor within 30-45 minutes to the precinct. Upon arrival, the peer mentor describes the HOPE program and its benefits to the defendant and defense counsel, gives the individual a Naloxone kit and training, and encourages the individual to visit a community-based Resource and Recovery Center.

Eligible individuals are given a new court date of only seven days hence, rather than the standard 30 days. They can visit a center immediately with the peer mentor or at any time before the seven-day return date.⁸¹ At the center, they are assessed by a counselor for substance use disorder, enrolled in the program, provided an individualized care plan, and provided with access to treatment options.

80 Staten Island Hope, <https://www.sihope.org> (last visited 8/21/20)

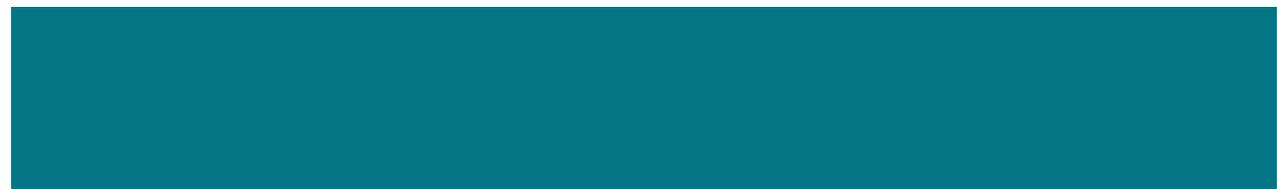
81 Staten Island Hope, <https://www.sihope.org> (last visited 8/21/20)

If the individual participates in an assessment before their return date, their case is adjourned for an additional 30 days. If the individual maintains meaningful participation in treatment services for the next 30 days, the RCDA declines to prosecute the case. However, if the individuals fails or quits the program, the case proceeds forward with a criminal prosecution.⁸²

RCDA has expanded the HOPE initiative to now include a post-arraignment component known as HOPE 2.0, which is a 90-day program. In addition to being a post-arraignment model, HOPE 2.0 includes a wider array of offenses that renders a defendant eligible for the program. Unlike the first HOPE program, it includes judicial oversight since the a criminal prosecution has been initiated.

In May 2020, RCDA and the other four New York City District Attorney Offices rolled out PROJECT RESET, a pre-arraignment diversion program offered to first time offenders. This model connects an offender to services before an accusatory instrument is filed. As New York City funding for this initiative was interrupted, the program was suspended in September 2020.

RCDA continues to examine and expand its ties with treatment providers, to ensure that the county is evenly served. As of October 5, 2020, HOPE has offered services to 812 defendants, 694 of whom completed assessment. 94% of those individuals who completed an assessment went on to complete the program. 624 individuals are currently “meaningfully engaged.” The program also has distributed 636 Naloxone kits.⁸³



82 Staten Island Hope, <https://www.sihope.org> (last visited 8/21/20)

83 Interview with Timothy Koller, Chief Assistant District Attorney, Richmond County District Attorney’s Office, New York. (11/2/2020.)

Conclusion

Prosecutors stand at a critical juncture of the opioid epidemic. They face a dual and complex challenge: saving lives and ensuring accountability. The response to this challenge is nuanced and can be resource intensive. However, the modern prosecutor is a problem solver with the clout to develop partnerships with public health officials, federal authorities, local law enforcement, grieving families, clinicians, treatment providers and overdose survivors themselves. Through these partnerships and comprehensive investigations, prosecutors can reduce the number of overdoses and hold wrongdoers accountable. The future will bring further innovation and increased understanding of the opioid epidemic. Prosecutors are well positioned to lead the way.



Appendix

Self-Survey

The following self-survey is designed to assist prosecutors to evaluate their current conditions and resources, identify potential partners and initiate discussions about goals.

Office Approach on Substance Use Disorder and the Opioid Epidemic

- Has the office developed goals and protocols for addressing the opioid epidemic?
- Have any prosecutors or staff been personally affected by the opioid epidemic? Has this changed their view of how to address the problem?
- Has the staff been trained on addiction, the approach of the office to addicted offenders and alternative sentencing options?
- Does the office designate a prosecutor as a point-person on opioid-related issues and opioid overdose scenes?
- What treatment options are available for someone addicted to drugs and charged with petty offenses? What options are available for those who are charged with serious offenses?
- Does the Office make a distinction in its charging decisions between defendants who suffer from substance use disorder and defendants who sell drugs for profit?

Data Collection

Overdose Victims and Causes

- Who keeps track of fatal and non-fatal overdoses - first responders, hospitals, medical examiner, social service agencies, non-profits?
- How many people died of overdoses in the county last year, and how many so far this year?
- How many people survived overdoses last year, and how many so far this year?
- What are the substances involved in the deaths?
- Do we know where these substances come from?
- What crimes are drug users most likely to commit?

Demographics

- What percentage of the deceased overdose victims are residents of the county?
- What are the racial demographics of the overdose victims?

- What are the racial demographics of local narcotics arrests?
- Do the racial demographics differ according to the substance responsible for the death?
- Does the office have an electronic case-management system? Can it track the race of those arrested and prosecuted, as well as outcomes of the case?
- What percentage of arrests in overdose-related investigations results in prosecution?
- Does the Office make a distinction in its charging decisions between defendants who suffer from substance use disorder and defendants who sell drugs for profit?
- What are the Office's criteria for determining whether a defendant suffers from substance use disorder?

Notification & First Response

- Who is notified in real-time of fatal and non-fatal overdoses? How are they informed?
- Does the local police department always respond to overdoses, either fatal or non-fatal?
- Do county officials deploy Narcan, if so how often and how has it been working?
- Are witnesses and fellow users calling 911?
- Is there a 'Good Samaritan Law' in the state? If so, what is its scope?
- Does the county and Office participate in the High Intensity Drug Trafficking Area (HIDTA) ODMAP real-time tracking and reporting system?
- If not, what approvals (such as a City Council vote) are required to participate in the HIDTA ODMAP real-time tracking and reporting system?
- Do first responders make any electronic data entries from the overdose scene that are eligible for inclusion in ODMAP?
- How, when and in what form does the DA's Office receive notifications about overdose deaths?

Handling of Overdose Scenes

- Do local police departments handle overdose death scenes as crime scenes?
- Are local police officers trained to respond to overdose death scenes?
- Are there any other law enforcement units in the county (i.e. sheriffs, state police) that respond to overdose death scenes?
- If only some departments do so: *why* and *how*?
- Is there a written protocol for handling overdose scenes, fatal or non-fatal?
- Is there any subsequent outreach to overdose survivors?

Partnerships

- Who are the District Attorney's primary law enforcement partners in the county?
- Which, if any, law enforcement partners in the county have the interest, resources, staff and/or time to investigate opioid overdoses?

- Has the office contacted and coordinated with the Medical Examiner or Coroner's Office on an overdose response protocol?
- Has the office contacted and coordinated with the county and state public health departments on an action plan?
- Has the office contacted and coordinated with nonprofit health departments?
- Does the office have a list of trusted substance use disorder treatment providers?
- Does the office partner with the U.S. Attorney's Office on opioid related cases? Does the office have a cross-designated Special Assistant U.S. Attorneys who can work on opioid overdose cases?
- Are needle exchange programs operating within the county? Does the county have other harm reduction initiatives?
- Has the office organized or attended meetings with representatives of all of the major stakeholders in the community: law enforcement, health officials, state and county government, corrections, substance use disorder treatment providers, harm reduction experts, researchers?
- Has the office applied for grants to fund special initiatives?

RCDA Overdose Response Worksheet



Overdose Response Worksheet:

Save/DOA _____

Case # _____

Name of Aided _____

Date of Birth _____

Home Address _____

Home Phone Number _____

Cell Phone Number _____

Cell Phone Recovered _____

Voucher# _____

Notification

Date of Occurrence _____ Time of Occurrence _____

Location of Occurrence _____

Precinct of Occurrence _____ UF61 # _____ Aided # _____

ICAD # _____

Notified By _____

ODTF Supervisor Notified _____

Response

Time arrived at scene _____

Weather _____

Time Pronounced (IF DOA) _____

ODTF Case # _____ PDU Case # _____

OCME Case # _____ PBSI ECT Run # _____

ODTF Investigator _____

PDU Investigator _____

1st Officer on scene _____

EMS name, shield, agency _____ ACR # _____

Narcan Administered (by who / doses) _____

Hospital Removed to _____

Attending DR & Prognosis _____

Felony ADA Notified _____

Outside Agency Involved : (ie ACS) _____

Video Recovered Y/N _____ Probative Video Y/N _____

Family Notification (who made notification, family statement)

Next of kin information:(name and phone number)_____

Any children present at scene?(If yes names and DOB)_____

Is the Overdose victim responsible for the care of any children? _____

Log #'s

Chief of Detectives (from Unusual Occurrence Report) _____

PBSI (from Patrol 49) _____

Ensure an ODTF supervisor is listed on all patrol 49's and DB Unusual's

Chart of Drug Delivery Resulting in Death and Other Penal Law Statutes⁸⁴

State	Statute	Crime	Action	Causation Analysis
Louisiana	L.a. 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
Massachusetts	Mass. Ge. Laws Ann. Ch. 265 §13	Manslaughter	Sellers liable for manslaughter because overdose is a foreseeable consequence of selling drugs "wanton and reckless"	Proximate Cause
Michigan	Mich. Comp. Laws Ann. §750.317a	A felony punishable for life or any amount of years		Consummation causing the death – does not have to be a but-for cause, nor the sole cause of death.
New York	NY Laws. Penal Law. Part 3. Title H Article 125	Homicide, Criminally Negligent Homicide		
Pennsylvania	Title 18 § 2506. Drug delivery resulting in death.	First Degree Felony	Intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes controlled substances and another person dies as a result of using it.	But-for causation
Tennessee	§39-13-210(a)(2)	Second Degree Murder/Class A Felony	Unlawful distribution.	Proximate cause of death
Wisconsin	Wis. Stat. §940.02(2)(a)	Class C Felony	Manufacturing, distributing, or delivery of a controlled substance. Each person in supply chain is liable.	Death from use. Note: irrelevant whether the death is the result of itself or its mixture or combination with any other controlled substance.

⁸⁴ Based upon the more extensive listing contained in *Strategies for Prosecuting Drug-Induced Homicide Cases*, Association of Prosecuting Attorneys, and Bureau of Justice Assistance (2017).

Chart of Good Samaritan Laws

State	Statute	Relevant Text	Important Distinctions
Louisiana	LA Rev Stat § 14:403.10	A. Seeking medical assistance for another individual experiencing an overdose - "may not be charged, prosecuted, or penalized for possession of a controlled dangerous substance... <i>unless</i> the person illegally provided or administered a controlled dangerous substance to the individual." B. Person experiencing a drug-related overdose and is in need of medical assistance - "shall not be charged, prosecuted, or penalized for possession of a controlled dangerous substance"	If the individual calling medical assistance for the person overdosing is the one who provided the drugs, they will not be immune to prosecution.
Massachusetts	Title XV, Chapter 94C, Section 34A	(a) A person who, in good faith, seeks medical assistance for someone experiencing a drug-related overdose shall not be charged or prosecuted for possession of a controlled substance...	Massachusetts does not protect individuals from being charged with "distribution or possession of a controlled substance with intent to distribute"
Michigan	333.7404 Use of controlled substance or controlled substance analogue; violations; penalties; individuals exempt from violation; notification of parent, guardian, or custodian of minor; other criminal charges; definitions.	(b) An individual who in good faith attempts to procure medical assistance for another individual or who accompanies another individual who requires medical assistance for a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation of this section is obtained as a result of the individual's attempting to procure medical assistance for another individual or as a result of the individual's accompanying another individual who requires medical assistance to a health facility or agency.	Protects individuals when "he or she possesses or possessed in an amount <i>sufficient only for personal use.</i> "
New York	§ 220.78 Witness or victim of drug or alcohol overdose	Person in good faith seeking health care for someone (or them selves) overdosing will not be charged/prosecuted for controlled substance.	Affirmative defense to criminal sale of controlled substance. ***Nothing in section bars admissibility of evidence to prosecution of a separate defendant who does not independently qualify for bar to prosecution or affirmative defense.
Pennsylvania	Title 35 P.S. Health and Safety § 780-113.7. Drug overdose response immunity	Person receives immunity from prosecution if they report an overdose with "reasonable belief that another person was in need of immediate medical attention and was necessary to prevent death or serious bodily injury due to a drug overdose." The person reporting must remain on scene until officials arrive. (2) "This section may not interfere with or prevent the investigation, arrest, charging or prosecution of a person for the delivery or distribution of a controlled substance, drug-induced homicide or any other crime not set forth in subsection (b)." Persons experiencing drug overdose events may not be charged and shall be immune from prosecution as provided in subsection (b) if a person who transported or reported and remained with them may not be charged and is entitled to immunity under this section.	Individual who called law enforcement or health officials will obtain immunity only if they remain with the person needing attention until officials arrive. Limited to possessory offenses

Tennessee	§ 63-1-156. Medical assistance sought for person experiencing drug overdose; arrest, charge, or prosecution for drug violation if evidence for the arrest, charge, or prosecution resulted from seeking medical assistance	(b) Any person who in good faith seeks medical assistance for a person experiencing or believed to be experiencing a drug overdose shall not be arrested, charged, or prosecuted for a drug violation if the evidence for the arrest, charge, or prosecution of the drug violation resulted from seeking such medical assistance. Any person who is experiencing a drug overdose and who in good faith seeks medical assistance for or is the subject of a request for medical assistance shall not be arrested, charged, or prosecuted for a drug violation if the evidence for the arrest, charge, or prosecution of the drug violation resulted from seeking such medical assistance. This immunity from being arrested, charged, or prosecuted shall apply to the person experiencing a drug overdose only on the person's first such drug overdose. Any such person shall also not be subject to the following, if related to the seeking of medical assistance:	Tennessee only protects individuals experiencing their <i>first</i> overdose.
Wisconsin	961.443. Immunity from criminal prosecution; possession	Text of subsec. (2) eff. August 1, 2020> (2) Immunity from criminal prosecution . An aider is immune from prosecution under s. 961.573 for the possession of drug paraphernalia, under s. 961.41(3g) for the possession of a controlled substance or a controlled substance analog, and under s. 961.69(2) for possession of a masking agent under the circumstances surrounding or leading to his or her commission of an act described in sub. (1) .	