



OHIO PROSECUTING ATTORNEYS ASSOCIATION

196 EAST STATE STREET • SUITE 200 • COLUMBUS, OHIO 43215 • TELEPHONE 614/221-1266 • FAX 614/221-0753 • WWW.OHIOPA.ORG

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Executive Director

December 9, 2019

Ms. Sara Andrews, Executive Director
Ohio Criminal Sentencing Commission
65 South Front Street, 5th Floor
Columbus, Ohio 43215

Executive Director Andrews - Sara -

I write to you in response to the troubling letter that was recently sent to the Criminal Sentencing Commission regarding the use of prosecutor discretion to selectively prosecute some individuals for involuntary manslaughter for causing an overdose death.

As an initial matter, it is worth noting a few things about the authors of the letter. Only one of the authors lives and works full-time in Ohio. Two of the authors are associated with centers at their law schools that have received millions of dollars in funding from the Charles Koch Foundation. Two other authors are associated with a center at Northeastern University School of Law that lists the Open Societies Foundation as one of its primary funders and the ACLU as one of its partners. A fifth author is currently a visiting professor at Ohio State's Drug Enforcement and Policy Center, one of the centers funded by the Charles Koch Foundation. The Koch Foundation, the Open Societies Foundation, and the ACLU openly support efforts to defelonize and/or decriminalize drug possession and drug use in the United States. The fact that the letter was sent by a group of individuals who do not call Ohio home, along with a series of uninformed assertions in the letter, raises serious questions about whether the authors understand the practical experience of those in the trenches fighting drug trafficking and drug abuse. The fact that the authors of the letter are funded and supported by organizations that openly call for defelonizing and/or decriminalizing the use of drugs raises serious questions about their objectivity, impartiality, and agenda.

Substantively, the authors admit that they do not necessarily understand what is going on in these cases. Yet they make a series of conclusive, but wholly uninformed, assertions about what they view as an ineffective and dangerous use of involuntary manslaughter charges in overdose death cases. The letter is based on flawed assumptions, a flawed understanding of the purposes of felony sentencing in Ohio, and flawed logic.

Flawed Assumptions

The letter assumes that "rather than using evidence-based treatment and intervention to stem the opioid crisis, critical resources are being spent on prosecuting and incarcerating people who are struggling with substance abuse disorder."

Evidence-based treatment already exists in Ohio and is used extensively. Ohio prosecutors have been at the forefront of addressing opiate addiction and combatting drug trafficking in our state. We have been instrumental in the creation of diversion programs for drug addicted offenders, the creation and implementation of drug courts and other specialized dockets, and the use of medication assisted treatment. We have supported policies to enable intervention in lieu of conviction, record sealing, and the alleviation of collateral consequences for addicts who are in recovery. We currently support House Bill 1 that would expand intervention in lieu of conviction and record sealing even further. To pretend that our prosecutors are wasting critical resources is inaccurate and disingenuous.

What the authors really want is a one-size-fits-all law to limit prosecutorial and/or judicial discretion under the guise of “evidence based recommendations.” They would prohibit involuntary manslaughter charges and/or limit sentencing authority regardless of the individual facts of the case. They would prohibit a prosecutor from charging a drug trafficker with involuntary manslaughter when he mixed fentanyl with his heroin or meth in order to attract more buyers by offering them a better high. They would prohibit a judge from sentencing such a person to prison. They would advance such a policy in the name of public safety. Despite another baseless assertion in the letter that prosecutors have pursued these charges without any statewide discussion, Ohio prosecutors have discussed this topic in detail, our Association has offered several trainings for our own membership, and our members have trained others nationally on the topic. Best practices already exist and are in use.

The letter states that “Ohio pursues more drug-induced homicide charges than all but one other state in the Country” and that the authors “are deeply concerned that prosecutors’ use of this dangerous policy has grown and is continuing to expand in Ohio.”

This assumption appears to be based on “news reports” rather than on any serious academic research. It also belies the facts. Ohio was ground zero for the opiate crisis. We have, as the authors admit, one of the highest overdose death rates in the nation. Drug abuse and drug trafficking are extensive here. Yet the letter is intended to give the impression that Ohio prosecutors are using involuntary manslaughter charges overzealously. I urge the commission to consider the attached document that is based in fact rather than conjecture.

Twenty one states have specific statutes regarding overdose homicides. The United States Code prohibits drug trafficking with a specification for serious physical harm, the sentence for which can be up to twenty years. Ohio is hardly alone in its efforts to combat drug trafficking through the use of overdose death homicide charges. As the attached document shows, prosecutors use these charges selectively based on individual facts and circumstances. Placing arbitrary limits on the use of this tool and the discretion of our elected officials is neither wise nor necessary. It would be a step backward in the fight against drug trafficking and a detriment to public safety.

Flawed Understanding

The letter states that progress in the fight against addiction is “undermined by punitive prosecutions of accidental overdose deaths, especially since study after study undermines the proposition that harsh criminal punishment helps deter or solve substance use disorder.” It states that “limited state resources are going to lengthy periods of *unproductive* incarceration, instead of being used for helpful and necessary drug treatment.” This suggests that the only purpose of our criminal justice system is treatment and rehabilitation.

As criminal justice experts the authors of the letter know that the first two purposes of felony sentencing in Ohio are to protect the public from future crime by the offender and others and to punish the offender. Their letter would have us ignore the first two purposes and focus solely on treatment and rehabilitation. Their letter would have us pretend like there is not a deceased victim who no longer has the opportunity to seek treatment and rehabilitation due to the actions of another. They would have us believe that the only “directly impacted” person is the person being prosecuted, and ignore the directly impacted family and friends of the deceased. They would have us ignore the direct impact on the communities to which many F4/F5 drug traffickers are returned after being placed on community control as a result of other recently enacted one-size-fits-all policies. While punishment and incarceration might be distasteful to academics, there is a victim who lost his or her life, most likely family and friends who lost a loved one, and a community that deserves to prevent the offender from causing more death.

Flawed Logic

The letter states that “it is clear that often the people who are being prosecuted [for involuntary manslaughter] are individuals who struggle with substance use themselves.”

The whole purpose of the letter is to seek the Sentencing Commission's assistance in gathering data and examining this topic. Yet, based only on news reports, the authors assert that it is "clear" that "often" the people being prosecuted are struggling with substance use. Even if true, the argument rests on the logic that people with substance use disorder aren't culpable for their own actions and, because they are suffering from a disease, should not be held accountable. By extension, prosecutors should no longer be able to charge an alcoholic with aggravated vehicular homicide when he gets into a car and causes the death of another. Under the authors' logic we should no longer punish or incarcerate such a person because alcoholism is a disease that requires only treatment and rehabilitation. While this is the logical extension of the authors' argument, I doubt many would agree with such a policy or believe that it would promote public safety. Ohio prosecutors certainly do not. While substance use disorder, like alcoholism, may be a disease, it does not and should not absolve people from accountability when they put others' lives at risk. To suggest that it should is dangerous.

Finally, the letter cites Ohio's "Good Samaritan" statute as the type of effective policy that Ohio *should* be pursuing. What the authors seem not to know, perhaps because they do not live in Ohio, is that the Good Samaritan statute itself often leads to overdose deaths. Because individuals who use the Good Samaritan statute are immune from arrest, there is often nothing that an emergency responder can do for the person once they have reversed the overdose. Rather than follow through with what is required by the statute, most addicts simply return to drug use, many overdose again, and some die. Because they are not brought into a system that can connect them to treatment, monitor their treatment, and encourage progress, they are on their own to seek and obtain recovery. While arrest and possible prosecution might seem distasteful to academics, people who are brought into a system that can connect them to and monitor treatment are often, practically speaking, the lucky ones. We should be resistant to the authors' "feel good" logic. Just because something feels good doesn't mean it is the right thing to do.

Ultimately, accountability for drug dealers and others who provide or corrupt others with drugs may not be acceptable to academics but accountability is what victims' families and the public deserve, and it is what justice demands. We urge your skeptical consideration of their request to place arbitrary limits on the discretion of our elected officials.

Respectfully,



Louis Tobin
Executive Director

LT:dpm

Clermont

Year	Overdose Deaths	Involuntary Manslaughter
2019	41 (Through August)	8 Total adjudications since 2013
2018	68	
2017	76	

Cuyahoga

Year	Overdose Deaths	Involuntary Manslaughter ¹
2019	623 (Through Dec. 5)	7
2018	551	8
2017	727	7
2016	666	9
2015	370	10

Franklin

Year	Overdose Deaths	Involuntary Manslaughter
2019	389 (Through August)	2
2018	526	7
2017	526	12
2016	353	7
2015	325	1

Hamilton

Year	Overdose Deaths	Involuntary Manslaughter
2019	567	Hamilton County does not specifically track this. They estimate 10 cases per year.
2018	468	
2017	403	

Summit

Year	Overdose Deaths	Involuntary Manslaughter ²
2019	141	8
2018	131	9
2017	232	15
2016	299	19
2015	192	12

¹ Cases may involve more than one defendant.

² Of these 63 adjudications, Summit County estimates that 60 were the result of a plea.