

A Prosecutor's Quick Guide to Opioid Overdose Investigations



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Introduction	1
Getting Started.....	1
Setting Goals.....	1
Staffing	1
Law Enforcement Partnerships	2
Data Collection	2
Treatment Programs	3
Communicating with Family Members	4
Public Health Experts and Researchers.....	4
Community Outreach	4
Funding.....	5
Charging Decisions	5
Drug Sale Charges and the “Grey Area”	5
Homicide Charges.....	6
Death by Delivery Statutes.....	6
Good Samaritan Laws.....	7
Conducting Opioid Overdose Investigations	7
Crime Scene Evidence	7
Electronic Devices: Tracking, Tapping and Extraction	10
Medical and Prescription Information	11
Autopsy and Toxicology	12
Interviewing Witnesses	13
Conclusion	15

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Introduction

This is a summary of a paper entitled “Seeking Justice and Solutions: A Prosecutor’s Guide to Opioid Overdose Investigations.”¹ This Quick Guide provides an overview of areas for consideration, including investigative steps and prosecutorial decision making. The full paper provides further discussion of these topics, various examples of how prosecutor offices of all sizes have addressed these complex issues, and a self-survey to evaluate an office’s capacity to handle these challenging issues.

Getting Started

Setting Goals

Modern prosecutors are asking what part they can play in saving lives, while still holding drug traffickers accountable. When saving lives is the first concern², new approaches reveal themselves. Prosecutors cannot go it alone or apply the usual playbook. The opioid epidemic calls for adopting complex, multi-disciplinary approaches that provide solutions to the opioid crisis on a case-by-case basis, ranging from treatment to homicide prosecutions. Once a goal is set, the prosecutor office should undergo a review of its current procedures regarding when to prosecute, whom to prosecute and which charges to pursue.

Staffing

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

- Prosecutor Liaison
- Addiction Specialist
- Peer Advocate
- Analyst/Paralegal/Researcher

¹ See <http://pceinc.org/wp-content/uploads/2021/02/20210202-Opioid-Overdose-Investigations-PCE-Aequitas-Final.pdf>

² See Part 4 for an outline of how this approach is used by the Staten Island District Attorney’s Office, New York.

Law Enforcement Partnerships

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

Prosecutors cannot undertake opioid overdose investigations without a dedicated and expert investigation partner who can respond to the actual scene of an overdose. In certain jurisdictions, partnerships stemmed from serendipitous encounters between concerned prosecutors and a single officer or investigator determined to make a dent in the local epidemic statistics; in others, partnerships are intentionally cultivated through training programs and assignments. These partners should also include United States Attorney's Offices and federal law enforcement agencies, such as the Drug Enforcement Administration and the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Data Collection

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



The type of data to collect includes:

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

One tool that has proven to be highly beneficial in the real-time, accurate reporting and surveillance of fatal and nonfatal overdoses is the Overdose Detection Mapping Application Program³ (ODMAP). ODMAP is a free web software platform that aims to provide near real-time data to public safety and public health agencies, to encourage the mobilization of responses to overdoses as efficiently and quickly as possible. The software presents overdose data within and across jurisdictions to assist local, federal and tribal agencies including licensed first responders and hospitals, to identify overdose spikes and clusters.

Treatment Programs

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



³ Overdose Detection Mapping Application Program, ODMAP Fact Sheet, <http://www.odmap.org/Content/docs/training/general-info/ODMAP-Fact-Sheet.pdf>, (last visited 8/20/2020).

Communicating with Family Members

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

Public Health Experts and Researchers

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

Community Outreach

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



Funding

Securing predictable, additional resources is a fundamental element of sustainability. In 2018, the federal government increased its funding by more than 120% for programs to combat the opioid epidemic, reaching more than seven billion dollars.⁴ These funds include grants for state and local government entities as well as nonprofit organizations. One resource specifically for prosecutors is the Innovative Prosecution Solutions Grants (IPS Grants) from the U.S.

Department of Justice's Bureau of Justice Assistance.⁵ State and local resources for treatment, law enforcement, data collection and prosecution may also be available.

Charging Decisions

Drug Sale Charges and the “Grey Area”

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

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



⁴ The Bipartisan Policy Center, *Tracking Federal Funding to Combat the Opioid Crisis*, March 2019, <https://bipartisanpolicy.org/wp-content/uploads/2019/03/Tracking-Federal-Funding-to-Combat-the-Opioid-Crisis.pdf> (last visited 8/28/2020). See also, <https://cossapresources.org/Program/SiteGrants> (last visited 11/7/2020)

⁵ The Bureau of Justice Assistance, *Innovative Prosecution Solutions*, <https://bja.ojp.gov/program/innovative-prosecution-solutions/overview> (last visited 8/20/2020).

Homicide Charges

Some or all of the following factors may support a homicide charge.⁶ Most of these criteria apply whether the prosecutor's state has a Death by Delivery statute or not.

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

Death by Delivery Statutes

Death by Delivery laws allow prosecutors to seek homicide charges when a drug transaction results in death. Roughly half of states have adopted them with varying elements, standards of causation and sentencing requirements. These statutes have been around for some time but have not been used frequently: between 2011 and 2016, however, there was a 300% increase in drug-induced homicide charges.⁷

⁶ In most states, sentencing may be a consideration only for prosecutors, since juries are not allowed to learn, let alone consider, the range of punishment for the alleged crimes. In Louisiana, however, mandatory life sentences are an acceptable topic for *voir dire* in second degree murder death by delivery cases. Sentencing considerations, whether out of a concern for the availability of drug treatment in prison, equity concerns or jury trials, may therefore weigh on prosecutors' decisions as well, in the choice between murder and manslaughter charges, or sale charges rather than homicide.

⁷ See Zachary A. Siegel, *Despite "Public Health" Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides*, The Appeal, 11/08/2017, <https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7/> (last visited 08/19/2020).

Good Samaritan Laws

Fear of prosecution may prevent fellow drug users, drug suppliers, overdose witnesses or even uninvolved bystanders to leave someone overdosing without calling for help. Fear may even incite witnesses to destroy evidence at the scene of an overdose. Understanding Good Samaritan laws, which provide varying levels of immunity for bystanders who call for assistance, can help prosecutors develop public education messages and make appropriate charging decisions.⁸



Conducting Opioid Overdose Investigations

Conducting an opioid overdose investigation draws on traditional investigative techniques, but also requires specific knowledge about opioid abuse and trafficking. The following guide based upon the work of ADA Patricia Daugherty from the Milwaukee County District Attorney's Office, Wisconsin, presents practical tips for investigating an opioid overdose scene, many of which apply to both fatal and non-fatal overdose scenes. ***See the full report for a more detailed guidance on Conducting Opioid Overdose Investigations.***⁹

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

Crime Scene Evidence

Search and Seizure

A search warrant will probably be needed to search for and recover many of the items discussed below. All the suggestions below assume that law enforcement has the right lawfully to search and seize the item mentioned.

⁸ See Appendix in full report for chart of Good Samaritan laws, <http://pceinc.org/wp-content/uploads/2021/02/20210202-Opioid-Overdose-Investigations-PCE-Aequitas-Final.pdf#page=69>

⁹ See <http://pceinc.org/wp-content/uploads/2021/02/20210202-Opioid-Overdose-Investigations-PCE-Aequitas-Final.pdf>

Photographing the Scene

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

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



Electronic Devices

The importance of electronic communication devices cannot be overstated. Drug purchasers frequently utilize cell phones and other electronic devices to contact their source of supply. With the proper authority, police should recover from the scene all relevant cell phones, tablets, computers, game consoles and other devices that can be used to communicate with others. Once obtained, a warrant or consent may be needed to search the devices for emails, text messages, call logs, photos, videos, contact lists, chat records, social media content, GPS information, Apps, search history and documents. Of greatest interest is the victim's most recent contacts, as this may include the drug supplier.

Controlled Substances

It is important to know what drugs or prescription medications the victim may have possessed or consumed. In some instances, a victim may have overdosed from a mixture of drugs. Police should recover all evidence of drugs used including powders, pills, residue, and trace amounts in syringes, cooker tins, etc. Officers should package items individually. They should wear gloves to preserve DNA and fingerprints and to prevent exposure to potentially dangerous drugs. Some labs can also test for the precise "cut" involved, which can then be compared with substances sold by the supplier in subsequent controlled buys.

Prescription Drugs

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

Prosecutors should request or confirm that the Medical Examiner's Office has spoken to every doctor whose prescription forms or controlled substance prescriptions are found at the scene to (1) request a copy of the patient's chart (2) inform the physician, without providing any additional detail, that the patient is deceased. Information regarding prescribing physicians can help identify patterns of unsafe prescribing practices.

Drug Paraphernalia and Packaging Materials

Drug paraphernalia can include syringes, tourniquets and belts, hose clamps or other grinders, snorting straws and bills, snorting or cutting plates, cooking tins and spoons, corner cut baggies, foil folds, paper folds, burnt foil, gem packs, scales, pill bottles, pill cutters, cocaine pipes, etc. It is common for co-users to clean up and remove evidence prior to leaving the scene.

Paraphernalia can be found in various places inside and outside of the overdose location.

Packaging found at the death scene can be compared to packaging recovered from a suspect at another time.



Evidence of Narcan

Narcan is effective for approximately 30-90 minutes but does not remove the drugs from the person’s system. Therefore, it is possible for the person to “rebound” back into an overdose after a period of time once the Narcan wears off.

If Narcan was administered and the victim died, it will have given the body more time to metabolize the substances. This will be reflected in the toxicology report and must be discussed with the toxicologist.

Paper Records.

Paper records such as ledgers, drug notes, date books, calendars, prescriptions, pharmacy paperwork, journals, notepads, treatment facility records can be very helpful. To keep doctor shopping information straight, some will keep records showing doctor appointments, professed reasons for treatment, and quantities of drugs obtained. Drug ledgers can also assist law enforcement in locating the subject’s supplier(s), customers or co-users.

Dark Web

Some drug dealing has moved to the Dark Web. Information at the scene, either in paper records or electronically may provide Dark Web sites and passwords used to buy drugs.¹⁰

Surveillance Videos

Many drug transactions occur at public places, such as grocery stores and parking lots. Once the potential location of the transaction is determined, the surrounding businesses should be immediately contacted to ascertain if video was recorded.

Electronic Devices: Tracking, Tapping and Extraction

If resources are limited, first, prosecutors should focus on the victim’s electronic devices to obtain the most recent calls, texts or emails. Second, prosecutors should send a preservation letter to the provider in order to prevent the needed information from being deleted. Finally,

¹⁰ See example, <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/press-releases/dark-web-fentanyl-trafficker-known-drug-llama-sentenced-13-years-federal-prison>

prosecutors should take the time and care to determine whether additional search warrants are needed to extract information not just from the phone, but also social media sites or email accounts.

Tracking & Tapping

The same tools that prosecutors use to conduct narcotics investigations may be applied to overdose death investigations. These include pen registers, trap and trace orders for real-time access to numbers called or received by a target phone; cell tower records to estimate the location of an electronic device and its owner; GPS devices to monitor the location of target vehicles; wiretaps to listen to conversations involving a targeted device.

Medical and Prescription Information

Prescription Drug Monitoring Program (PDMP)

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

State Oversight Authorities

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



Medical Examiners

Medical examiners (ME) should contact physicians for medical records when prescription bottles are found at the scene of a fatal overdose. Prosecutors can request that medical examiners systematically notify the physician of any patient deaths, document such a call in their reports and provide the reports to prosecutors.

Autopsy and Toxicology

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

Timing of Autopsy Report

In cases of fatal overdose, it will likely be several weeks or months before the Medical Examiner's Office will finalize an official cause of death. The investigator must obtain a copy of the autopsy report, toxicology report and the report of the ME investigator who responded to the scene of the death, along with any photographs or reports they may have.

Interview with Medical Examiner

In cases where a Death by Delivery homicide may be charged; it is useful to speak with the pathologist who conducted the autopsy to discuss the cause of death.¹¹ The ME will have to determine, to a reasonable degree of medical certainty, that the drug delivered by the suspect was an independently sufficient cause of the victim's death (the causation standard may vary depending on the relevant statute).

Metabolization of Opioids

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

¹¹ Gilson TP, Rendon C, Pinjuh J, *Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions - The Burrage Decision*, Acad Forensic Pathol. 2017, abstract available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6474483/pdf/10.23907_2017.010.pdf (last visited 8/28/2020).

Poly-Substance Overdoses

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

Interviewing Witnesses

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

- Obtain full pedigree information for witnesses, including their phone numbers, addresses, work, contact information for friends and family.
- What did they see?
- How do they know the victim and for how long?
- Did they witness the drug consumption or purchase?
- Who else was present?
- How did the victim traditionally consume the drugs, e.g. snorting, IV, etc.?
- Prior to the overdose, when did they last see the victim? What was the victim's appearance?
- What was the timeline leading up to and immediately following the overdose?
- Were they using drugs with the victim that day?
- Did they purchase drugs with the victim?
- Did they supply the victim with the drugs?
- Do they know the history of the victim's drug use, and if so, how long and what kind of drugs?
- Who did the victim use drugs with?
- Where did the victim get the drug from and how did the victim contact that person?
- Has the victim previously overdosed?
- Does the victim get prescription medication?
- What is the victim's source of money?
- If they are cooperative, ask for consent to search their phone for all content, or at least content relating to the victim and drug use.
- Photograph and notate any recent contact with the victim seen on the phone. If any incriminating contacts are discovered, e.g., recent drug-related text messages, the phone could be seized for a complete download.

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

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

Witnesses with suspected substance use disorders should be connected to community health and substance use disorder treatment providers: it is a medical condition that may require immediate care.



Special Considerations for Overdose Survivors

Overdose survivors face multiple, serious health risks in the twelve months following the incident, requiring thoughtful coordination of medical, psychiatric and substance use disorder treatment.¹²

Immediate intervention after an overdose, with resources for harm reduction and treatment, may save their life. However, prosecutors cannot assume that overdose survivors have experienced the incident as catastrophically as their family, friends and community – or that overdose survivors see it as a turning point for them. Survivors retain little – if no – memory of

¹² JAMA Psychiatry, Causes of Death After Nonfatal Opioid Overdose, June 20, 2018, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6143082/> (last visited 1/18/2021)

the overdoses.¹³ A peer advocate, particularly if they have themselves walked the path of recovery, has the capacity to help an overdose survivor realize what happened and how to take next steps toward harm reduction and treatment.

Conclusion

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



¹³ Zoom interview with Amanda Wexler, LCSW, CASAC-T Clinical Director of Diversion & Victim Services, Richmond County District Attorney's Office, New York. Notes on file with PCE. (06/05/2020).