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## Drug Dealer or Murderer? Pennsylvania's Approach to Drug Delivery Resulting In Death

Stormie B. Mauck

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# Drug Dealer or Murderer? Pennsylvania's Approach to Drug Delivery Resulting in Death

Stormie B. Mauck\*

## ABSTRACT

Drug overdoses are rapidly increasing and are now tragically one of the leading causes of death of young adults in Pennsylvania. To combat this problem, Pennsylvania began aggressively charging individuals responsible for distributing drugs that were the cause of an overdose death under Section 2506 of the Pennsylvania Criminal Code: Drug Delivery Resulting in Death. The crime—which was originally classified as third-degree murder but is now a first-degree felony—requires that the defendant acted recklessly in distributing drugs to another person, and carries a maximum prison sentence of 40 years.

As drug addiction rates continue to soar across the country, many other states are enacting similar statutes in an attempt to dissuade drug dealers from distributing drugs. While the desired effect of the statutes is the same, the approach varies drastically from state to state. If viewed as a spectrum, Section 2506 falls somewhere in the middle between other state statutes ranging from embracing leniency to imposing strict liability. Proponents of charging individuals under Section 2506 believe that a conviction will hold drug dealers responsible for their actions and will deter others from distributing drugs. Critics, however, argue that Section 2506 has not been proven to reduce the number of drug overdose deaths or to deter dealers.

This Comment will detail the elements of Section 2506 and explain how Section 2506 has withstood multiple constitutional challenges by

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\*J.D. Candidate, The Pennsylvania State University, Penn State Law, 2019. This Comment is dedicated in loving memory of my father, Brian Lane Mauck (8/22/63 – 9/22/16), who instilled in me a love of writing through his own success as an author, and who would have loved nothing more than to see his daughter published. I would like to thank my daughter for being my inspiration to be better, my fiancé for being my constant shoulder to rely on, my mother for being my biggest cheerleader in life, and my friends and family for all their love and support while writing this Comment. Finally, I also like to thank all the members of *Penn State Law Review* for their dedication and hard work on Volume 123. We did it!

individuals charged under the statute. This Comment will then compare Section 2506 to similar statutes of other states to analyze whether a better approach exists. Ultimately, this Comment will argue that the best approach is to charge drug dealers under the traditional drug distribution statutes and use the funds currently expended on investigating and prosecuting individuals under Section 2506 to expand Pennsylvania's current drug addiction programs.

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#### I. INTRODUCTION

On January 24, 2014, Ryan Kemp purchased ten bags of heroin.<sup>1</sup> Mr. Kemp struggled with drug addiction for many years and had unsuccessfully attempted treatment.<sup>2</sup> After making the purchase, Mr. Kemp invited Elizabeth Kline Smeltzer to his home, where the two used heroin that night.<sup>3</sup> Mr. Kemp then fell asleep, and when he awoke, Ms.

1. Commonwealth v. Kemp, No. CP-14-CR-0000547-2014, 2015 Pa. Super. Unpub. LEXIS 4193, at \*1—2 (Pa. Super. Ct. Nov. 16, 2015).

2. Clayton Over, *Kline Smeltzers Seek Rehab Over Lengthy Prison Sentence for Man Convicted in Daughter's Fatal Overdose*, CENTRE DAILY TIMES (Dec. 13, 2014), <http://www.centredaily.com/news/article42896046.html>.

3. *Kemp*, 2015 Pa. Super. Unpub. LEXIS 4193, at \*1—2.

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Kline Smeltzer was dead.<sup>4</sup> Her cause of death was ruled a drug overdose.<sup>5</sup> Ms. Kline Smeltzer was only 21 years old and was a graduate of State College Area High School and a part-time Penn State student who was beloved by her family and friends.<sup>6</sup>

Mr. Kemp was charged with Drug Delivery Resulting in Death.<sup>7</sup> Ms. Kline Smeltzer's parents, who are both pastors, asked the court for a lenient sentence for Mr. Kemp that emphasized treatment and recovery.<sup>8</sup> Ms. Kline Smeltzer's parents stated, "A sentence of no longer than two years in jail, coupled with treatment and recovery support for drug abuse in prison and upon release would make him accountable for his actions and provide him with an opportunity to lead a productive life afterward."<sup>9</sup> Her mother further explained, "For me, what would honor my daughter's life is for Ryan to deal with his addiction, to get out of jail and to have a productive, meaningful life."<sup>10</sup> The Centre County Court of Common Pleas Judge considered the victim's family's wishes, but sentenced Mr. Kemp to 4 to 12 years imprisonment followed by a year of probation.<sup>11</sup>

Mr. Kemp was not likely the defendant the Pennsylvania legislature had in mind when it enacted a statute allowing drug dealers to be charged with murder after selling drugs to an individual that overdosed on the drugs and died.<sup>12</sup> Section 2506 of the Pennsylvania Criminal Code,<sup>13</sup> Drug Delivery Resulting in Death, is classified as a form of criminal homicide that is a felony of the first degree and punishable by up to 40 years imprisonment.<sup>14</sup> Section 2506 was an attempt by the Pennsylvania legislature to lower the number of drug overdose deaths; however, the statute does not always ensure that the correct people are prosecuted.<sup>15</sup> Drug addicts are often the individuals being prosecuted, rather than the individuals actually responsible for manufacturing or introducing the drugs to the area.<sup>16</sup>

This Comment will analyze Section 2506 to determine if the statute is achieving its purpose of lowering the amounts of fatal drug overdoses in Pennsylvania.<sup>17</sup> This Comment will first discuss the requirements of

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Over, supra* note 2.

9. *Id.*

10. *Id.*

11. *Kemp*, 2014 Pa. Super. Unpub. LEXIS 4193, at \*2—3.

12. 18 PA. STAT. AND CONS. STAT. ANN. § 2506 (West 2019).

13. *Id.*

14. *Id.*

15. *See infra* Part III.

16. *See infra* Part III.

17. *See infra* Part III.

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Section 2506 and how the statute has changed since its enactment,<sup>18</sup> and will then compare Pennsylvania's laws to the laws of other states.<sup>19</sup> Finally, this Comment will look at alternative methods for combating the rising number of drug related deaths.<sup>20</sup>

## II. BACKGROUND

While Section 2506 seems simple on its face, the statute contains intricacies that must be carefully considered.<sup>21</sup> As will be discussed below, multiple amendments were made to the statute throughout the years in response to Pennsylvania courts' interpretations of the statute and to continue to ensure that the statute is effectively used.<sup>22</sup> The Pennsylvania courts' interpretations of the statutes have largely been a result of criminal defendants challenging the constitutionality of the law.<sup>23</sup>

### A. *Elements of Section 2506*

Section 2506 contains two main elements.<sup>24</sup> The first makes the Section applicable to any "person [who] intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance . . . ."<sup>25</sup> As the text implies, selling drugs is sufficient to violate the statute, but is not necessary.<sup>26</sup> Girlfriends who give their boyfriends drugs,<sup>27</sup> doctors who prescribe drugs,<sup>28</sup> and those who otherwise deliver drugs to another person all fall within the statute's reach.<sup>29</sup>

The second element of Section 2506 requires "another person [to die] as a result of using the substance."<sup>30</sup> Courts apply a "but-for" test<sup>31</sup> to

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18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part III.

21. *See infra* Section II.A.

22. *See infra* Section II.C.

23. *See infra* Section II.D for a discussion of the challenges to the constitutionality of Section 2506.

24. 18 PA. STAT. AND CONS. STAT. ANN. § 2506 (West 2019).

25. *Id.* § 2506(a).

26. *Id.*

27. Snejana Farberov, *Woman, 27, Charged with Homicide for Giving Her Recovering Addict Boyfriend, 19, Heroin which Killed Him*, DAILY MAIL (Dec. 12, 2013), <https://dailym.ai/2InhKDo>.

28. *See* Renatta Signorini & Debra Erdley, *Hempfield Doctor Charged with Prescribing Drugs that Killed Woman*, TRIB LIVE (Apr. 26, 2017, 12:06 PM), <http://bit.ly/2DccD5q>.

29. 18 PA. STAT. AND CONS. STAT. ANN. § 2506.

30. *Id.*

31. *See But-for Causation*, BOUVIER LAW DICTIONARY (Desk ed. 2012) ("But-for causation is an easily remembered phrase for a necessary cause, in that if this cause had

determine if the defendant's actions sufficiently caused the death.<sup>32</sup> Heroin is especially pervasive in Pennsylvania and is the cause in many of Pennsylvania's overdose deaths,<sup>33</sup> which caused many courts to consider the particularly dangerous effects of this drug.<sup>34</sup> The Pennsylvania Superior Court has found that the defendant who delivered the heroin is the but-for cause of a victim's death, even where other drugs were in the victim's system, as long as the dose of heroin administered was a lethal—or potentially lethal—dose.<sup>35</sup>

Further, in its 2019 opinion of *Commonwealth v. Peck*,<sup>36</sup> the Pennsylvania Superior Court found that drug delivery, the first element of Section 2506, does not need to take place in Pennsylvania as long as the death caused by the use of the drug, the second element, occurs in Pennsylvania.<sup>37</sup> In *Peck*, the defendant sold drugs in Maryland which resulted in the overdose death of the victim in Pennsylvania.<sup>38</sup> The defendant argued that a “violation of Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act (CSDDCA) is a necessary element of [Section 2506],” and because the delivery took place in Maryland, he could not be convicted.<sup>39</sup> The court concluded Section 102 of Pennsylvania's criminal code “clearly establishes that acts occurring outside of Pennsylvania may be subject to criminal prosecution in Pennsylvania, particularly when a death occurs within Pennsylvania.”<sup>40</sup> Thus, where the elements of Section 2506 are met, delivery occurring outside of Pennsylvania does not bar conviction.<sup>41</sup>

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not happened, then this result could not have followed. In other words but for this cause, this effect could not have occurred.”).

32. See *Commonwealth v. Kakhankham*, 132 A.3d 986, 993 (Pa. Super. Ct. 2015) (“The statute, therefore, is clear as to the level of causation. It requires a ‘but-for’ test of causation.”); see also John J. Dvorske, *Drug Delivery Resulting in Death is a Felony*, 5B SUMM. PA. JUR. 2D CRIMINAL LAW § 29:75 (West 2019) (“[T]he statute requires a ‘but-for’ test of causation and, thus, is not unconstitutionally vague as to the level of causation necessary for guilt.”).

33. DRUG ENF'T ADMIN. PHILA. DIV. & UNIV. OF PITTSBURGH, JOINT INTELLIGENCE REPORT: ANALYSIS OF OVERDOSE DEATHS IN PENNSYLVANIA, 2016, at 5 (July 2017), <http://bit.ly/2v13tV6> [hereinafter ANALYSIS OF OVERDOSE DEATHS IN PENNSYLVANIA].

34. See *Commonwealth v. Proctor*, 156 A.3d 261, 269 (Pa Super. Ct. 2017); see also *Kakhankham*, 132 A.3d at 996.

35. See *Proctor*, 156 A.3d at 269.

36. *Commonwealth v. Peck*, 202 A.3d 739 (Pa. Super. Ct. Jan. 8, 2019).

37. *Id.* at 743.

38. *Id.* at 739.

39. *Id.* at 742.

40. *Id.* at 743.

41. See *id.* (“Here, the Commonwealth presented evidence that (1) although the conduct, i.e., the delivery, occurred in Maryland, it was in violation of Pennsylvania's CSDDCA, (2) a death resulted from the delivery, and (3) Appellant acted recklessly when causing Decedent's death. Therefore, even if the trial court lacked jurisdiction to convict Appellant of the delivery under Section 102, the Commonwealth still established the

B. *Mens Rea Requirements*

The mens rea requirement for the first element of the statute is clearly articulated as “intentional.”<sup>42</sup> However, the Pennsylvania legislature did not explicitly include a mens rea requirement for the second element of Section 2506.<sup>43</sup> Criminal defendants have argued that because the Pennsylvania legislature did not articulate a mens rea requirement for the second element, it intended that the scienter requirement from the first element should apply to the second element as well.<sup>44</sup> However, the Pennsylvania Superior Court in *Commonwealth v. Kakhankham*<sup>45</sup> concluded that the required mens rea was “at least recklessly.”<sup>46</sup>

The court reasoned that while the statute does not specifically state what the mens rea requirement is for the second element of the statute, a recklessness standard could be inferred from Section 302 of the Pennsylvania Criminal Code,<sup>47</sup> which provides that the default mens rea for statutes that do not include one is intentionally, knowingly, or recklessly.<sup>48</sup> The court found that the act of providing heroin alone is enough to establish reckless conduct because heroin is “an inherently dangerous drug and the risk of such a lethal result is certainly foreseeable.”<sup>49</sup> Thus, intentionally providing heroin to another person satisfies the mens rea requirement for both elements of the statute.<sup>50</sup> While this holding was specific to heroin, the same reasoning could apply to other inherently dangerous drugs, such as fentanyl or other prescription opioids.

C. *Amendments to Section 2506*

Section 2506 was originally enacted in 1989 during the expanded War on Drugs initiated by then President Ronald Reagan.<sup>51</sup> The law

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sufficiency of the evidence of a Drug Delivery Resulting in Death.”) (internal citations omitted).

42. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(a) (West 2019).

43. *See id.*

44. *See Commonwealth v. Kakhankham*, 132 A.3d 986, 992–93 (Pa. Super. Ct. 2015).

45. *Id.* at 993.

46. *Id.* at 995.

47. 18 PA. STAT. AND CONS. STAT. ANN. § 302(c) (West 2019). The statute provides in relevant part: “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.” *Id.*

48. *Id.*

49. *See Kakhankham*, 132 A.3d at 996 (citing *Minn. Fire and Cas. Co. v. Greenfield*, 855 A.2d 854, 870–71 (Pa. 2004)).

50. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2506 (West 2019).

51. Act of Dec. 22, 1989, No. 109, 1989 Pa. Laws 773 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. § 2506); *see also A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <https://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Oct. 15, 2017) (“The presidency of Ronald Reagan marked the start of a long period of

originally classified Drug Delivery Resulting in Death as murder in the third degree, and carried a minimum sentence of five years.<sup>52</sup> The first amendment to the statute came in 1998,<sup>53</sup> after the Pennsylvania Superior Court held the statute was unconstitutional in 1996.<sup>54</sup> To solve this issue, the 1998 amendment to Section 2506 repealed a provision of the statute that stated defendants do not need notice of the applicability of the statute before their conviction.<sup>55</sup> The law then remained substantially unchanged until it was amended again in 2011.<sup>56</sup>

The 2011 amendments were the result of a 2005 Pennsylvania Supreme Court decision that held the prosecution was required to prove malice in order obtain a conviction for Drug Delivery Resulting in Death because it was a form of murder in the third degree.<sup>57</sup> Proving malice made it very difficult for the prosecution to successfully convict a defendant under Section 2506.<sup>58</sup> The 2011 amendments' recharacterization of the crime thus lessened the prosecution's burden of proof.<sup>59</sup>

In addition, the 2011 amendments deleted the mandatory minimum sentence of 5 years and added a maximum sentence of 40 years.<sup>60</sup> The legislature also reclassified Drug Delivery Resulting in Death as a felony of the first degree.<sup>61</sup> Although the crime is no longer considered murder in

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skyrocketing rates of incarceration, largely thanks to his unprecedented expansion of the drug war. The number of people behind bars for nonviolent drug law offenses increased from 50,000 in 1980 to over 400,000 by 1997.”)

52. 1989 Pa. Laws. at 773.

53. Act of Feb. 18, 1998, No. 19, 1998 Pa. Laws 102 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. § 2506).

54. See *Commonwealth v. Highhawk*, 687 A.2d 1123, 1192 (Pa. Super. Ct. 1996) (finding Section 2506 to be unconstitutional because subsection (c) of the 1989 version of the statute did not provide fair notice of the prohibited conduct).

55. Section 2506(c), 1989 Pa. Laws. at 773 (repealed 1998). This subsection provided in relevant part:

Proof of sentencing.—Provisions of this section shall not be an element of the crime. Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider evidence presented at trial, shall afford the Commonwealth and the defendant an opportunity to present necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

*Id.*

56. Act of July 7, 2011, No. 40, 2011 Pa. Laws 220 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. § 2506).

57. *Commonwealth v. Ludwig*, 874 A.2d 623, 631 (Pa. 2005).

58. Richard Gazarik, *Changed Pennsylvania Law May Prompt More Charges in Fatal Overdoses*, TRIB LIVE (Mar. 19, 2014 11:36 PM), <http://tinyurl.com/y5j2olll>.

59. *Id.*

60. *Id.*

61. *Id.*

the third degree, Drug Delivery Resulting in Death is still considered a form of criminal homicide.<sup>62</sup>

The 2011 amendments to Section 2506 also created a need to amend Section 9714 of the Pennsylvania criminal sentencing laws.<sup>63</sup> Section 9714 provides sentences for second degree and lesser offenses, and the amendments to Section 9714 specifically added Drug Delivery Resulting in Death to the definition of “crime of violence.”<sup>64</sup> Because murder of the third degree was already classified as a crime of violence, Section 9714 needed to be amended to keep Drug Delivery Resulting in Death within the scope of Section 9714’s sentence enhancements for repeat offenders.<sup>65</sup>

The Pennsylvania Legislature amended Section 2506 again in 2014.<sup>66</sup> This amendment added subsection (b)(2), which states that the penalty section, which imposes a 40-year maximum sentence,<sup>67</sup> would not apply to convictions where the victim was under 13 years of age.<sup>68</sup> While the majority of the Section 2506 amendments were a result of court decisions, many of the cases challenging the constitutionality of Section 2506 were unsuccessful.<sup>69</sup>

#### D. *Constitutionality Challenges*

Criminal defendants often challenge the constitutionality of Section 2506.<sup>70</sup> The typical constitutional challenge is that the statute is void for

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62. *Id.* Criminal homicide is the term that relates to the action of a defendant who “intentionally, knowingly, recklessly, or negligently causes the death of another human being.” The term also includes murder of any degree, involuntary manslaughter, and voluntary manslaughter. Karl Oakes & Kimberly C. Simmons, *Definition and classification of criminal homicide, generally*, 4 SUMM. PA. JUR. 2D CRIMINAL LAW § 12:1 (West 2019).

63. 42 PA. STAT. AND CONS. STAT. ANN. § 9714 (West 2019).

64. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 9714(g) (defining Drug Delivery Resulting in Death as a crime of violence); *see also* H.R. 396, 194th Leg., 3rd Spec. Sess. (Pa. June 11, 2011) (expressing legislative intent to continue to treat Drug Delivery Resulting in Death as a crime of violence).

65. H.R. 396, 194th Leg., 3rd Spec. Sess. (Pa. June 11, 2011)

66. 18 PA. STAT. AND CONS. STAT. ANN. § 2506 (West 2019).

67. *Id.* § 2506(b)(1).

68. *See id.* § 2506(b)(2) (seemingly indicating that drug delivery resulting in the death of a victim under 13 years of age could be subject to a longer sentence).

69. *See infra* Section II.D.

70. *See* Commonwealth v. Storey, 167 A.3d 750, 755–56 (Pa. Super. Ct. 2017); *see also* Commonwealth v. Ludwig, 874 A.2d 623, 627–28 (Pa. 2005); Commonwealth v. Proctor, 156 A.3d 261, 265–66 (Pa. Super. Ct. 2017); Commonwealth v. Kakhankham, 132 A.3d 986, 989–90 (Pa. Super. Ct. 2015); Commonwealth v. Costa, 861 A.2d 358, 360–61 (Pa. Super. Ct. 2004); Commonwealth v. Nahavandian, 849 A.2d 1221, 1226 (Pa. Super. Ct. 2004).

vagueness,<sup>71</sup> but defendants have also argued that the statute imposed a sentence that violated the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>72</sup> Constitutional challenges to Section 2506 have generally been unsuccessful in Pennsylvania courts.<sup>73</sup>

### 1. Void for Vagueness

In the Pennsylvania Superior Court's first opinion interpreting the meaning of Section 2506, *Commonwealth v. Highhawk*,<sup>74</sup> the court held that the statute was void for vagueness.<sup>75</sup> The trial court concluded that Section 2506 was nothing more than a statute providing sentencing guidelines, not a new crime a defendant could be charged with.<sup>76</sup> The Superior Court disagreed and concluded that although the statute's text was "unclear and ambiguous,"<sup>77</sup> the legislature intended to create a new crime.<sup>78</sup> However, the Superior Court held that even though the legislature created a new crime, subsection (c) of Section 2506<sup>79</sup> made it unconstitutionally void for vagueness because it "fail[ed] to provide fair notice of the prohibited conduct."<sup>80</sup>

Following the 1998 amendment, which repealed the provision of Section 2506 that the court in *Highhawk* found unconstitutional, the constitutionality of the statute was not questioned before an appellate court again until 2004.<sup>81</sup> In 2004, the Superior Court decided *Commonwealth v. Nahavandian*<sup>82</sup> and *Commonwealth v. Costa*.<sup>83</sup> The defendants in both cases argued that Section 2506 was void for vagueness, as it did not

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71. See *Storey*, 167 A.3d at 755–56; see also *Ludwig*, 874 A.2d at 627–28; *Proctor*, 156 A.3d at 265–66; *Kakhankham*, 132 A.3d at 989–90; *Costa*, 861 A.2d at 360–61; *Nahavandian*, 849 A.2d at 1226.

72. See *Proctor*, 156 A.3d at 265–66; see also U.S. CONST. amend. VIII.

73. See *Storey*, 167 A.3d at 757; see also *Ludwig*, 874 A.2d at 631; *Proctor*, 156 A.3d at 267–68, 276; *Kakhankham*, 132 A.3d at 992; *Costa*, 861 A.2d at 365; *Nahavandian*, 849 A.2d at 1226. *But see* *Commonwealth v. Highhawk*, 687 A.2d 1123, 1129 (Pa. Super. Ct. 1996).

74. *Highhawk*, 687 A.2d at 1125 ("We are called upon to interpret, for the first time, the meaning of this statutory provision.").

75. *Id.* at 1129. Due process requires that criminal statutes be sufficiently clear to give reasonable notice of the conduct that will be considered a crime under the statute. *Id.* at 1128–29. If a statute is "so vague that men of common intelligence must necessarily guess at its meaning", a court will find the statute to be unconstitutional for being void for vagueness. *Id.* at 1128.

76. *Id.* at 1124.

77. *Id.* at 1125.

78. *Id.* at 1127.

79. See *supra* note 55.

80. *Highhawk*, 687 A.2d at 1129.

81. *Commonwealth v. Nahavandian*, 849 A.2d 1221, 1226 (Pa. Super. Ct. 2004); see also *Commonwealth v. Costa*, 861 A.2d 358, 360–61 (Pa. Super. Ct. 2004).

82. *Commonwealth v. Nahavandian*, 849 A.2d 1221 (Pa. Super. Ct. 2004).

83. *Commonwealth v. Costa*, 861 A.2d 358 (Pa. Super. Ct. 2004).

include a specific mens rea requirement.<sup>84</sup> The court found in both cases, however, that because the statute indicated Drug Delivery Resulting in Death was a type of third degree murder, the legislature meant to incorporate the common law mental state of third degree murder: malice.<sup>85</sup> Thus, the court found in both cases that the statute was not unconstitutionally void.<sup>86</sup>

Following these two decisions, the Pennsylvania Supreme Court in *Commonwealth v. Ludwig*<sup>87</sup> reached the same decision and followed the same reasoning as the Superior Court in *Nahavandian* and *Costa*.<sup>88</sup> The Pennsylvania Supreme Court found that “the mental state of malice aforethought is significantly more than mere carelessness or neglect, or the disregard of a chance or possibility of death, and it is this special frame of mind that is required to obtain a conviction under Section 2506.”<sup>89</sup> The court then turned to the question of whether the Commonwealth had met its *prima facie* case of malice.<sup>90</sup>

In *Ludwig*, the defendant had sold three teenage girls double doses of ecstasy.<sup>91</sup> After consuming the ecstasy at a concert, fifteen-year-old Brandy French became ill and later died of an ecstasy overdose.<sup>92</sup> The Pennsylvania Supreme Court found that the act of delivering an illegal drug that did not have an “extremely high risk” of death could not be considered malice.<sup>93</sup> Because ecstasy is “only” a potentially dangerous drug, the court reasoned that the act of selling ecstasy without more does not support a finding of malice.<sup>94</sup>

The court also determined that neither the age of the girls nor the fact that the ecstasy was a double dose changed the malice determination because the defendant was also a teenager, and all parties understood the pill was a double dose.<sup>95</sup> Finally, the court indicated that selling the drugs to the victim, as opposed to giving the drugs to the victim, without more, was not enough to establish malice.<sup>96</sup> With this decision, the court exemplified how difficult it would be for the prosecution to ever

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84. *Nahavandian*, 849 A.2d at 1226; *see also Costa*, 861 A.2d at 360–61.

85. *Nahavandian*, 849 A.2d at 1226; *see also Costa*, 861 A.2d at 365.

86. *Nahavandian*, 849 A.2d at 1226; *see also Costa*, 861 A.2d at 365.

87. *Commonwealth v. Ludwig*, 847 A.2d 623 (Pa. 2005).

88. *Id.* at 631 n.7.

89. *Id.* at 632.

90. *Id.*

91. *Id.* at 626.

92. *Id.* at 627–28.

93. *Id.* at 633.

94. *Id.* at 632–33.

95. *Id.*

96. *Id.* at 634.

successfully charge a defendant with Drug Delivery Resulting in Death.<sup>97</sup> Ultimately, this decision spurred the 2011 amendments to Section 2506.<sup>98</sup>

Following the 2011 amendments, which reclassified Drug Delivery Resulting in Death as a felony of the first degree to avoid making the prosecution prove malice,<sup>99</sup> the statute's constitutionality was again challenged in 2015.<sup>100</sup> The defendant in *Kakhankham* argued the statute was unconstitutionally vague because it did not clearly indicate the required mens rea or level of causation required for conviction.<sup>101</sup> The court found that the required mens rea was at least recklessness,<sup>102</sup> and that the required level of causation was but-for causation.<sup>103</sup> The court reasoned the defendant's sale of a bundle of heroin to the victim was the but-for cause of the victim's death by overdose and rose to the level of recklessness, thereby meeting both requirements at the heart of the void for vagueness challenge.<sup>104</sup>

The next void for vagueness challenge came in 2017 in the Superior Court's decision in *Commonwealth v. Proctor*.<sup>105</sup> The defendant in *Proctor* attempted to distinguish his case from the *Kakhankham* decision because the victim's death was caused by a mixture of heroin the defendant had provided and other drugs the defendant did not know the victim had taken.<sup>106</sup> The defendant argued the statute failed to give adequate notice "that engaging in criminal conduct, but conduct that does not generally cause death, can, in some rare and unlucky situations, be the source of criminal liability for the unforeseen and unforeseeable death of a third party."<sup>107</sup>

The court responded by placing importance on the fact that the amount of heroin the victim ingested was a lethal dose, or a potentially lethal dose, even withstanding the other drugs in the victim's system.<sup>108</sup> Because the dose was potentially fatal on its own, the court determined it

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97. *Ludwig*, 847 A.2d at 632–33 (finding that the prosecution could not use the delivery of an illegal drug as evidence of malice because it is the first element of the crime, and using an existing element of the crime to prove malice would make the statute a strict liability crime); see also Gazarik, *supra* note 58 (quoting Westmoreland County District Attorney: "We no longer have to prove intent. That didn't make sense. Why would a drug dealer want to kill his customer?").

98. See Gazarik, *supra* note 58.

99. Act of July 7, 2011, No. 40, 2011 Pa. Laws 220 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. § 2506).

100. *Commonwealth v. Kakhankham*, 132 A.3d 986, 989–90 (Pa. Super. Ct. 2015).

101. *Id.*

102. *Id.* at 994.

103. *Id.* at 993.

104. *Id.* at 995–96.

105. *Commonwealth v. Proctor*, 156 A.3d 261 (Pa. Super. Ct. 2017).

106. *Id.* at 268.

107. *Id.* at 267.

108. *Id.* at 267–68.

was foreseeable that the person could die.<sup>109</sup> Therefore, the statute was not vague as it applied to the facts and circumstances of the defendant's case.<sup>110</sup>

Finally, the most recent void for vagueness challenge occurred in the Superior Court's decision in *Commonwealth v. Storey*.<sup>111</sup> Like the defendant in *Proctor*, the defendant here attempted to distinguish his case from *Kakhankham* by arguing that he sold heroin to an individual who was obtaining the drugs for a third party that later overdosed on the heroin.<sup>112</sup> Thus, the defendant argued that the statute did not give adequate notice that he could be liable for the death of a third party he had no knowledge of.<sup>113</sup> The court found this distinction to be immaterial because the statute only required that "another person dies as a result of using the substance,"<sup>114</sup> not necessarily the person who purchased drugs from the defendant.<sup>115</sup> Thus, the court in *Storey* also found that the statute was not unconstitutionally vague as applied to the facts of the case.<sup>116</sup>

## 2. Cruel and Unusual Punishment

In addition to the void for vagueness challenge, the defendant in *Proctor* also argued that the statute was unconstitutional because it violated the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>117</sup> The defendant argued the statute violated the Eighth Amendment because "[the defendant] was a drug addict and never intended to cause any loss of life and the statute permits severely disproportionate punishments of individuals tangentially involved in a drug overdose."<sup>118</sup> The defendant in *Proctor* was ultimately sentenced to "an aggregate sentence of 12 years and 10 months to 26 years and 10 months of incarceration."<sup>119</sup> The court, however, upheld the statute as constitutional because the sentence did not lead to an "inference of gross disproportionality" when it was viewed in light of the fact that the defendant's conduct caused the death of a young man.<sup>120</sup>

Thus, despite multiple challenges to the constitutionality of Section 2506 before the Pennsylvania appellate courts, the statute remains on the

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109. *Id.* at 269.

110. *Id.*

111. *Commonwealth v. Storey*, 167 A.3d 750, 755–56 (Pa. Super. Ct. 2017).

112. *Id.* at 757.

113. *Id.*

114. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(a) (West 2019) (emphasis added).

115. *Storey*, 167 A.3d at 757.

116. *Id.*

117. *Commonwealth v. Proctor*, 156 A.3d 261, 266 (Pa Super. Ct. 2017).

118. *Id.*

119. *Id.* at 275–76.

120. *Id.* at 276.

books in an attempt to deter drug dealers.<sup>121</sup> However, the current use of Section 2506 may not reflect what the legislature likely intended to effect with the statute.<sup>122</sup> Further, the statute can be very difficult to apply, and little evidence suggests that it has made a difference in reducing drug overdose deaths in Pennsylvania.<sup>123</sup> In fact, the number of drug overdoses in Pennsylvania continues to rise,<sup>124</sup> suggesting different or additional action needs to be taken to combat this issue.

### III. ANALYSIS

Rising drug overdose deaths is not a problem unique to Pennsylvania.<sup>125</sup> In fact, the federal government and a substantial number of states have statutes similar to Pennsylvania's Drug Delivery Resulting in Death.<sup>126</sup> Additionally, many states that do not have a specific statute charge drug dealers with felony murder or voluntary or involuntary manslaughter.<sup>127</sup> Compared to Pennsylvania, some states have statutes that are more lenient, and some states have statutes that are less lenient.<sup>128</sup>

This part of this Comment will compare Pennsylvania's Section 2506 to other states' statutes regarding drug delivery resulting in death to address the concerns with these statutes and evaluate what portions of the statutes are effective.<sup>129</sup> This part will then detail alternative approaches to

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121. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(a) (West 2019).

122. *See* Commonwealth v. Highhawk, 687 A.2d 1123, 1127 (Pa. Super. Ct. 1996) ("Section 2506 clearly represents an attempt to control the number of deaths related to controlled substances.").

123. *See infra* Part III.

124. *See* ANALYSIS OF OVERDOSE DEATHS IN PENNSYLVANIA, *supra* note 33, at 5 ("In 2016, 4,642 drug-related overdose deaths were reported by Pennsylvania coroners and medical examiners, an increase of 37 percent increase from 2015. In 2016, approximately 13 people died of a drug-related overdose each day.").

125. *See Drug Overdose Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/statedeaths.html> (last updated Dec. 19, 2018).

126. *See* 21 U.S.C. § 841(b)(1)(viii) (2012 & Supp. 2017); *see also* ALASKA STAT. § 11.41.120(a)(3) (2018); COLO. REV. STAT. § 18-3-102(1)(e) (2018); DEL. CODE ANN. tit. 16, § 4752B (2019); FLA. STAT. ANN. § 782.04(1)(a)(3)-(4) (West 2019); 720 ILL. COMP. STAT. ANN. 5/9-3.3 (West 2019); KAN. STAT. ANN. § 21-5430 (West 2019); LA. REV. STAT. ANN. § 14:30.1(3) (2018); MICH. COMP. LAWS ANN. § 750.317a (West 2019); MINN. STAT. ANN. § 609.195(b) (West 2019); N.H. REV. STAT. ANN. § 318-B:26(IX) (2019); N.J. STAT. ANN. § 2C:35-9 (2019); N.C. GEN. STAT. § 14-17(b)(2) (2018); OKLA. STAT. tit. 21, § 701.7(B) (2019); R.I. GEN. LAWS § 11-23-6 (2019); TENN. CODE ANN. § 39-13-210(a)(2) (2019); VT. STAT. ANN. tit. 18, § 4250 (2018); WASH. REV. CODE ANN. § 69.50.415 (West 2019); W. VA. CODE ANN. § 61-2-1 (West 2019); WIS. STAT. ANN. § 940.02(2)(a)-(b) (West 2018); WYO. STAT. ANN. § 6-2-108 (2019).

127. DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 2 (Nov. 2017), <http://bit.ly/2Uwvi1I>.

128. *See infra* Sections III.A–B.

129. *See infra* Sections III.A–B.

charging individuals under these statutes.<sup>130</sup> This Comment will then argue that charging individuals under these types of statutes is ineffective to reduce the amount of overdose deaths and that an alternative approach focusing on treating addiction would be more effective.<sup>131</sup>

A. *Statutes More Lenient than Pennsylvania's*

While Pennsylvania's Section 2506 is one of the more lenient approaches to addressing drug overdose deaths,<sup>132</sup> some states have much more forgiving statutes.<sup>133</sup> The statutes are more lenient in different aspects, including lesser sentences, how often individuals are charged under the statutes, and restrictions placed on who can be charged.<sup>134</sup>

1. Washington

Section 69.50.415 of Washington's Uniform Controlled Substances Act, Controlled Substances Homicide, was enacted in 1987.<sup>135</sup> Section 69.50.415 provides, "A person who unlawfully delivers a controlled substance . . . which . . . is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide."<sup>136</sup> Section 69.50.415 is considered a class B felony in Washington,<sup>137</sup> which is punishable by confinement in a state correctional facility for up to 10 years, a fine up to \$20,000, or both.<sup>138</sup>

Section 69.50.415 differs from Section 2506 of the Pennsylvania Criminal Code in many ways. Most obvious is that Section 69.50.415 is classified as a class B felony,<sup>139</sup> the second highest felony in the state,<sup>140</sup> while Section 2506 is a first-degree felony,<sup>141</sup> the highest in the state.<sup>142</sup> Section 69.50.415 also carries a maximum sentence of 10 years,<sup>143</sup> while Section 2506 carries a maximum sentence of 40 years.<sup>144</sup> Section 2506's

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130. *See infra* Section III.C.

131. *See infra* Section III.C.

132. *See infra* Section III.A.

133. *See infra* Section III.A.

134. *See infra* Section III.A.

135. WASH. REV. CODE ANN. § 69.50.415 (West 2019).

136. *Id.* § 69.50.415(1).

137. *Id.* § 69.50.415(2).

138. WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 2019).

139. WASH. REV. CODE ANN. § 69.50.415(2).

140. WASH. REV. CODE ANN. § 9A.20.021(1)(b).

141. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(a) (West 2019).

142. 18 PA. STAT. AND CONS. STAT. ANN. § 1103(1) (West 2019).

143. WASH. REV. CODE ANN. § 9A.20.021(1)(b).

144. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(b)(1). A sentence of 40 years is double the normal maximum sentence for first degree felonies in Pennsylvania under 18 PA. STAT. AND CONS. STAT. ANN. § 1103(1) (West 2019).

longer maximum sentence is problematic when viewed in light of the fact that many of the individuals charged under Section 2506 are addicts themselves or simply shared drugs with the victim.<sup>145</sup> Long sentences for these individuals are disproportionate to their actions and do not address the underlying problem in many cases—the addiction.<sup>146</sup>

Further, studies have shown that longer sentences do not have stronger effects on deterrence.<sup>147</sup> For punishments to deter individuals from committing a crime, the individuals must take the time to consider what the consequences of committing the crime will be.<sup>148</sup> Those suffering from drug addictions are rarely ever able to make rational decisions relating to crimes, and those who simply share their drugs with a friend or significant other are probably not aware that they could be charged in connection with an overdose death.<sup>149</sup> Thus, long sentences are often not justified when true drug dealers are seldom convicted and the sentences do not have a strong deterrence effect.<sup>150</sup>

Additionally, Section 69.50.415 of Washington's Controlled Substances Act requires that the specific person to whom the drugs were delivered be the person who dies,<sup>151</sup> while Section 2506 allows the charge when any person dies as a result of delivery of the drugs.<sup>152</sup> This is an area where Section 2506 has the potential to be more successful at achieving the goal of deterring drug dealers and reducing the number of drug overdose deaths. Section 2506 allows law enforcement agencies to track the drug involved in an overdose to the actual drug dealer in a case where a friend or significant other buys drugs and then shares the drugs with the victim.<sup>153</sup> While tracking the drugs back to the drug dealers is often very difficult,<sup>154</sup> Section 2506 at least makes this an option in Pennsylvania.<sup>155</sup>

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145. See Joshua Vaughn, *Understanding Overdose: Charges of Drug Delivery Resulting in Death on the Rise*, THE SENTINEL (Dec. 3, 2017), <http://tinyurl.com/y4wx8uy6> (“A review of more than 200 cases of drug delivery homicides nationwide conducted by Health In Justice, a program run by researchers from Northeastern University, found less than half of the charged cases involved a typical dealer/buyer relationship.”).

146. Clarence Walker, *The New War on Drug Dealers: Charging Them With Murder When Their Customers Die of Overdose*, ALTERNET (May 31, 2015), <https://www.alternet.org/drugs/overdose-murder-new-war-drug-dealers>.

147. DRUG POLICY ALLIANCE, *supra* note 127, at 39.

148. *Id.*

149. *Id.*

150. *Id.*

151. WASH. REV. CODE ANN. § 69.50.415(1) (West 2019).

152. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(a) (West 2019).

153. *Id.*

154. See Renatta Signorini, *Pa. Investigators Struggle to Build Drug Death Cases*, TRIB LIVE (Aug. 17, 2016), <http://bit.ly/2Gyb0Bi>.

155. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(a).

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Finally, the way individuals charged under Section 69.50.415 are prosecuted in Washington is more lenient than in Pennsylvania.<sup>156</sup> Some Washington communities are focusing on public health initiatives to combat addiction rather than prosecuting drug dealers.<sup>157</sup> The King County chief criminal prosecutor posed the following question:

Frankly, the debate we're having as a community right now is: Is this a public health issue or is this a criminal issue? Are we going to lock people up as a way to sort of manage use among drug users and the drug communities or are we going to try to find some way to treat it as a public health issue with harm-reduction strategies in other things?<sup>158</sup>

As discussed fully later in this Comment, diverting resources away from prosecuting these crimes and towards public health initiatives may be more successful at combating overdose deaths.<sup>159</sup> Thus, the way certain counties in Washington are combating drug overdose deaths is likely more effective than convicting defendants under Section 2506.

## 2. Wyoming

Section 6-2-108 of Wyoming's Criminal Code is also more lenient than Section 2506 of Pennsylvania's Criminal Code.<sup>160</sup> Wyoming passed Section 6-2-108, Drug Induced Homicide, in 1995.<sup>161</sup> Section 6-2-108 provides the following:

- (a) A person is guilty of drug induced homicide if:
- (i) He is an adult or is at least four (4) years older than the victim; and
  - (ii) He . . . unlawfully deliver[s] a controlled substance to a minor and that minor dies as a result of the injection, inhalation, ingestion or administration by any other means of any amount of that controlled substance.
- (b) Except as provided in W.S. 6-2-109, drug induced homicide is a felony punishable by imprisonment in the penitentiary for not more than twenty (20) years.<sup>162</sup>

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156. *See infra* Section III.A.

157. Taylor Mirfendereski, *Fighting Heroin: Dealers Charged with Homicide When Customers Die*, KING 5 (Mar. 22, 2017), <http://www.king5.com/news/local/fighting-heroin-dealers-charged-with-homicide-when-customers-die/424682320>.

158. *Id.*

159. *See infra* Section III.C.

160. *Compare* WYO. STAT. ANN. § 6-2-108 (2019), with 18 PA. STAT. AND CONS. STAT. ANN. § 2506.

161. WYO. STAT. ANN. § 6-2-108.

162. *Id.*

Unlike Section 2506,<sup>163</sup> Section 6-2-108 places an age restriction on the individuals that can be convicted under the statute.<sup>164</sup> Also unlike Section 2506,<sup>165</sup> which applies to all overdose deaths, Section 6-2-108 only applies to overdose deaths of minors.<sup>166</sup> Additionally, the maximum penalty under Section 6-2-108 is only 20 years imprisonment compared to a maximum of 40 years under Section 2506.<sup>167</sup> Thus, even though Section 6-2-108 applies only to conduct that is arguably more morally offensive, the overdose deaths of minors, the maximum sentence is half that of Section 2506.<sup>168</sup>

Although Section 6-2-108 was enacted 23 years ago, there are no published cases in Wyoming that cite to the statute, and only three news articles regarding the crime were written between 2011 and 2016.<sup>169</sup> In 2016, the number of drug overdose deaths per 100,000 individuals in Wyoming (17.6) was much smaller than Pennsylvania's (37.9), but it was still significant.<sup>170</sup> The lack of prosecutions under Section 6-2-108 could be due to Section 6-2-108's restrictions on the age of the defendant and victims or that Wyoming convicts drug dealers under its regular drug laws.

#### *B. Statutes Less Lenient than Pennsylvania's*

Many states have statutes that are less lenient than Pennsylvania's.<sup>171</sup> These include statutes with minimum sentences, longer maximum

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163. Section 2506 imposes no restrictions on the age of the defendant convicted under the statute, but the statute does state that the 40-year maximum sentence does not apply to overdose deaths of victims under the age of 13. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(b)(2).

164. WYO. STAT. ANN. § 6-2-108(a)(i).

165. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(b)(2).

166. WYO. STAT. ANN. § 6-2-108(a)(ii). Rhode Island and Colorado also both have statutes that apply only where an individual delivers a controlled substance to minors. *See* R.I. GEN. LAWS § 11-23-6 (2019); COLO. REV. STAT. § 18-3-102(1)(e) (2018) (further restricting homicide charges to individuals who unlawfully deliver a controlled substance to a minor on school grounds).

167. WYO. STAT. ANN. § 6-2-108(b).

168. *Compare* WYO. STAT. ANN. § 6-2-108(b), *with* 18 PA. STAT. AND CONS. STAT. ANN. § 2506(b)(1). Furthermore, Section 6-2-108's maximum sentence is potentially even less than half of Section 2506's if the victim is under the age of 13. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2506(b)(2).

169. DRUG POLICY ALLIANCE, *supra* note 127, at 12.

170. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 125.

171. *See infra* Section III.B.

sentences,<sup>172</sup> and strict liability statutes.<sup>173</sup> Conversely, some of state statutes are more restrictive with who may be charged with the crime.

### 1. Michigan

Section 750.317a of Michigan's Penal Code, Delivery of a Schedule 1 or 2 Controlled Substance, Death as a Felony, was enacted in 2006.<sup>174</sup> Section 750.317a states:

A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.<sup>175</sup>

While Michigan allows a person convicted under Section 750.317a to be sentenced to life imprisonment,<sup>176</sup> what makes Section 750.317a so severe is that the statute creates a strict liability crime.<sup>177</sup> As long as the individual intended to deliver a controlled substance to another person, the individual can be sentenced to life in prison if any person dies from using the delivered drugs.<sup>178</sup>

Although Pennsylvania courts claim that Section 2506 is not a strict liability crime, intentionally providing heroin to a person who dies is sufficient to establish the "reckless" behavior required under Section 2506.<sup>179</sup> Thus, at least when heroin is involved, in Pennsylvania all the prosecution has to prove is that the defendant intended to distribute the drug.<sup>180</sup> While this is more than the Michigan statute requires, the effect is likely the same as neither statute requires an intent to cause death.

A major concern with only having to prove intent to provide the drug to another person is that this action does not actually cause the individual's death.<sup>181</sup> Defendants cannot raise the defense that the victims contributed

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172. See DRUG POLICY ALLIANCE, *supra* note 127, at 8 ("State law penalties [for Drug Delivery Resulting in Death] vary from two years to capital punishment. In six states—Colorado, Florida, Louisiana, Oklahoma, Rhode Island, and West Virginia—the minimum penalty is life in prison.")

173. See N.J. STAT. ANN. § 2C:35-9 (2019) (listing the New Jersey statutory provision titled "Strict Liability for Drug-Induced Deaths").

174. MICH. COMP. LAWS ANN. § 750.317a (West 2019).

175. *Id.*

176. *Id.*

177. *People v. Plunkett*, 780 N.W.2d 280, 285 (Mich. 2010) ("MCL 750.317a is a general intent crime, and as such does not require the intent that death occur from the controlled substance first delivered in violation of MCL 333.7401.")

178. MICH. COMP. LAWS ANN. § 750.317a (West 2019).

179. *Commonwealth v. Kakhankham*, 132 A.3d 986, 996 (Pa. Super. Ct. 2015).

180. *Id.*

181. See *Walker*, *supra* note 146.

to their death by choosing to use the drug.<sup>182</sup> Thus, these statutes imply that the individuals charged are just as culpable as murderers despite never having the intent to kill anyone.<sup>183</sup>

Strict liability for any drug delivery resulting in death may also have a negative impact on Good Samaritan laws.<sup>184</sup> Section 780-113.7 of the Pennsylvania Controlled Substance, Drug, Device, and Cosmetic Act<sup>185</sup> provides immunity to individuals who report a drug overdose of another person to an emergency service.<sup>186</sup> However, the statute only provides immunity from certain drug-related crimes and parole violations, and Section 2506 is not included in the list.<sup>187</sup> If individuals who distributed drugs know that they can be sentenced for 40 years if a person dies from an overdose without even having the intent to hurt the victim, they might be less likely to report the overdose to the authorities.<sup>188</sup> This means that convictions under Section 2506 and other states' statutes with strict liability offenses might actually be causally related to an increase in drug overdose deaths.<sup>189</sup>

## 2. Florida

Florida classifies drug delivery resulting in death as first-degree murder.<sup>190</sup> Subsection 782.04(1)(a)(3) of Florida's murder statute states that an individual is guilty of murder in the first degree when the individual is 18 years of age or older and distributes certain substances<sup>191</sup> that are proven to be the proximate cause of the death of another person.<sup>192</sup> Subsection 782.04(1)(a)(3) carries a minimum life sentence and the possibility of a death sentence,<sup>193</sup> while Section 2506 of Pennsylvania's Criminal Code imposes no minimum sentence and a maximum sentence of 40 years.<sup>194</sup>

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182. *Id.*

183. DRUG POLICY ALLIANCE, *supra* note 127, at 40.

184. *Id.*

185. 35 PA. STAT. § 780-113.7 (West 2019).

186. *Id.*

187. 35 PA. STAT. § 780-113.7(b).

188. *See* DRUG POLICY ALLIANCE, *supra* note 127, at 40.

189. *See id.*

190. FLA. STAT. ANN. § 782.04(1)(a)(3) (West 2019).

191. The substances included in Section 782.04(1)(a)(3) are: substances controlled under Section 893.03(1) of the Florida Drug Abuse Prevention and Control Act; Cocaine; Opium or any synthetic or natural salt, compound, derivative, or preparation of opium; Methadone; Alfentanil; Carfentanil; Fentanyl; Sufentanil; or any controlled substance analog, as described in Section 893.0356 of Florida's Drug Abuse Prevention and Control Act. FLA. STAT. ANN. § 782.04(1)(a)(3)(a)-(i).

192. FLA. STAT. ANN. § 782.04(1)(a)(3).

193. FLA. STAT. ANN. § 775.082 (West 2019).

194. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(b)(1) (West 2019).

Not only does Subsection 782.04(1)(a)(3) not require any specific intent other than unlawfully distributing drugs; if convicted, defendants will, at a minimum, spend the rest of their life in jail and, at a maximum, be executed without ever having intended to kill anyone.<sup>195</sup> Possibly allowing a drug dealer to be executed just for distributing drugs to another person without forcing the other person to use the drugs or intending to kill the other person is an extremely drastic approach.<sup>196</sup> Despite the potential sentence, the number of drug overdose deaths continue to rise in Florida.<sup>197</sup> Although the maximum sentence under Section 2506 is likely extreme when viewed in light of the culpability of the defendants, it seems much more reasonable than the maximum sentence under Subsection 782.04(1)(a)(3).

C. *Alternatives to Drug Delivery Resulting in Death Statutes*

While in theory charging drug dealers with murder should deter others from continuing to distribute drugs, drug manufacturers and high-level drug dealers are often not the individuals being charged.<sup>198</sup> Defendants in drug distribution cases are typically drug addicts themselves, and, instead of being anonymous drug dealers, often have a relationship to the individual who overdoses.<sup>199</sup>

Additionally, the fact that bringing charges under Section 2506 is very difficult further complicates the effectiveness of Section 2506.<sup>200</sup> The investigation process often requires multiple officers to locate where the drugs came from and expert medical testimony to determine the exact cause of death.<sup>201</sup> This tedious process means that the cost to prosecute defendants under Section 2506, in addition to the costs associated with incarcerating the defendants, is very high,<sup>202</sup> despite no evidence that Section 2506 is effective in deterring drug overdose deaths.<sup>203</sup> Pennsylvania already has extensive drug laws which allow individuals

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195. FLA. STAT. ANN. § 782.04(1)(a)(3).

196. *Id.*

197. Tophier Avery, *Opioid Overdose Deaths Rise in Florida*, ADDICTION NOW (Nov. 29, 2017), <https://www.drugaddictionnow.com/2017/11/29/opioid-overdose-deaths-rise-in-florida/>.

198. *See* Vaughn, *supra* note 145.

199. *Id.*

200. *See* Signorini, *supra* note 154.

201. *See* Signorini & Erdley, *supra* note 28.

202. DRUG POLICY ALLIANCE, *supra* note 127, at 52.

203. *See id.* at 2 (“Prosecutors and legislators who champion renewed drug-induced homicide enforcement couch the use of this punitive measure, either naively or disingenuously, as necessary to curb increasing rates of drug overdose deaths. But there is not a shred of evidence that these laws are effective at reducing overdose fatalities.”) (emphasis added).

who distribute drugs to be charged,<sup>204</sup> without evidence that the additional charge of Drug Delivery Resulting in Death under Section 2506 does any more to reduce the number of drug overdose deaths.<sup>205</sup> If the legislature sincerely wants to achieve this purpose, it should use taxpayer funds in more efficient ways that are actually proven to reduce the number of drug overdose deaths.<sup>206</sup>

### 1. Drug Education Programs

One way to decrease the number of drug overdose deaths in Pennsylvania is to increase funding for overdose education programs. These programs include Naloxone education and training programs.<sup>207</sup> Naloxone is a drug that can reverse opioid overdoses and prevent death.<sup>208</sup> Currently, Pennsylvanians can obtain Naloxone from a pharmacy with a prescription from their family doctor or by using the standing order.<sup>209</sup> The standing order was issued by the Pennsylvania Physician General, and is a prescription for the general public to obtain Naloxone.<sup>210</sup>

Despite the standing order, many individuals do not know they are able to obtain the drug, and even if they do obtain it, do not know how to use it.<sup>211</sup> Training courses designed to instruct individuals on how to use Naloxone can be found online.<sup>212</sup> While increasing educational efforts will not deter drug dealers from selling drugs, they could help prevent thousands of overdose deaths each year.<sup>213</sup>

### 2. “Warm Hand-Off” Program

Additionally, a second way to decrease overdose deaths is to expand the “Warm Hand-Off” program in Pennsylvania.<sup>214</sup> The Pennsylvania Department of Drug and Alcohol Programs (“DDAP”)<sup>215</sup> started the Warm

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204. See 35 PA. STAT. § 780-113 (West 2019).

205. See *supra* note 203 and accompanying text.

206. See *infra* Section III.C. While there are a number of other proposed alternatives to help battle addiction, those alternatives are outside the scope of this Comment.

207. Sophie Stone, *Naloxone, What is it, How to Get It, and How to Use It*, PA. GOVERNOR TOM WOLF (May 17, 2016), <https://www.governor.pa.gov/blog-naloxone-what-it-is-how-to-get-it-and-how-to-use-it/>.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Warm Hand-Off*, PA DEP’T OF DRUG & ALCOHOL PROGRAMS, <https://www.ddap.pa.gov/Pages/Warm-Hand-Off.aspx> (last visited Apr. 21, 2019).

215. The Pennsylvania Department of Drug and Alcohol Programs was originally part of the Department of Health but was separated into its own department in 2012 as part of the Commonwealth’s strong commitment to reducing drug and alcohol addiction. DDAP’s

Hand-Off program in 2016 to assist overdose survivors treated in emergency departments by offering to transfer them directly to drug treatment facilities.<sup>216</sup> The logic behind the program follows care provided by medical professionals after other catastrophic health emergencies—such as a heart attack.<sup>217</sup> Following administering emergency care to save the lives of individuals having a heart attack is the second step of ensuring the individuals get the follow up care with a cardiologist that they need.<sup>218</sup> With the Warm Hand-Off program, Pennsylvania is recognizing that there is also a necessary second step of treatment following an overdose.<sup>219</sup>

In 2017, the Warm Hand-Off program was in effect in Harrisburg and a small number of other communities.<sup>220</sup> As of August 2017, Dauphin County offered treatment through the Warm Hand-Off program to 116 individuals who survived an overdose.<sup>221</sup> Of those 116 individuals, 50 accepted the offer and started treatment through the program.<sup>222</sup> The 66 individuals that declined treatment were paired with a caseworker who discussed treatment options with the individuals and their families.<sup>223</sup> In early 2018, DDAP held regional summits throughout Pennsylvania to brainstorm how to implement and improve Warm Hand-Off programs in different counties.

For the Warm Hand Off program to be successful across Pennsylvania, the state would also have to invest either in expanding existing treatment facilities or creating additional facilities.<sup>224</sup> The lack of available and affordable treatment facilities is a nationwide problem.<sup>225</sup> According to the Substance Abuse and Mental Health Services Administration, only 11% of people who needed drug and alcohol treatment in 2013 were able to obtain treatment.<sup>226</sup> Increasing available treatment facilities, in combination with the Warm Hand Off program, will

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mission is to “to engage, coordinate and lead the Commonwealth of Pennsylvania’s effort to prevent and reduce drug, alcohol and gambling addiction and abuse; and to promote recovery, thereby reducing the human and economic impact of the disease.” *About DDAP*, PA DEP’T OF DRUG & ALCOHOL PROGRAMS, <https://www.ddap.pa.gov/Pages/About.aspx> (last visited Aug. 1, 2019).

216. *Id.*

217. *Spotlight: Pennsylvania’s Warm Hand-Off*, ADDICTION POLICY FORUM (July 2018), <http://tinyurl.com/y2rlrkc4>.

218. *Id.*

219. *Id.*

220. David Wenner, ‘Warm Handoffs’ Working in Pa. to Connect Overdose Survivors with Treatment, PENN LIVE (Aug. 15, 2017), <http://tinyurl.com/y2jdgodq>.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Liz Szabo, *Addiction Treatment Hard to Find, Even as Overdose Deaths Soar*, USA TODAY (May 14, 2015), <https://bit.ly/31iIRFR>.

not likely deter drug dealers from selling drugs. The program could, however, save the lives of thousands of Pennsylvanians and drastically reduce the demand for drugs.

### 3. Drug Courts

One final way to combat overdose deaths is to expand the drug court programs across the state. Pennsylvania drugs courts allow individuals to receive treatment instead of incarceration for certain crimes.<sup>227</sup> Drug courts are described in Pennsylvania as “combin[ing] intensive judicial supervision, mandatory drug testing, treatment and incentives to help offenders with substance abuse problems break the cycle of addiction and crime.”<sup>228</sup> While each drug court across Pennsylvania works differently, they are all guided by a nationally recognized framework that includes ten key initiatives, such as access to treatment and frequent drug and alcohol testing.<sup>229</sup> The majority of studies conducted to assess the effectiveness of drug courts show that they are effective in reducing recidivism.<sup>230</sup> Pennsylvania drug courts hold individuals distributing drugs accountable for their actions while also addressing the underlying problem of the addiction, which can be effective at reducing drug overdose deaths.<sup>231</sup>

Currently, Pennsylvania has drug courts in 45 of its 67 counties.<sup>232</sup> However, the drug courts do not have sufficient funding to accept all of the individuals that qualify for the programs.<sup>233</sup> When all costs are considered, drug courts save the state thousands of dollars per defendant.<sup>234</sup> Unlike the long prison sentences defendants convicted under

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227. *Drug Courts*, THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, <http://www.pacourts.us/judicial-administration/court-programs/drug-courts> (last visited Apr. 21, 2019).

228. *Id.*

229. *Id.*

230. Edward J. Latessa & Angela K. Reitler, *What Works in Reducing Recidivism and How Does it Relate to Drug Courts?*, 41 OHIO N. U. L. REV. 757, 767–68 (2015). Recidivism is defined in the criminal law context as “the repetition of criminal conduct by a person who had been earlier arrested and punished for such conduct.” *Recidivism*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

231. *Id.*

232. *See Drug Courts*, *supra* note 227.

233. *See* Colin Deppen, *How do Drug Courts Work? Are They Effective? A Look at the Revolution Sweeping the U.S. Legal System*, PENN LIVE (Jun. 22, 2016), [http://www.pennlive.com/news/2016/06/how\\_do\\_drug\\_courts\\_work\\_are\\_th.html](http://www.pennlive.com/news/2016/06/how_do_drug_courts_work_are_th.html) (reporting that many who would stand to benefit from drug court programs “fall through the cracks, with state funding for the drug court only covering certain types of offenses.”).

234. *See* Latessa & Reitler, *supra* note 230, at 776 (discussing an Oregon drug court study that found that “[d]ue to fewer new crimes and reduced incarceration, the average cost savings per drug court participant was \$6,812; this figure increases to \$16,933 when victimization costs are included”); *see also Do Drug Courts Work? Findings from Drug Court Research*, NAT’L INST. OF JUSTICE, <https://nij.gov/topics/courts/drug->

Section 2506 may serve,<sup>235</sup> defendants enrolled in drug courts get the drug addiction treatment they need.<sup>236</sup> Treatment has a real effect on lowering the number of drug overdose deaths, unlike convicting defendants under Section 2506.<sup>237</sup>

Drug courts allow defendants to focus on beating their addictions and force them to work on improving their lives.<sup>238</sup> One defendant, Dylan, explained that “[d]rug court changed my life.” Dylan broke his neck when he was 13 years old, and was prescribed prescription painkillers.<sup>239</sup> Like so many others, this prescription turned into a crippling heroin addiction.<sup>240</sup> During his fight for sobriety, Dylan was in and out of jail, and attempted rehab.<sup>241</sup> When he relapsed again, he told the court to lock him up; however, Dylan explained “[the drug court administrators] saw in me something I did not see in myself.”<sup>242</sup> After completing drug court, Dylan celebrated two years of sobriety in November 2018.<sup>243</sup> Imprisoning addicts typically does not help address their underlying addiction. Participation in drug courts, however, allow addicts to battle their addiction and make meaningful changes to their lives.

#### IV. CONCLUSION

Pennsylvania’s current approach to reducing the number of drug overdose deaths, Section 2506, is ineffective and often punishes the wrong individuals.<sup>244</sup> As it stands, drug addicts may face imprisonment of up to 40 years for simply sharing drugs with a friend who overdoses and may never receive the possibility of treatment.<sup>245</sup> This approach is very costly

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courts/Pages/work.aspx (last updated May 1, 2018) (“Compared to traditional criminal justice system processing, treatment and other investment costs averaged \$1,392 lower per drug court participant. Reduced recidivism and other long-term program outcomes resulted in public savings of \$6,744 on average per participant (or \$12,218 if victimization costs are included).”).

235. 18 PA. STAT. AND CONS. STAT. ANN. § 2506(b)(1) (West 2019).

236. See *Drug Courts*, *supra* note 227.

237. DRUG POLICY ALLIANCE, *supra* note 127, at 51–52.

238. Anne Danahy, ‘Drug Court Changed My Life.’ *Counties Turn To Courts As One Way To Battle Opioids*, WPSU PENN STATE (Sept. 27, 2018), <https://tinyurl.com/y3ucyqz7> (“If [defendants] do go into the Drug Court program, that means . . . meeting with the judge every other week, getting treatment, seeing their probation officer, going to self-help meetings. And getting frequent drug or alcohol tests or wearing a patch that can detect use. Participants are in the program for an average of 18 months.”).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. See *supra* Part III.

245. See *supra* Section II.A.

and does nothing to address the drug addiction epidemic in Pennsylvania.<sup>246</sup> Neither a more lenient nor strict liability approach would increase Section 2506's effectiveness.<sup>247</sup>

Reliance on Section 2506 is ultimately unnecessary because Pennsylvania's current drug distribution laws can effectively punish individuals guilty of illegally delivering drugs.<sup>248</sup> The funds currently used to investigate overdose deaths as murders, prosecute defendants, and incarcerate defendants under Section 2506 should instead be used to combat addiction in a meaningful way, such as state funded rehabilitative programs.<sup>249</sup> By treating drug addicts as humans with a disease instead of as criminals, Pennsylvania can drastically reduce the number of lives lost to drug overdoses.

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246. *See supra* Section III.C.

247. *See supra* Section III.A, B.

248. *See supra* Section III.C.

249. *See supra* Section III.C.