

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

HAMPSHIRE COUNTY

NO. SJC-12617

COMMONWEALTH

v.

JESSE CARRILLO

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

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INTRODUCTION

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

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

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

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

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

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

ISSUES PRESENTED

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

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

INTERESTS OF AMICI

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

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

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

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

ARGUMENT

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

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

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

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

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

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

manage the illness.

Importantly, this Court recently held In Re Matter of G.P., 473 Mass. 112 (2015), that when construing civil commitment law as it relates to substance use, daily heroin consumption by an addicted person does not create *per se* "a likelihood [that] serious harm [will] result." G.L. c. 123, §35. It therefore follows that purchasing heroin for an addicted person does not create a *high degree of likelihood* that substantial harm will result. Moreover, to hold, as previous cases have,² that the sharing of heroin automatically constitutes wanton or reckless conduct in the event of an accidental overdose effectively creates a strict liability crime -- a *de facto* drug-induced homicide provision -- something the Legislature has considered and thus far rejected. See 2017 Senate Doc. No. 2158.³

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

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

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

³ <https://malegislature.gov/Bills/190/S2158>

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

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

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

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

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

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

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

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

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

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

⁸ <https://dl4rmgtrwzf5a.cloudfront.net/sites/default/files/drugfacts-treatmentapproaches.pdf>

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

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

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

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

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

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

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

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

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

generally as

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

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

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

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

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

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

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

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

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

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

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

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

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

If daily heroin use by a drug-addicted person does

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

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

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

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

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

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

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

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

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

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

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

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

¹⁵ <https://scholarship.law.nd.edu/ndlr/vol83/iss3/2/>

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

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

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

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

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

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

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

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

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

In declining to give the instruction, the judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4688551/>

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

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

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

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

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

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

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

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

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

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

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

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

²⁸ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3853169/>

NPR Morning Edition (July 2, 2018).²⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³³<https://www.centeronaddiction.org/download/file/fid/487>

³⁴ <https://ssrn.com/abstract=2628297>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴²<https://www.sciencedirect.com/science/article/pii/S0955395911000223>

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

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

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

⁴⁵ <https://www.ncbi.nlm.nih.gov/pubmed/29200340>

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

CONCLUSION

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

Respectfully submitted,

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ADDENDUM

Statutory Provisions Cited

G.L. c. 94C, §32

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

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

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

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

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

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

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

G.L. c. 94C, §34

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

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

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

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

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

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

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

G.L. c. 94C, §34A

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

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

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

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

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

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

G.L. c. 123A, §1

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

G.L. c. 123, §35

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

"Alcohol use disorder", the chronic or habitual consumption of alcoholic beverages by a person to the extent that (1) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning, or (2) the person has lost the power of self-control over the use of such beverages.

"Facility", a public or private facility that provides care and treatment for a person with an alcohol or substance use disorder.

"Substance use disorder", the chronic or habitual consumption or ingestion of controlled substances

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

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

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

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

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

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

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

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

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

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

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

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

G.L. c. 111E, §10

Any defendant who is charged with a drug offense shall, upon being brought before the court on such charge, be informed that he is entitled to request an examination to determine whether or not he is a drug dependent person who would benefit by treatment, and that if he chooses to exercise such right he must do so in writing within five days of being so informed.

If the defendant requests such an examination, the court may in its discretion determine that the defendant is a drug dependent person, who would benefit by treatment, without ordering the examination. In such event, the court shall inform the defendant that he may request assignment to a drug treatment facility, and advise him of the consequences of assignment and that if he is so assigned the court proceedings shall be stayed for the term of such assignment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G.L. c. 272, §7

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

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

CERTIFICATE OF COMPLIANCE

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



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