

UNDERSTANDING AND CHALLENGING THE LAW: PENNSYLVANIA AND FEDERAL DRUG DELIVERY RESULTING IN DEATH (DDRD) STATUTES DECODED

Presenters:

- Brian McNeil, Appellate Public Defender and Intern Coordinator, York County (PA) Public Defender's Office
- Andrea Harris, Assistant Federal Public Defender, Western District of Virginia

Understanding & Challenging the Law: Pennsylvania and Federal DDRD Statutes Decoded

Defending Drug Overdose Homicides in Pennsylvania
November 6, 2019

Brian McNeil, Public Defender, Appellate Unit, York Co. Public Defender
Andrea Harris, Asst. Federal PD, Western District of Virginia

I. Pennsylvania Drug Delivery Resulting In Death Statute

18 Pa. C.S.A. § 2506 (2014)

It is a felony of the first degree if a person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance ... and another person dies as a result of using the substance.

II. Federal Drug Statutes

A. Most commonly used federal drug statutes include the following:

- 21 USC § 841 Prohibits the manufacture, distribution or dispensing of, and possession with intent to do so, controlled substances.
- 21 USC § 846 Prohibits attempts and conspiracies to manufacture, distribute, dispense, or possess with intent to do so, controlled substances
- 21 USC § 952 Prohibits the importation of controlled substances
- 21 USC § 953 Prohibits the exportation of controlled substances
- 21 USC § 963 Prohibits attempts and conspiracies to import/export controlled substances.

The penalty structures for these and other drug crimes are set out in 21 USC § 841(b) and 21 U.S.C. § 960(b).

B. Sentencing Enhancements

The minimum and maximum statutory penalties are driven by the type and quantity of the drug involved, but may be increased if the defendant has a prior “serious drug felony” or “serious violent felony” pursuant to 21 USC § 851.

The minimum and maximum statutory penalties may also be increased if the offense involved “**death or serious bodily injury.**”

If “death or serious bodily injury results from the use of the substance,” the following enhanced penalties apply:

Statutory Provisions	Standard Penalty	Enhanced Penalty for Death/SBI
21 USC § 841(b)(1)(A) 21 USC § 960(b)(1)	<ul style="list-style-type: none"> 10 years to Life With one 851, 15 years to life With two 851s, 25 years to life 	<ul style="list-style-type: none"> 20 years to Life With any 851, Life
21 USC § 841(b)(1)(B) 21 USC § 960(b)(2)	<ul style="list-style-type: none"> 5-40 years With 851, 10- Life 	<ul style="list-style-type: none"> 20 years to Life With any 851, Life
21 USC § 841(b)(1)(C) 21 USC § 960(b)(3)	<ul style="list-style-type: none"> 0-20 years With 851, 0-30 years 	<ul style="list-style-type: none"> 20 years to Life With 851, Life
21 USC § 841(b)(1)(E)	<ul style="list-style-type: none"> 0-10 years With 851, 0-20 years 	<ul style="list-style-type: none"> 0-15 years With 851, 0-30 years

LITIGATION TIP: The sentence enhancement is an element of the offense that must be alleged in the Indictment.

C. Death or Serious Bodily Injury

“...if death or serious bodily injury results from the use of such substance...”

1. Serious bodily injury

- Defined in 21 U.S.C. 802(25)
- Means bodily injury which involves:
 - (A) A substantial risk of death;
 - (B) Protracted and obvious disfigurement; OR
 - (C) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

2. Results from is not defined

- Relates to Causation
- Means but/for causation; *See Burrage v. United States*

D. *Burrage v. United States*, 134 S.Ct. 881 (2014)

Supreme Court granted *certiorari* to address two questions related to the enhanced penalty provisions of 21 U.S.C. § 841(b)(1)(C) for distribution of drugs when “death results” from such distribution.

Questions Presented:

1. Whether a person can be convicted for distribution of heroin causing death when the heroin that was distributed “contributed to” death by “mixed drug intoxication” but was not the sole cause of death?
2. Whether the crime of distribution of drugs causing death under 21 USC § 841 is a strict liability crime, without a foreseeability or proximate cause requirement?

First question addresses **Actual Cause**.

Second question addresses **Legal/Proximate Cause**.

- “The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause.” *Burrage*, 134 S.Ct. at 887.
- “When a crime requires ‘not merely conduct but also a specified result of conduct,’ a defendant generally may not be convicted unless his conduct is ‘both (1) the actual cause, and (2) the ‘legal’ cause (often called ‘proximate cause’) of the result.” *Id.*
- These two categories roughly coincide with the two questions on which *certiorari* was granted.

1. Actual Cause = But/For Cause

Holding: “[A]t least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 USC § 841[] unless such use is a but-for cause of the death or injury.” *Burrage v. United States*, 134 S.Ct. 881, 892 (2014)

- There must be proof “that the harm would not have occurred” in the absence of – that is, but for – the defendant’s conduct
- This is the *minimum* requirement for a finding of causation.
- **Contributing to the death** is not enough.
- The language Congress enacted requires death to “result from” use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed

- Court did not address the rare scenario where multiple sufficient causes independently, but concurrently, produce a result. (i.e., A fatally stabs B at the same time X independently shoots B in the head)

LITIGATION TIP: **If multiple drugs involved, try to build argument that the drug distributed by client only contributed to the death or serious bodily injury.**

2. Legal Cause = Proximate Cause

- Supreme Court declined to answer the proximate cause issue presented in *Burrage* because it ruled in Mr. Burrage's favor on the actual cause issue
- Supreme Court did discuss proximate cause in *Paroline v. United States*, 134 S.Ct. 1710 (2014)
- Only some actual causes – those with a “sufficient connection to the result” – are proximate causes
- Proximate cause is often explained in terms of **foreseeability** or the scope of the risk created by the predicate conduct
- See *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010) for extended discussion of causation.
- ***United States v. Patterson***, 38 F.3d 139 (4th Cir. 1994)
 - Held that plain language of § 841(b)(1)(C) does not require a finding that the death resulting from the distribution was a reasonably foreseeable event
 - Statute puts drugs dealers and users on notice that their sentence will be enhanced if people die from using the drugs they distribute
 - Affirmed most recently in ***United States v. Alvarado***, 816 F.3d 242 (4th Cir. 2016)
- ***United States v. Robinson***, 167 F.3d 824 (3rd Cir. 1999)
 - Third Circuit adopted the reasoning of *Patterson*, holding that Congress' language is “plain and unambiguous” and does not require proof that the defendant knew or should have known that death would result
 - “Congress recognized that the risk [of death or serious bodily injury] is inherent in the product and thus it provided that persons who distribute it do so at their peril”
 - Recently considered favorably by Third Circuit in unpublished opinion of *United States v. O'Brien*, 738 Fed. Appx. 38 (3rd Cir. 2018).
- ***United States v. Harden***, 893 F.3d 434 (7th Cir. 2018)
 - Seventh Circuit adopts reasoning of *Patterson*, *Robinson*, and *Burkholder* that no proximate causation requirement because:

- Statutory language does not require proof of proximate cause and use of term “results from” rather than “cause” does not imply common law requirement of proximate cause
 - Policy of strict liability when death occurs fits the statutory language and its evident purpose due to the extremely hazardous nature of drug distribution
 - In fn 1, 7CCA notes that *Hatfield’s* discussion of proximate cause was dicta.
- ***United States v. Burkholder***, 816 F.3d 607 (10th Cir. 2016)
 - Question: whether jury must find that the victim’s death was a foreseeable result of the defendant’s drug-trafficking offense?
 - 2:1 decision holding that Section 841 required only proof of but-for causation and did not require showing of proximate causation (or foreseeability of the result).
 - **Dissent:** not convinced that “results from” language unambiguously reveals Congress’ intent to “forgo a proximate-cause requirement” and impose strict liability on criminal defendants
 - Cert. denied January 9, 2017
- Many circuits have interpreted identical “death results” language in other statutes to require not just actual causation but proximate causation
 - A few examples:
 - *United States v. Harris*, 701 F.2d 1095 (4th Cir. 1983)
 - 18 USC § 241 (conspiracy to violate civil rights) (“if death results” provision requires actual causation and proximate causation – that is, “death foreseeably and naturally results from the rights-violating conduct”)
 - *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979)(18 USC § 242)
 - *United States v. Marler*, 756 F.2d 206, 215-216 (1st Cir. 1985)(18 USC § 242)
 - *United States v. Martinez*, 588 F.3d 301, 317-18 (6th Cir. 2009)(18 USC § 1347)
 - *United States v. Spinney*, 795 F.2d 1410, 1415-16 (9th Cir. 1986)
 - *United States v. Woodley*, 136 F.3d 1399, 1405-06 (10th Cir. 1998) (18 USC § 245 violent interference with enjoyment of public facility based on race)
 - Also from the Third Circuit:
 - *United States v. Matusiewicz*, 165 F. Supp.3d 166 (D. Del. 2015)
 - Federal interstate stalking and cyberstalking case required proof that victim’s death was reasonably foreseeable result of the particular offense and that her death could be expected to follow as a natural consequence of the particular offense

LITIGATION TIP: **Ask for a jury instruction on whether the death was a foreseeable result. Not likely to get one in the 3CCA but preserve the issue for appeal.**

II. Federal Plea Negotiations/Sentencing Issues

A. Plea Agreements

1. Stipulation – United States Sentencing Guideline (USSG) § 1B1.2(c)

- A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- Better than conviction of greater offense because the defendant can at least argue for a sentence below the guideline range (and below 20 years) based on the § 3553(a) factors.

2. Standards for Acceptance of Plea Agreements – USSG § 6B1.2

- Court may accept agreement under Rule 11(c)(1)(B) or (C) if the court is satisfied either that:
 - The recommended/agreed sentence is within the applicable guideline range
 - OR
 - (A) the recommended/agreed sentence is outside the applicable guideline range for justifiable reasons AND
 - (B) those reasons are set forth with specificity in the statement of reasons form

3. Sessions Memo – March 20, 2018

- Encourages prosecutors consider “every lawful tool at their disposal” and to pursue capital punishment “in appropriate cases” to combat the opioid epidemic.

B. Federal Sentencing Guideline Base Offense Levels:

Guideline	Base Offense Level	Applies If:
2D1.1(a)(1)	43	<ul style="list-style-type: none"> • Conviction under 21 USC § 841(b)(1)(A)-(C) or 21 USC § 960(b)(1)-(3) • Death or Serious Bodily Injury Resulted From Use • One or More Prior Convictions For Similar Offense
2D1.1(a)(2)	38	<ul style="list-style-type: none"> • Conviction under 21 USC § 841(b)(1)(A)-(C) or 21 USC § 960(b)(1)-(3) • Death or Serious Bodily Injury Resulted From Use

2D1.1(a)(3)	30	<ul style="list-style-type: none"> • Convicted under 21 USC § 841(b)(1)(E) or 21 USC 960(b)(5) • Death or Serious Bodily Injury Resulted From Use • One or More Prior Convictions For Similar Offense
2D1.1(a)(4)	26	<ul style="list-style-type: none"> • Convicted under 21 USC § 841(b)(1)(E) or 21 USC 960(b)(5) • Death or Serious Bodily Injury Resulted From Use

NOTE: USSG § 1B1.2(a): Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the **offense of conviction**.

1. Offense of conviction

- The U.S. Sentencing Commission’s view is that the “offense of conviction” language limits the application of these offense levels to cases where death or serious bodily injury is proved beyond a reasonable doubt by plea or to the factfinder. *See* USSG App. C, amend. 123 (effective Nov. 1, 1989) (“[t]he purpose of this amendment [limiting the application of §§ 2D1.1(a)(1), (a)(2)] is to provide that subsections (a)(1) and (a)(2) apply only in the case of a conviction under circumstances specified in the statutes cited”)¹
- Before *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the circuit courts applied *Apprendi* to solve the issue of whether the “offense of conviction” language limited the application of these enhancements to such cases or whether they may be applied after mere judicial fact finding. This resulted in a circuit split.
- After *Alleyne*, the Seventh Circuit held that “§2D1.1(a)(2) applies only when a resulting death (or serious bodily injury) was an element of the crime of conviction, proven beyond a reasonable doubt or admitted by the defendant. *United States v. Lawler*, 818 F.3d 281 (7th Cir. 2006).

2. Serious bodily injury

- Defined in **Comment 1(L) of USSG § 1B1.1**.
- Means injury involving:
 - Extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty;
 - Requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.

¹ Amendment 727 added § 2D1.1(a)(3)-(4) as a response to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub.L. 110-425. “[T]he amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance.” The Amendment effective date was November 1, 2009.

- Also deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.
- This **definition differs from the statutory definition** under 21 U.S.C. § 802(25).
 - **Similar:** both apply to protracted impairment of the function of a bodily member, organ, or mental faculty
 - **Different:** substantial risk of death vs. extreme physical pain or requiring medical intervention
- Courts have not addressed whether the “serious bodily injury” enhancement under USSG § 2D1.1(a)(1)-(4) is triggered by the guidelines definition or the statutory definition.
- However, one court noted in an unpublished opinion that the Supreme Court has held a statutory definition should be given preference over a general guideline definition. *See United States v. Alvarez*, 165 F.App’x 707, 708-09 (11th Cir. 2006) (citing *United States v. LaBonte*, 520 U.S. 751, 757 (1997), and *Stinson v. United States*, 508 U.S. 36, 38 (1993), for the propositions that the guidelines “must bow to the specific directives of Congress,” and “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute,” respectively).

LITIGATION TIP: **In federal court, it is often in the client’s best interest to negotiate a plea agreement that allows him to plead to the lesser included offense of simple distribution even if he has to stipulate to the higher base offense level since it at least allows for an argument for a sentence below 20 years.**

C. Federal Sentencing

1. Grounds for Departure (Policy Statement) – USSG § 5K2.1 Death

- If death resulted, the court may increase the sentence above the authorized guideline range.
- Loss of life does not automatically suggest a sentence at or near the statutory maximum.
- The sentencing judge must give consideration to matters that normally would distinguish among levels of homicide, such as the defendant’s state of mind and the degree of planning or preparation.
- Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken.

- The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious bodily injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the Chapter Two guidelines, already reflects the risk of personal injury.
- For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.
- *United States v. Nossan*, 647 F.3d 822, 824 (8th Cir. 2011) (5K2.1 departure to 60-month sentence where guideline range was 10-16 months was appropriate because Nossan set into motion a chain of events that risked serious injury or death, even when an intent to harm is entirely absent and the defendant was not directly responsible for the death)
- *United States v. Ihegworo*, 959 F.2d 26 (5th Cir. 1992) (District court departed upward based on 5K2.1 because a preponderance of the evidence clearly related Love's overdose death to the heroin the defendant was distributing)
- *United States v. Russow*, 2015 WL 1057513 (D.Conn. 2015) (Having found that the heroin that defendant sold to RP knowing of his addiction and his intended use by injection using defendant's "pens," resulted in RP's death, Court concluded an above-guideline sentence warranted under 5K2.1).

2. Restitution

- 18 USC § 3663, the Victim and Witness Protection Act (VWPA), is the restitution statute applicable to offenders convicted of offenses under the Controlled Substances Act
- 18 USC 3663(a)(2) defines "victim" to mean a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.
- However, after a listing of eligible drug offenses covered by this discretionary restitution statute, Subsection (a)(1)(A) specifically provides that **"in no case shall a participant in an offense under such sections [of the Controlled Substances Act] be considered a victim of such offense under this section"**
- **But See Cases Below With Very Narrow Reading of "Participant":**
 - *United States v. Mousseau*, 517 F.3d 1044, 1048 (8th Cir. 2008) (For the prohibition in Section 3661(a)(1) to apply, the defendant must be convicted of one of the offenses enumerated in the statute, and the person to whom restitution is due must have committed the *same* offense.

Mousseau was convicted of providing a controlled substance to a minor – an offense the minor did not commit, and, thus, was not a participant of).

- *United States v. Nossan*, 647 F.3d 822 (8th Cir. 2011) (Recipient of drug distributed by Nossan did not commit the offense of distributing a controlled substance – though he may have been guilty of other crimes, e.g., drug possession – and his estate was eligible for restitution)
- **Note:** There is no corresponding proscription in the mandatory restitution statute (18 USC § 3663A)
 - Seems likely to be an inadvertent omission
 - *United States v. Reifler*, 446 F.3d 65, 127 (7th Cir. 2006) (An order entered under the MVRA that had the effect of treating coconspirators as victims and thereby requiring restitution was a fundamental error adversely reflecting on the public reputation of the judicial proceedings)

D. Crime Victims' Rights Act

- Is the person (or estate of person) who overdosed a victim entitled to make Victim Impact Statement?
- 18 USC 3771 is the Crime Victims' Rights Act
 - Right to be reasonably heard at bond, plea, sentencing, or parole hearing (a)(4)
 - Right to full and timely restitution (a)(6)
 - Right to be informed of any plea bargain or deterred prosecution agreement (a)(9)
- CVRA defines “crime victim” to mean a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. 18 USC § 3771(e)(2).
- Does not explicitly contain the same exception found in 18 USC 3663 for participants in the offense

E. Good Samaritan Laws

- No federal Good Samaritan Law
- **35 P.S. 780-113.7 – Drug Overdose Response Immunity**
 - Effective December 1, 2014
 - Provides immunity from prosecution if:
 - Law enforcement only becomes aware of offense because person transported one experiencing a drug overdose event to law enforcement or a health care facility

- The person provided his or her own name and location and cooperated with law enforcement
 - The person remained with the person needing immediate assistance until law enforcement or emergency services personnel arrived
 - Does **not** apply to delivery or distribution of a controlled substance or to drug-induced homicide
- **Virginia Code 18.2-251.03** (Safe Reporting of Overdoses)
- Became effective July 1, 2015
 - Provides an affirmative defense to prosecution of an individual for unlawful possession of a controlled substance if *such* individual *seeks or obtains emergency medical attention for himself* or another person if either is experiencing an overdose by contemporaneously reporting such overdose to fire, EMS, police, or 911.
 - Does **not** apply to distributor of drug
 - Does **not** apply to the person overdosing if he or she is not the one who sought or obtained the medical services for him or herself. *Broadus v. Commonwealth*, -- S.E.2d --, 67 Va. App. 265 (Va. App. 2017)
- **DC Code § 7-403** (Seeking Health Care for an Overdose Victim)
- Effective: March 19, 2013
 - Provides that unlawful possession of a controlled substance will not be considered a crime or serve as the basis for revoking or modifying a person's supervision for a person who seeks health care for him or herself or for another person if reasonable belief that the person is experiencing an overdose
 - Does **not** apply to distributors of the drugs
 - Does contain a **mitigation provision** that states that seeking health care for someone having an overdose may be considered by the court as a mitigating factor in any criminal prosecution or sentencing for a drug offense other than the possession offenses to which the statute primarily applies
- **Maryland Code, Criminal Procedure, § 1-210**
- Effective: March 14, 2016
 - Provides immunity from prosecution to person reporting medical emergency and the person experiencing medical emergency for certain possession offenses
 - Does **not** apply to distributors

LITIGATION TIP:	Good Samaritan laws do not generally apply to distributors of drugs but may be a useful mitigation argument if client either called 911 or rendered or attempted to render aid to an individual suffering an overdose.
------------------------	---

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL
No. 1280 Session of
1989

INTRODUCED BY KASUNIC, MOEHLMANN, CALTAGIRONE, ALLEN, ANGSTADT, ARGALL, BELARDI, BILLOW, BIRMELIN, BLAUM, BOYES, BUSH, CAWLEY, CESSAR, CHADWICK, D. F. CLARK, CLYMER, COLAIZZO, CORNELL, COWELL, DAVIES, DeLUCA, DEMPSEY, DIETTERICK, DISTLER, DOMBROWSKI, DORR, FARGO, FARMER, FEE, FOX, GEIST, GIGLIOTTI, GODSHALL, GRUPPO, HAGARTY, HALUSKA, HAYDEN, HAYES, HERMAN, HOWLETT, JACKSON, JADLOWIEC, JOHNSON, KENNEY, KOSINSKI, LaGROTTA, LEH, LLOYD, MAIALE, MARKOSEK, MARSICO, MAYERNIK, McVERRY, MELIO, MERRY, MICOZZIE, MORRIS, MRKONIC, NAHILL, NAILOR, PICCOLA, PITTS, PRESSMANN, RAYMOND, RITTER, ROBBINS, ROBINSON, RYBAK, SAURMAN, SCHEETZ, SEMMEL, SERAFINI, S. H. SMITH, D. W. SNYDER, STABACK, STEIGHNER, STUBAN, TANGRETTI, E. Z. TAYLOR, THOMAS, TIGUE, TRELLO, VAN HORNE, WAMBACH, WESTON, J. L. WRIGHT, YANDRISEVITS, J. H. CLARK, G. SNYDER, LASHINGER, TRICH, BURD, O'BRIEN, LANGTRY, BATTISTO, F. TAYLOR, NOYE, FLICK, BARLEY, STISH, LINTON AND BROUJOS, APRIL 24, 1989

AS AMENDED ON THIRD CONSIDERATION, IN SENATE, DECEMBER 12, 1989

AN ACT

1 Amending Title 18 (Crimes and Offenses) of the Pennsylvania
2 Consolidated Statutes, defining the offense of drug delivery
3 resulting in death; and providing penalties.

4 The General Assembly of the Commonwealth of Pennsylvania
5 hereby enacts as follows:

6 Section 1. Title 18 of the Pennsylvania Consolidated
7 Statutes is amended by adding a section to read:

8 § 2506. Drug delivery resulting in death.

9 (a) General rule.--A person COMMITS MURDER OF THE THIRD
10 DEGREE who administers, dispenses, delivers, gives, prescribes,

<—

sells or distributes any controlled substance or counterfeit
controlled substance in violation of section 13(a)(14) or (30)
of the act of April 14, 1972 (P.L.233, No.64), known as The
Controlled Substance, Drug, Device and Cosmetic Act, to AND
another person who dies as a result of using the substance
commits murder of the third degree.

<—

<—

<—

(b) Mandatory minimum sentence.--A person convicted under
subsection (a) shall be sentenced to a mandatory minimum term of
imprisonment of five years and a fine of \$15,000, or such larger
amount as is sufficient to exhaust the assets utilized in and
the proceeds from the illegal activity.

(C) 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.

<—

(D) MANDATORY SENTENCING.--THERE SHALL BE NO AUTHORITY IN
ANY COURT TO IMPOSE ON AN OFFENDER TO WHICH THIS SECTION IS
APPLICABLE A LESSER SENTENCE THAN PROVIDED FOR HEREIN OR TO
PLACE THE OFFENDER ON PROBATION, PAROLE, WORK RELEASE OR
PRERELEASE OR TO SUSPEND SENTENCE. NOTHING IN THIS SECTION SHALL
PREVENT THE SENTENCING COURT FROM IMPOSING A SENTENCE GREATER
THAN PROVIDED HEREIN. SENTENCING GUIDELINES PROMULGATED BY THE
PENNSYLVANIA COMMISSION ON SENTENCING SHALL NOT SUPERSEDE THE

1 MANDATORY SENTENCES PROVIDED HEREIN. DISPOSITION UNDER SECTION
2 17 OR 18 OF THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC
3 ACT SHALL NOT BE AVAILABLE TO A DEFENDANT TO WHICH THIS SECTION
4 APPLIES.

5 (E) APPELLATE REVIEW.--IF A SENTENCING COURT REFUSES TO
6 APPLY THIS SECTION WHERE APPLICABLE, THE COMMONWEALTH SHALL HAVE
7 THE RIGHT TO APPELLATE REVIEW OF THE ACTION OF THE SENTENCING
8 COURT. THE APPELLATE COURT SHALL VACATE THE SENTENCE AND REMAND
9 THE CASE TO THE SENTENCING COURT FOR IMPOSITION OF A SENTENCE IN
10 ACCORDANCE WITH THIS SECTION IF IT FINDS THAT THE SENTENCE WAS
11 IMPOSED IN VIOLATION OF THIS SECTION.

12 (F) FORFEITURE.--ASSETS AGAINST WHICH A FORFEITURE PETITION
13 HAS BEEN FILED AND IS PENDING OR AGAINST WHICH THE COMMONWEALTH
14 HAS INDICATED AN INTENTION TO FILE A FORFEITURE PETITION SHALL
15 NOT BE SUBJECT TO A FINE. NOTHING IN THIS SECTION SHALL PREVENT
16 A FINE FROM BEING IMPOSED ON ASSETS WHICH HAVE BEEN SUBJECT TO
17 AN UNSUCCESSFUL FORFEITURE PETITION.

18 Section 2. This act shall take effect immediately.

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 635 Session of
1997

INTRODUCED BY GREENLEAF, O'PAKE, HECKLER, GERLACH, WAGNER,
COSTA, SALVATORE, TOMLINSON, ULIANA, RHOADES AND HART,
MARCH 7, 1997

SENATE AMENDMENTS TO HOUSE AMENDMENTS, FEBRUARY 9, 1998

AN ACT

1 Amending Title 18 (Crimes and Offenses) of the Pennsylvania
2 Consolidated Statutes, further providing for sentencing for
3 the offense of drug delivery resulting in death, for certain
4 assaults by prisoners, ~~for arson and related offenses~~ and for <—
5 wiretapping and electronic surveillance; and providing for a <—
6 ~~Special Independent Prosecutor's Panel~~. THE OFFICE OF <—
7 ATTORNEY GENERAL, THE GENERAL COUNSEL, SPECIAL INVESTIGATIVE
8 COUNSEL AND INDEPENDENT COUNSEL AND THEIR POWERS AND DUTIES.

9 The General Assembly of the Commonwealth of Pennsylvania
10 hereby enacts as follows:

11 Section 1. Sections 2506 and 2703 of Title 18 of the
12 Pennsylvania Consolidated Statutes are amended to read:

13 § 2506. Drug delivery resulting in death.

14 (a) General rule.--A person commits murder of the third
15 degree who administers, dispenses, delivers, gives, prescribes,
16 sells or distributes any controlled substance or counterfeit
17 controlled substance in violation of section 13(a)(14) or (30)
18 of the act of April 14, 1972 (P.L.233, No.64), known as The
19 Controlled Substance, Drug, Device and Cosmetic Act, and another
20 person dies as a result of using the substance.

1 (b) Mandatory minimum sentence.--A person convicted under
2 subsection (a) shall be sentenced to a [mandatory minimum term
3 of imprisonment of five years] minimum sentence of at least five
4 years of total confinement and a fine of \$15,000, or such larger
5 amount as is sufficient to exhaust the assets utilized in and
6 the proceeds from the illegal activity, notwithstanding any
7 other provision of this title or other statute to the contrary.

8 [(c) Proof of sentencing.--Provisions of this section shall
9 not be an element of the crime. Notice of the applicability of
10 this section to the defendant shall not be required prior to
11 conviction, but reasonable notice of the Commonwealth's
12 intention to proceed under this section shall be provided after
13 conviction and before sentencing. The applicability of this
14 section shall be determined at sentencing. The court shall
15 consider evidence presented at trial, shall afford the
16 Commonwealth and the defendant an opportunity to present
17 necessary additional evidence and shall determine, by a
18 preponderance of the evidence, if this section is applicable.]

19 (d) [Mandatory] Authority of court in sentencing.--There
20 shall be no authority in any court to impose on an offender to
21 which this section is applicable a lesser sentence than provided
22 for herein or to place the offender on probation, parole, work
23 release or prerelease or to suspend sentence. Nothing in this
24 section shall prevent the sentencing court from imposing a
25 sentence greater than provided herein. Sentencing guidelines
26 promulgated by the Pennsylvania Commission on Sentencing shall
27 not supersede the mandatory sentences provided herein.
28 Disposition under section 17 or 18 of The Controlled Substance,
29 Drug, Device and Cosmetic Act shall not be available to a
30 defendant to which this section applies.

(e) [Appellate review] Appeal by Commonwealth.--If a sentencing court refuses to apply [this section] subsection (b) where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with [this section] subsection (b) if it finds that the sentence was imposed in violation of [this section] subsection (b).

(f) Forfeiture.--Assets against which a forfeiture petition has been filed and is pending or against which the Commonwealth has indicated an intention to file a forfeiture petition shall not be subject to a fine. Nothing in this section shall prevent a fine from being imposed on assets which have been subject to an unsuccessful forfeiture petition.

§ 2703. Assault by prisoner.

(a) Offense defined.--A person who [has been found guilty and is awaiting sentence to imprisonment, or a person who has been sentenced to imprisonment for a term of years in] is confined in or committed to any local or county detention facility, jail or prison or any State penal or correctional institution or other State penal or correctional facility[,] located in this Commonwealth[,] is guilty of a felony of the second degree if he, while so confined or committed or while undergoing transportation to or from such an institution or facility in or to which he was confined or committed intentionally or knowingly, commits an assault upon another with a deadly weapon or instrument, or by any means or force likely to produce serious bodily injury. A person is guilty of this offense if he intentionally or knowingly causes another to come into contact with blood, seminal fluid, saliva, urine or feces

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 396 Session of
2011

INTRODUCED BY O'NEILL, CLYMER, EVERETT, FARRY, GRELL, GROVE,
HARKINS, MILLER, MOUL, PEIFER, PYLE, SCAVELLO, TALLMAN,
J. TAYLOR, VEREB, HESS, GILLESPIE, FABRIZIO, QUINN, KIRKLAND,
GEIST, MILNE, D. COSTA AND CALTAGIRONE, FEBRUARY 2, 2011

AS REPORTED FROM COMMITTEE ON JUDICIARY, HOUSE OF
REPRESENTATIVES, AS AMENDED, APRIL 12, 2011

AN ACT

1 Amending ~~Title~~ TITLES 18 (Crimes and Offenses) AND 42 (JUDICIARY
2 AND JUDICIAL PROCEDURE) of the Pennsylvania Consolidated
3 Statutes, further providing for drug delivery resulting in
4 death AND FOR SENTENCES FOR SECOND AND SUBSEQUENT OFFENSES. ←

5 The General Assembly of the Commonwealth of Pennsylvania
6 hereby enacts as follows:

7 Section 1. Section 2506 of Title 18 of the Pennsylvania
8 Consolidated Statutes is amended to read:

9 § 2506. Drug delivery resulting in death.

10 (a) [General rule] Offense defined.--A person commits
11 [murder of the third degree who] a felony of the first degree if
12 the person intentionally administers, dispenses, delivers,
13 gives, prescribes, sells or distributes any controlled substance
14 or counterfeit controlled substance in violation of section
15 13(a)(14) or (30) of the act of April 14, 1972 (P.L.233, No.64),
16 known as The Controlled Substance, Drug, Device and Cosmetic
17 Act, and another person dies as a result of using the substance.


1 (b) [Mandatory minimum sentence.--A person convicted under
2 subsection (a) shall be sentenced to a minimum sentence of at
3 least five years of total confinement and a fine of \$15,000, or
4 such larger amount as is sufficient to exhaust the assets
5 utilized in and the proceeds from the illegal activity,
6 notwithstanding any other provision of this title or other
7 statute to the contrary.] Penalty.--A person convicted under
8 subsection (a) shall be sentenced to a term of imprisonment
9 which shall be fixed by the court at not more than 40 years.

10 [(d) Authority of court in sentencing.--There shall be no
11 authority in any court to impose on an offender to which this
12 section is applicable a lesser sentence than provided for herein
13 or to place the offender on probation, parole, work release or
14 prerelease or to suspend sentence. Nothing in this section shall
15 prevent the sentencing court from imposing a sentence greater
16 than provided herein. Sentencing guidelines promulgated by the
17 Pennsylvania Commission on Sentencing shall not supersede the
18 mandatory sentences provided herein. Disposition under section
19 17 or 18 of The Controlled Substance, Drug, Device and Cosmetic
20 Act shall not be available to a defendant to which this section
21 applies.

22 (e) Appeal by Commonwealth.--If a sentencing court refuses
23 to apply subsection (b) where applicable, the Commonwealth shall
24 have the right to appellate review of the action of the
25 sentencing court. The appellate court shall vacate the sentence
26 and remand the case to the sentencing court for imposition of a
27 sentence in accordance with subsection (b) if it finds that the
28 sentence was imposed in violation of subsection (b).]


29 (f) Forfeiture.--Assets against which a forfeiture petition
30 has been filed and is pending or against which the Commonwealth

1 has indicated an intention to file a forfeiture petition shall
2 not be subject to a fine. Nothing in this section shall prevent
3 a fine from being imposed on assets which have been subject to
4 an unsuccessful forfeiture petition.

5 SECTION 2. SECTION 9714(G) OF TITLE 42 IS AMENDED TO READ: 
6 § 9714. SENTENCES FOR SECOND AND SUBSEQUENT OFFENSES.

7 * * *

8 (G) DEFINITION.--AS USED IN THIS SECTION, THE TERM "CRIME OF
9 VIOLENCE" MEANS MURDER OF THE THIRD DEGREE, VOLUNTARY
10 MANSLAUGHTER, AGGRAVATED ASSAULT AS DEFINED IN 18 PA.C.S. §
11 2702(A)(1) OR (2) (RELATING TO AGGRAVATED ASSAULT), RAPE,
12 INVOLUNTARY DEVIATE SEXUAL INTERCOURSE, AGGRAVATED INDECENT
13 ASSAULT, INCEST, SEXUAL ASSAULT, ARSON AS DEFINED IN 18 PA.C.S.
14 § 3301(A) (RELATING TO ARSON AND RELATED OFFENSES), KIDNAPPING,
15 BURGLARY OF A STRUCTURE ADAPTED FOR OVERNIGHT ACCOMMODATION IN
16 WHICH AT THE TIME OF THE OFFENSE ANY PERSON IS PRESENT, ROBBERY
17 AS DEFINED IN 18 PA.C.S. § 3701(A)(1)(I), (II) OR (III)
18 (RELATING TO ROBBERY), OR ROBBERY OF A MOTOR VEHICLE, DRUG
19 DELIVERY RESULTING IN DEATH AS DEFINED IN 18 PA.C.S. § 2506(A)
20 (RELATING TO DRUG DELIVERY RESULTING IN DEATH), OR CRIMINAL
21 ATTEMPT, CRIMINAL CONSPIRACY OR CRIMINAL SOLICITATION TO COMMIT
22 MURDER OR ANY OF THE OFFENSES LISTED ABOVE, OR AN EQUIVALENT
23 CRIME UNDER THE LAWS OF THIS COMMONWEALTH IN EFFECT AT THE TIME
24 OF THE COMMISSION OF THAT OFFENSE OR AN EQUIVALENT CRIME IN
25 ANOTHER JURISDICTION.

26 Section ~~2~~ 3. This act shall take effect in 60 days. 

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 112 Session of
2013

INTRODUCED BY VEREB, RAPP, BISHOP, BOBACK, K. BOYLE, V. BROWN,
D. COSTA, DAVIS, DEASY, GINGRICH, GROVE, HESS, HICKERNELL,
KORTZ, MACKENZIE, MAJOR, MCGEEHAN, MILLARD, R. MILLER,
O'NEILL, READSHAW, SANTARSIERO, SAYLOR, SCHLOSSBERG, SIMMONS,
TOOHIL, YOUNGBLOOD, MULLERY, MURT, GILLEN, COHEN, DAY, GRELL,
BRADFORD, NEILSON, QUINN AND FARRY, JANUARY 15, 2013

AS AMENDED ON THIRD CONSIDERATION, IN SENATE, JUNE 3, 2014

AN ACT

1 Amending ~~Title~~ TITLES 18 (Crimes and Offenses) AND 42 (JUDICIARY <--
2 AND JUDICIAL PROCEDURE) of the Pennsylvania Consolidated
3 Statutes, IN SEXUAL OFFENSES, FURTHER PROVIDING FOR DRUG <--
4 DELIVERY RESULTING IN DEATH; providing for the offense of
5 sexual assault by sports official, volunteer or employee of
6 nonprofit association; AND, IN SENTENCING, FURTHER PROVIDING <--
7 FOR SENTENCES FOR OFFENSES AGAINST INFANT PERSONS.

8 The General Assembly of the Commonwealth of Pennsylvania
9 hereby enacts as follows:

10 ~~Section 1. Title 18 of the Pennsylvania Consolidated~~ <--
11 ~~Statutes is amended by adding a section to read:~~

12 SECTION 1. SECTION 2506(B) OF TITLE 18 OF THE PENNSYLVANIA <--
13 CONSOLIDATED STATUTES IS AMENDED TO READ:

14 § 2506. DRUG DELIVERY RESULTING IN DEATH.

15 * * *

16 (B) PENALTY.--

17 (1) A PERSON CONVICTED UNDER SUBSECTION (A) SHALL BE
18 SENTENCED TO A TERM OF IMPRISONMENT WHICH SHALL BE FIXED BY

1 THE COURT AT NOT MORE THAN 40 YEARS.

2 (2) PARAGRAPH (1) SHALL NOT APPLY TO A PERSON CONVICTED
3 UNDER SECTION 2502(C) (RELATING TO MURDER) WHEN THE VICTIM IS
4 LESS THAN 13 YEARS OF AGE AND THE CONDUCT ARISES OUT OF THE
5 SAME CRIMINAL ACT.

6 * * *

7 SECTION 2. TITLE 18 IS AMENDED BY ADDING A SECTION TO READ:

8 § 3124.3. Sexual assault by sports official, volunteer or
9 employee of nonprofit association.

10 (a) Sports official.--Except as provided in section 3121
11 (relating to rape), 3122.1 (relating to statutory sexual
12 assault), 3123 (relating to involuntary deviate sexual
13 intercourse), 3124.1 (relating to sexual assault) and 3125
14 (relating to aggravated indecent assault), a person who serves
15 as a sports official in a sports program of a nonprofit
16 association or a for-profit association commits a felony of the
17 third degree when that person engages in sexual intercourse,
18 deviate sexual intercourse or indecent contact with a child
19 under 18 years of age who is participating in a sports program
20 of the nonprofit association or for-profit association.

21 (b) Volunteer or employee of nonprofit association.--Except
22 as provided in sections 3121, 3122.1, 3123, 3124.1 and 3125, a
23 volunteer or an employee of a nonprofit association having
24 direct contact with a child under 18 years of age who
25 participates in a program or activity of the nonprofit
26 association commits a felony of the third degree if the
27 volunteer or employee engages in sexual intercourse, deviate
28 sexual intercourse or indecent contact with that child.

29 (c) Definitions.--As used in this section, the following
30 words and phrases shall have the meanings given to them in this

[J-205-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 7 WAP 2002

Appellant

v.

GREGORY DAVID LUDWIG,

Appellee

: Appeal from the Order of the Court of
: Common Pleas of Allegheny County
: entered March 12, 2002 at No. CC
: 200114991.

: RESUBMITTED: September 27, 2004

OPINION

MR. CHIEF JUSTICE CAPPY¹

DECIDED: MAY 19, 2005

This appeal presents a constitutional challenge to a criminal statute, 18 Pa.C.S. §2506, "Drug delivery resulting in death," for vagueness, because the statute fails to sufficiently set forth the mental state required for criminal liability. Additionally, we are called upon to determine whether the trial court erred in granting Appellee Gregory Ludwig's Petition for Writ of Habeas Corpus based upon the Commonwealth's failure to establish a *prima facie* case under Section 2506. For the reasons that follow, we hold that Section 2506 is not unconstitutionally vague and that the applicable mental state for a conviction under the statute is malice. We further conclude, however, that the Commonwealth has failed to establish a *prima facie* case of malice under Section 2506.

Accordingly, we affirm the order of the trial court, granting Ludwig's Petition for Writ of Habeas Corpus with respect to the charge of Drug delivery resulting in death.

The facts underlying this appeal are not in dispute. On the evening of May 17, 2001, fifteen-year-old Brandy French (Brandy), eighteen-year-old Paula Wilson (Paula), and seventeen-year-old Michelle Maranuk (Michelle) discussed with one another their desire to consume the drug Ecstasy at an all-day concert that they would be attending the following day. After the conversation, Michelle contacted a recent acquaintance, nineteen-year-old Ludwig, and informed him that she was interested in purchasing Ecstasy for herself and two of her friends. Ludwig replied that he would be willing to sell Michelle three Ecstasy pills at a price of \$20 a pill and offered to meet her at the local Dairy Queen later that evening. Michelle relayed that information to Brandy and Paula, and the girls then arranged for Paula's boyfriend, Robert Sontag, to drive them to the Dairy Queen to meet Ludwig.

Upon arriving at the Dairy Queen, Ludwig entered the girls' car, and the entire group took a short drive. During the drive, Michelle took \$20 from Paula and Brandy and handed Ludwig \$60. In return, Ludwig supplied Michelle with three tablets of white double-stacked Mitsubishi Ecstasy.² Michelle kept all of the pills until the next day.

At approximately 4:00 pm the following afternoon, the three girls met in the ladies' room at the concert to take the Ecstasy. Michelle gave Paula and Brandy each a pill, but

(...continued)

¹ This appeal was reassigned to this author.

² "White double stacked Mitsubishi" refers to the fact that the pills were white in color, contained a double dose of Ecstasy, and were "stamped" with the Mitsubishi automobile emblem.

advised them to take only one-half of a pill, because it was double-dosed, and neither Paula nor Brandy had previously taken Ecstasy. The girls then ingested their pills, Michelle taking her whole pill and Paula and Brandy taking one-half of their respective pills. Paula and Brandy, however, believing that they had not experienced the full effects of the Ecstasy, returned to the ladies' room a short while later and consumed the remaining halves of their pills.³

Soon after consuming the second half of her pill, Brandy began to vomit. She also complained of a severe headache and became sluggish. After discussing the situation with some other friends they had met at the concert, Michelle, Paula, and their friends decided that they would take Brandy to the home of Lewis Hopkins (Lewis), a friend of Michelle's cousin, whom they had met at the concert.

Upon arriving at Lewis' home, the group carried Brandy, who was by that time semi-conscious, into the house and put her in a bed. The group then left Brandy in the bedroom and went to another part of the house. Lewis' mother, who was home at the time, inquired into Brandy's condition, but was told only that Brandy had been drinking at the concert and had become ill.

At approximately 9:30 p.m., Brandy began to have difficulty breathing. Although it was suggested that someone call an ambulance, an ambulance was not called because Brandy's breathing seemed to return to normal and Lewis' mother objected to an ambulance coming to her home for fear that it would tarnish her reputation. More than an

³ There is conflicting testimony regarding who possessed the two halves of the pills after Michelle originally provided the pills to the girls. Michelle testified that Paula held on to the remaining halves, and Paula testified that Brandy held on to her half.

hour later, however, Paula noticed that Brandy again was having difficulty breathing. Realizing that Brandy needed immediate medical attention, Michelle, Paula, and Lewis decided to take Brandy to a hospital. Brandy, however, stopped breathing when the group reached Lewis' driveway. At that point, Lewis' mother telephoned 911. After their arrival, police and paramedics took Brandy to a hospital. Subsequently, on May 20, 2001, Brandy died; an autopsy determined that Brandy's death was due to an overdose of Ecstasy.

As a result of these events, the Allegheny County Coroner's Office held an Open Inquest into Brandy's death. In August of 2001, the Coroner's office ultimately recommended that the District Attorney file charges of murder against Ludwig and Michelle. Subsequently, Ludwig was charged with one count of drug delivery resulting in death pursuant to Section 2506.⁴

On November 7, 2001, Ludwig filed a Petition for Writ of Habeas Corpus with the Court of Common Pleas of Allegheny County, arguing that Section 2506 is unconstitutionally vague in that the requisite mental element is too vaguely defined, and that even if the statute is not unconstitutionally vague, the Commonwealth had failed to present sufficient evidence to establish a *prima facie* case of the elements of Section 2506. The trial court granted Ludwig's petition on both grounds and dismissed the charge premised upon Section 2506. See Commonwealth v. Ludwig, 55 Pa. D. & C.4th 449 (Allegheny Co. 2002).

⁴ Ludwig was also charged with one count of delivery of a controlled substance, possession with intent to deliver, and possession. Michelle, however, was not charged with any criminal offense.

Specifically, in holding Section 2506 to be unconstitutionally vague, the trial court found that because the statute fails to sufficiently set forth the *mens rea* necessary for conviction, it is impossible to determine whether Section 2506 functions as a strict liability offense or a new version of third degree murder requiring a showing of malice. Id. at 459. Given this lack of clarity, the trial court determined that Section 2506 does not sufficiently define the conduct to be prohibited by the statute, and consequently, is unconstitutionally vague. Id. In the alternative, the trial court reasoned that even if Section 2506 functions as a new version of third-degree murder adequately setting forth a *mens rea* of malice, it would still grant Ludwig's petition because the Commonwealth had failed to present sufficient evidence to establish a *prima facie* case that Ludwig acted with malice. Id. at 465-467.

The Commonwealth appealed the trial court's decision to our Court which has jurisdiction pursuant to 42 Pa.C.S. §722(7), which provides that we shall have exclusive jurisdiction over an order of the court of common pleas holding a statute unconstitutional. We first consider the issue of whether Section 2506 is unconstitutionally vague.⁵

As a threshold matter, a statute is presumed to be constitutional and will only be invalidated as unconstitutional if it "clearly, palpably, and plainly violates constitutional rights." Commonwealth v. MacPherson, 752 A.2d 384, 388 (Pa. 2000)(citation omitted). Related thereto, courts have the duty to avoid constitutional difficulties, if possible, by

⁵ Analysis of the constitutionality of a statute, and whether the Commonwealth met its *prima facie* case under Section 2506, are both questions of law, therefore, our standard of review is de novo. Commonwealth v. MacPherson, 752 A.2d 384, 388 (Pa. 2000); Pa.R.A.P. 2111(a)(2). Our scope of review, to the extent necessary to resolve the legal questions before us, is plenary, i.e., we may consider the entire record before us. Buffalo Township v. Jones, 813 A.2d 659, 664 n.4 (Pa. 2002); Pa.R.A.P. 2111(a)(2).

construing statutes in a constitutional manner. Harrington v. Dept. of Transportation, Bureau of Driver Licensing, 763 A.2d 386, 393 (2000); see also 1 Pa.C.S. §1922(3) (setting forth the presumption that the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth). Consequently, the party challenging a statute's constitutionality bears a heavy burden of persuasion. MacPherson, 752 A.2d at 388.

Turning to the constitutional challenge raised in this appeal, as a general proposition, statutory limitations on our individual freedoms are reviewed by courts for substantive authority and content, in addition to definiteness or adequacy of expression. See, Kolender v. Lawson, 461 U.S. 352, 357 (1983). A statute may be deemed to be unconstitutionally vague if it fails in its definiteness or adequacy of statutory expression. This void-for-vagueness doctrine, as it is known, implicates due process notions that a statute must provide reasonable standards by which a person may gauge his future conduct, i.e., notice and warning. Smith v. Goguen, 415 U.S. 566, 572 (1974); Commonwealth v. Heinbaugh, 354 A.2d 244, 246 (Pa. 1976).⁶

Specifically with respect to a penal statute, our Court and the United States Supreme Court have found that to withstand constitutional scrutiny based upon a challenge of vagueness a statute must satisfy two requirements. A criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

⁶ Ludwig claims that Section 2506 is violative of both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. He does not, however, suggest that a different analysis under (continued...)

enforcement.” Kolender, 461 U.S. at 358; Commonwealth v. Mayfield, 832 A.2d 418, 422 (Pa. 2003); Commonwealth v. Mikulan, 470 A.2d 1339, 1342 (Pa. 1983); see also Heinbaugh, 354 A.2d at 246; see generally Goldsmith, THE VOID-FOR-VAGUENESS DOCTRINE IN THE SUPREME COURT, REVISITED, 30 Am. J. Crim. L. 279 (2003).

In considering these requirements, both High Courts have looked to certain factors to discern whether a certain statute is impermissibly vague. For the most part, the Courts have looked at the statutory language itself, and have interpreted that language, to resolve the question of vagueness. See Kolender, 461 U.S. at 358; Mayfield, 832 A.2d at 422; Commonwealth v. Cotto, 753 A.2d 217, 220 (2000). In doing so, however, our Court has cautioned that a statute “is not to be tested against paradigms of legislative draftsmanship,” Heinbaugh, 354 A.2d at 246, and thus, will not be declared unconstitutionally vague simply because the Legislature could have “chosen ‘clear and more precise language’” Id. (citation omitted). The Courts have also looked to the legislative history and the purpose in enacting a statute in attempting to discern the constitutionality of the statute. See United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 570-575 (1973); Cotto, 753 A.2d at 221. Consistent with our prior decisions, as well as United States Supreme Court case law, we will first consider the statutory language employed by the General Assembly in determining whether Section 2506 is unconstitutionally vague.

Section 2506 defines the crime of third-degree murder in the context where death results from certain conveyances of, *inter alia*, controlled substances in violation of the Controlled Substance, Drug, Device and Cosmetic Act:

(...continued)

our Constitution is applicable, and thus, we will analyze his vagueness challenge pursuant to the United States Constitution.

(a) General rule - A person commits murder of the third degree who administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.

18 Pa.C.S §2506(a)(footnote omitted).

While the statute proscribes that one who delivers drugs that result in death commits murder of the third degree, it contains no express element of culpability that is to be applied.

Ludwig argues that the trial court properly reasoned that the statute is unconstitutionally vague because it fails to define with requisite definiteness the mental state required for criminal liability. According to Ludwig, this lack of a clear standard leads to a risk of arbitrary governmental action. Conversely, the Commonwealth takes the position, employing a statutory construction approach, that by declaring a violation of Section 2506 to be “murder of the third degree” the Legislature intended to require a *mens rea* of malice. According to the Commonwealth, this is so because murder of the third degree has historically been defined by our Court to require proof of malice, citing to Commonwealth v. McGuire, 409 A.2d 313 (Pa. 1979). Thus, the statute is not unconstitutionally vague. Like the Commonwealth, the Attorney General, who has filed a brief as amicus curiae in this appeal, also contends that Section 2506 does not fail for vagueness, but offers that 18 Pa.C.S. §302 provides a culpability element when the General Assembly does not prescribe an applicable *mens rea*. Interpreting this provision, the Attorney General maintains that the required *mens rea* for conviction under Section 2506 is “intentional, knowing, or reckless conduct.” 18 Pa.C.S. §302(c).

In considering the parties’ respective arguments, we must keep in mind the rules of statutory construction. Specifically, the polestar of statutory construction is the intent of the

General Assembly. 1 Pa.C.S. §1921(a). In ascertaining the intent of the Assembly, we are to look at the words used by the Legislature, as that is the best evidence of its intent. If the words are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. §1921(b). Only when the words used by the Legislature are not explicit, do we turn to other factors to ascertain its intent. 1 Pa.C.S. §1921(c). Finally, penal provisions must be strictly construed in favor of the defendant and against the Commonwealth. 1 Pa.C.S. §1928(b)(1).

Employing these principles, we agree with the Attorney General that while Section 2506 does not explicitly provide for an applicable *mens rea*, the General Assembly has provided a default culpability provision in Section 302(c) of the Crimes Code that is to be applied to determine the appropriate element of culpability. Therefore, it is through this provision that we must consider the proper culpability element for Section 2506. 18 Pa.C.S. §302(c).

The statutory default provision offers that unless prescribed by law, culpability is established if a person acts, *inter alia*, at least recklessly:

(c) Culpability required unless otherwise provided. -- 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.

18 Pa.C.S. §302(c).

Upon review of the statute, it becomes clear that the General Assembly supplied triggering language in the Crimes Code's default culpability provision, i.e., that the default culpability of "intentionally, knowingly or recklessly" is applicable *only* where culpability "is not prescribed by law." 18 Pa.C.S. §302(c). In this case, we believe that culpability *is* prescribed by law.

Specifically, delivery of a drug resulting in death is expressly defined by the Legislature as murder of the third degree. The law is clear and well-settled regarding the *mens rea* for third degree murder. As noted by the Commonwealth, we have consistently prescribed the culpability required for third degree murder to be malice. See, e.g., McGuire, 409 A.2d at 315-16 (holding that under the new Crimes Code, the offense of third degree murder incorporates common law malice as an element). Indeed, malice aforethought is the essential distinguishing factor between murder and manslaughter in Pennsylvania. JOHN BURKOFF, CRIMINAL OFFENSES AND DEFENSES IN PENNSYLVANIA 267(4th ed. 2001). Likewise, other language in the Crimes Code also makes evident that malice is the appropriate mental state required to prove murder of the third degree. Specifically, in Chapter 26 of the Crimes Code, the General Assembly clarifies that a degree of “Murder,” whether under Chapter 26 or Chapter 25, includes malice. See 18 Pa.C.S. §2602 Definitions (“Murder.’ As used in this chapter, the term includes the same element of malice which is required to prove murder under Chapter 25 (relating to criminal homicide)”). Chapter 25, of course, includes Section 2506, “Drug delivery resulting in death.”

Therefore, by expressly defining the crime of Drug delivery resulting in death in the clear and unambiguous words of “murder of the third degree,” coupled with our case law and statutory language designating the proper mental state for third degree murder as malice, the Legislature made it plain that malice is the requisite *mens rea* for a violation of Section 2506.⁷ As the *mens rea* for this crime is “prescribed by law,” the lesser standard set forth in the default culpability provision of intentionally, knowingly, or recklessly, advocated by the Attorney General, is not implicated.

⁷ Indeed, the Superior Court has recently come to the same conclusion. Commonwealth v. Nahavandian, 849 A.2d 1221 (Pa. Super. Ct. 2004).

Based upon the above analysis, we conclude that Section 2506 is not unconstitutionally vague. First, considering the statutory language employed by the General Assembly, both in Section 2506 and the default culpability provision found at Section 302(c) of the Crimes Code, we determine that the statute provides a culpability element - malice. Moreover, we find that the Legislature, through these provisions has articulated the applicable *mens rea* with sufficient definiteness. Kolender, 461 U.S. at 357. Furthermore, by providing a *mens rea* of malice, the Legislature has supplied minimal guidelines regarding the elements necessary for a conviction pursuant to Section 2506 that are sufficiently definite. Thus, we also reason that the statute does not in any way encourage arbitrary and discriminatory enforcement. Kolender, 461 U.S. at 357. Accordingly, we hold that Section 2506 is not unconstitutionally vague and that the applicable mental state for a conviction under the statute is malice.

Resolution of this issue, however, does not end our inquiry. The trial court also found that even if it were to conclude that Section 2506 is not unconstitutionally vague and, in fact, calls for a finding of malice, Ludwig remained entitled to relief because the Commonwealth failed to present sufficient evidence of malice aforethought to establish a *prima facie* case against him.

To detain an individual who has been charged with a crime for trial on that offense, the Commonwealth must prove at a preliminary hearing a *prima facie* case of guilt against the accused. See Pa.R.Crim.P. 542(d), 543(A). To meet this burden, "the Commonwealth is required to present evidence, with regard to each of the material elements of the crime," to establish that the crime has been committed. Commonwealth v. McBride, 595 A.2d 589, 591 (Pa. 1991). As determined above, malice aforethought is one such element necessary for a conviction under Section 2506.

In determining whether malice has been established, our Court has utilized the traditional definition of that mental state set forth in Commonwealth v. Drum, 58 Pa. 9

(1868). That seminal definition makes clear that malice aforethought requires a unique state or frame of mind characterized by wickedness, hardness, cruelty, recklessness, and disregard of social duty:

Malice is a legal term, implying much more [than ill-will, spite, or a grudge]. It comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Murder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed.

Id. at 15.

Malice has been characterized as exhibiting an “*extreme* indifference to human life,” Commonwealth v. Gardner, 416 A.2d 1007, 1008 (Pa. 1980)(emphasis supplied), and “may be found to exist not only in an intentional killing, but also in an unintentional homicide where the perpetrator ‘consciously disregarded *an unjustified and extremely high risk* that his actions might cause death or serious bodily harm.’” Commonwealth v. Young, 431 A.2d 230, 232 (Pa. 1981)(quoting Commonwealth v. Hare, 404 A.2d 388, 391 (Pa. 1979))(emphasis supplied).

Indeed, our Court has stated that an inference of malice is not supported even by evidence which demonstrates that a defendant acted out of anger and rage; in such a case, voluntary manslaughter, not murder, is established. McGuire, 409 A.2d at 317. Thus, 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.

Turning to whether the Commonwealth met its *prima facie* case of malice in light of the above-stated definition and the facts before us, we emphasize that to satisfy the burden of setting forth a *prima facie* case, the Commonwealth is not required to prove its case

beyond a reasonable doubt; it must, however, set forth evidence of the existence of each element of the crime. The absence of evidence as to the existence of a material element, however, is fatal. Commonwealth v. Wojdak, 466 A.2d 991, 996-97 (Pa. 1983).

Although not set forth separately, in sum, the Commonwealth relies on five factors that it considers to be relevant regarding the malice inquiry, and that it believes leads to the conclusion that it established a *prima facie* case of malice: (1) supplying another with an illegal and dangerous substance of unknown quality; (2) lack of knowledge of the recipient's reaction or tolerance to the drug; (3) the age of the recipients; (4) providing a drug in an amount twice its "normal" dosage; and (5) motivation by profit. We will address each of these contentions *seriatim*.

First, we find that supplying an illegal and *potentially* dangerous substance of unknown quality to another does not in and of itself support a finding of malice. Most drugs, even prescription drugs that are used illegally, may *potentially* harm. Thus, as an indication of wickedness, ill-will, cruelty, and extreme indifference to human life, the legality and mere *potential* dangerousness of a drug, without more, falls short. More importantly, this factor is objectionable in this context for another reason - while considered as a factor to determine malice, the Commonwealth uses one of the other statutory elements (delivery of an illegal drug) to establish malice. Using an existing element of the crime to demonstrate a separate element, malice, vitiates malice as an independent element to be proven and renders Section 2506 a strict liability crime.

Finally, even if this factor is relevant with respect to malice, it fails under the facts of this case. There was no evidence that Ecstasy, as objectionable a drug as it is, is an inherently dangerous drug of such toxicity that there was a substantial and "extremely high

risk” that one who ingests Ecstasy will die. Young, 431 A.2d at 232.⁸ While the Commonwealth points to evidence of the possible dangers of consuming Ecstasy, and the lack of standards in manufacturing the drug, the trial court specifically noted that the record was “devoid of evidence” that there was a high probability of death that would result from the ingestion of Ecstasy. Likewise, there was no evidence that in this case the quality of the Ecstasy in question was exceptional. Thus, we find that simply because Ludwig delivered an illegal drug that was potentially harmful to another did not rise to the level of malice.

The Commonwealth’s second factor, regarding the lack of knowledge of a drug recipient’s medical history and tolerance for a drug, fails to support a finding of malice as we believe, at least in the circumstances before us, it is unreasonable to conclude that not knowing a recipient’s tolerance or possible reaction to a drug establishes the requisite wickedness, cruelty, recklessness, and disregard of social duty required for malice. Perhaps more importantly, this factor improperly turns the malice inquiry away from its traditional focus on the state of mind of the defendant based on the facts known to him, and instead alters the inquiry to center on the *unknown* status of the victim.

The third and fourth factors pointed to by the Commonwealth as establishing malice, providing a substance to another who is under the age of eighteen years of age and providing a double dosage of the drug, also does not establish the hardness of heart or even recklessness required for malice. First, it is important to note that Ludwig was a teenager, as were all of the other girls who ingested the drug. Moreover, the parties’ actions demonstrate that all involved had a common understanding of the nature of the

⁸ In Commonwealth v. Bowden, 309 A.2d 714 (Pa. 1973), we determined that the Commonwealth had failed to establish malice where the drug at issue was heroin. “Initially, although we recognize heroin is truly a dangerous drug, we also recognize that the injection of heroin into the body *does not generally cause death*.” Bowden, 309 A.2d at 718 (emphasis supplied); see also Commonwealth v. Parker, 327 A.2d 128, 130 (Pa. 1974).

transaction and that the girls in fact sought out the transaction. Furthermore, in its discussion of these factors, and in particular, the furnishing of a double dose of the drug, the Commonwealth ignores that all parties involved *were aware* that the amount given to the victim was double the "normal" dosage. The uncontradicted evidence establishes that the recipients were *cautioned* by their friend to take only one half of a pill. In fact, the pills initially were split in half. Yet with knowledge of the dosage and initially taking a half pill, the girls eventually took the whole double dose. We conclude that simply because the girls chose to take a double dose of Ecstasy, a dosage against which they were expressly warned, malice was not established as to Ludwig. If there was any evidence that Ludwig had concealed the fact that it was a double dose, or evidence that Ludwig surreptitiously increased the double dose to a triple dose while offering it to the girls in the packaging of a double dose, it at least might be arguable that it is indicative of a wickedness, hardness of heart, cruelty, and recklessness; however, these are not the facts of the case.

Finally, because one *sells* illegal drugs to another, rather than shares them with others free of charge, does not in and of itself establish malice. While the Commonwealth makes much of Ludwig's profit motive, at least in these circumstances, and without something more, we cannot agree that the mere sale of drugs is evidence of the wickedness, hardness of heart, cruelty, and recklessness required for malice aforethought.

Based upon the above analysis, we hold that the Commonwealth did not satisfy its burden of setting forth a *prima facie* case of malice under Section 2506. This Court recognizes the dangers inherent in the commerce of illegal substances as aptly illustrated by the sad facts of this matter, however, the day-to-day distribution of illegal drugs, as occurred here, without something more, does not constitute a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty such as to demonstrate an extreme indifference to human life, and thus, does not rise to the unique mental state of malice aforethought required by the General Assembly for a

conviction pursuant to Section 2506. Therefore, we affirm the order of the trial court, granting Ludwig's Petition for Writ of Habeas Corpus with respect to the charge of drug delivery resulting in death.⁹

Madame Justice Newman files a concurring opinion.

Mr. Justice Nigro files a dissenting opinion in which Messrs. Justice Saylor and Eakin join.

⁹ The trial court also found that the application of Section 2506 to the facts of the case violates Due Process in an attempt to hold Ludwig liable for the death of a person other than the person to whom the controlled substance was delivered. As we have decided that the Commonwealth failed to establish a *prima facie* case of malice, we need not reach this constitutional issue. Shuman v. Bernie's Drug Concessions, 187 A.2d 660, 664 (Pa. 1963)(constitutional question should not be passed upon unless absolutely necessary to resolve the controversy).

[J-205-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 7 WAP 2002

Appellant	:	Appeal from the order of the Court of
	:	Common Pleas of Allegheny County
	:	entered March 12, 2002 at No. CC
v.	:	200114991.
	:	
	:	

GREGORY DAVID LUDWIG,	:	RE-SUBMITTED: September 27, 2004
	:	
	:	

Appellee

CONCURRING OPINION

MADAME JUSTICE NEWMAN

DECIDED: MAY 19, 2005

I agree with the Majority that Section 2506 of the Crimes Code, 18 Pa.C.S. § 2506, is not unconstitutionally vague and that the applicable mental state for conviction under the statute is malice. I further agree that the Commonwealth has failed to establish a *prima facie* case of malice pursuant to Section 2506. However, I write separately because I do believe that the sale of drugs is an important factor in establishing the requisite malice for a third-degree murder conviction. The Majority Opinion states:

Finally, because one *sells* drugs to another, rather than shares them with others free of charge, does not in and of itself establish malice. While the Commonwealth makes much of Ludwig's profit motive, at least in these circumstances, and without something more, we cannot agree that the mere sale of drugs is evidence of the wickedness, hardness of heart, cruelty, and recklessness required for malice aforethought.

Commonwealth v. Ludwig, ___ A.2d. ___ (Pa. 2005) (emphasis in original). I agree that an interest in making money by selling illegal drugs, without more, is not sufficient to establish that the seller “consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm.” Commonwealth v. Young, 431 A.2d 230, 232 (Pa. 1981) (defining malice). However, unlike the Majority, I believe that when determining the existence of malice, pecuniary gain is an element that merits significant weight. In the case *sub judice*, even when we give such weight to Ludwig’s profit motive, the Commonwealth still has not established malice, especially in light of the fact that Ludwig informed the girls that they should take only half of the Ecstasy tablet at any one time.

Except for my position regarding the sale of drugs as a factor in determining malice, I join the Majority Opinion in all other respects.

[J-205-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 7 WAP 2002

Appellant :
: Appeal from the Order of the Court of
: Common Pleas of Allegheny County
: entered March 12, 2002 at No. CC
v. : 200114991.
: :
: :

GREGORY DAVID LUDWIG, : RESUBMITTED: September 27, 2004
: :
Appellee :

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: MAY 19, 2005

I agree with the majority that 18 Pa. C.S. § 2506 is not unconstitutionally vague because it fails to specify whether an offender has to possess a certain *mens rea* to commit the offense of drug delivery resulting in death. However, contrary to the majority, I would find that the default culpability provision in section 302(c) of the Crimes Code, 18 Pa. C.S. § 302(c), supplies the requisite *mens rea* for section 2506. Moreover, as section 302(c) only requires a *mens rea* of recklessness, I would also find that the Commonwealth adequately established a *prima facie* case of guilt against Appellee Gregory Ludwig for the offense of drug delivery resulting in death.

As the majority concedes, section 2506 does not contain an express element of culpability. See Slip Op., at 8. I therefore agree with the Attorney General that we must turn to the default culpability provision, which states as follows:

(c) Culpability required unless otherwise provided. -- 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.

18 Pa. C.S. § 302(c). Through this provision, the General Assembly has ensured that where, as here, an offense fails to either specify a *mens rea* or indicate that it is a strict liability offense,¹ it will not suffer from vagueness problems because section 302(c) supplies the necessary *mens rea*.² See id.; Commonwealth v. Mayfield, 832 A.2d 418, 427 (Pa.

¹ "Absolute criminal liability statutes are an exception to the centuries old philosophy of criminal law that imposed criminal responsibility only for an 'act coupled with moral culpability.'" Commonwealth v. Parmar, 710 A.2d 1083, 1089 (Pa. 1998) (citations omitted). Thus, the General Assembly enacts strict liability offenses only in limited circumstances, such as for public welfare offenses, which "do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals." Morisette v. U.S., 342 U.S. 246, 255 (1952); see also DaPra v. Pennsylvania Liquor Control Bd., 227 A.2d 491, 494 (Pa. 1967). "[T]hese offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." Morisette, 342 U.S. at 255. Furthermore, "violations of such [offenses] result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." Id. at 255-56. Another characteristic of these offenses is that they tend to impose relatively small penalties and conviction does not grave[ly] damage . . . an offender's reputation." Id.; see also 18 Pa. C.S. § 302(a)(1) (excepting summary offenses, which are offenses for which a convicted person may only be sentenced to a term of imprisonment of 90 days or less, from default culpability provision). Notably, none of these characteristics concerning strict liability offenses are present with respect to the offense of drug delivery resulting in death. Unlike typical strict liability offenses, the offense of drug delivery resulting in death concerns a crime of aggression in which another person is fatally injured as a direct result of consuming an illegal substance sold to her by the person charged with violating the offense. Moreover, the offense imposes a stringent penalty of at least five years of imprisonment and a fine of \$15,000. See 18 Pa. C.S. § 2506(b). Accordingly, under these circumstances, I agree with the apparent conclusion of the majority that the General Assembly did not intend the offense of drug delivery resulting in death to be a strict liability offense.

² Notably, the trial court also found that section 2506 was unconstitutionally vague because it does not provide sufficient guidelines regarding the element of causation. However, I also disagree with the trial court's conclusion in this regard because, just like section 302 of the Crimes Code provides the culpability element for section 2506, section (continued...)

2003) (holding that trial court erroneously found that statute was vague for failing to include a specific *mens rea* element because section 302(c) supplied the necessary *mens rea* element); Commonwealth v. Moss, 852 A.2d 374, 380-81 (Pa. 2004) (finding that section 302(c) provided the scienter requirement for statute which did not include a scienter requirement and thus the statute was not unconstitutionally vague); Commonwealth v. Pond, 846 A.2d 699, 705-06 (Pa. Super. 2004) (holding that section 302(c) provided the element of culpability for offense where statute was silent with regard to *mens rea* and there was no indication that the legislature intended to impose strict liability).

While the majority rejects the application of the default culpability provision and instead concludes that section 2506 prescribes a *mens rea* of malice based solely on the fact that it classifies the offense of drug delivery resulting in death as a third-degree murder crime, I cannot agree. Significantly, third-degree murder is a class of crimes that can include any number of different offenses. See 18 Pa. C.S. § 2505(c) (specifying that third-degree murder includes "[a]ll other kinds of murder" that are not first-degree murder or second-degree murder); 18 Pa. C.S. § 106(a)(1) (defining third-degree murder as class of crimes). Although this Court has held that the offense of third-degree murder requires a *mens rea* of malice, that holding does not necessarily mean that any other offense that the General Assembly classifies as a type of third-degree murder must also contain a *mens rea* of malice. Rather, in enacting an offense to be classified as a third-degree murder crime, the General Assembly is free to require a *mens rea* of malice or it may require some other

(...continued)

303 of the Crimes Code clarifies the element of causation for section 2506. See 18 Pa. C.S. § 303.

element of culpability.³ Accordingly, unlike the majority, I do not believe that this Court may presume that the General Assembly intended section 2506 to include a *mens rea* of malice merely because it classified the offense of drug delivery resulting in death as a type of third-degree murder crime. Rather, I would apply section 302(c)'s *mens rea* of recklessness to section 2506.

According to the Crimes Code, "[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." 18 Pa. C.S. § 302(b)(3). Moreover, "[t]he risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." *Id.* Applying this definition of recklessness to the instant case, I would find that the Commonwealth presented sufficient evidence to establish a *prima facie* case of guilt against Ludwig with respect to the offense of drug delivery resulting in death.

Ludwig was undoubtedly aware that Ecstasy is an illegal drug, unregulated by the government for any use, and that serious, sometimes fatal, reactions can result from the consumption of such a drug.⁴ Nevertheless, despite the illegal and dangerous nature of the

³ Indeed, I note that if the elements of the offense of third-degree murder were automatically bootstrapped into any separate offense classified as a type of third-degree murder, there would be no need to separately create such an offense because the conduct qualifying as third-degree murder under the separate offense would also constitute third-degree murder under the general offense of third-degree murder. Thus, the separate third-degree murder offense would simply be superfluous.

⁴ Dr. Frederick W. Fochtman, the director and chief toxicologist in the Forensic Laboratory Division of the Allegheny County Coroner's Office, explained during the Open (continued...)

drug, Ludwig supplied Brandy, a minor, with an Ecstasy pill containing twice the normal dosage. In addition, Ludwig gave Brandy the pill without knowing the purity or adulterated nature of the drug, how Brandy would react to the drug, or Brandy's tolerance to the drug.⁵ In my view, this evidence, particularly when considered in a light most favorable to the Commonwealth, is more than sufficient to show that Ludwig disregarded a substantial and unjustifiable risk that the direct result of his behavior would be that Brandy could die from an adverse reaction to the Ecstasy pill.⁶ See Commonwealth v. Huggins, 836 A.2d 862, 869-71 (Pa. 2003) (Commonwealth sufficiently proved a *prima facie* case of involuntary manslaughter against appellee where evidence showed that appellee acted recklessly by allowing himself to fall asleep when he was driving a van filled over-capacity with children

(...continued)

Inquest that Ecstasy pills are illicitly manufactured, meaning "that they are not being manufactured under any standards of good laboratory practice or good manufacturing practice." R.R. at 72a; see also id. at 292a (testimony from Andrew Petyak, special agent of Drug Enforcement Administration, that Ecstasy is produced under very unsanitized conditions). Dr. Fochtman further testified that because these drugs are produced in such a manner, some pills might contain double or triple the quantity of Ecstasy that another pill might contain and some pills may also include other drugs besides Ecstasy. See id. at 72a, 80a. In explaining the effects of Ecstasy, Dr. Fochtman stated that "when the drug increases in concentration, then it will produce anxiety, agitation, it could provide -- it could produce convulsions or seizures, it can cause a dystonia, where the person's muscles become very firm and very rigid, and it also could cause a CNS depressant effect, which would depress the respirations, and in addition to that, it can have an arrhythmic effect, or cause the heart to beat irregularly." Id. at 81a. According to Dr. Fochtman, there are multiple ways that death can result from these effects of the drug. See id. at 82a.

⁵ Any assertion by Ludwig that he was unaware that someone other than Michelle would ultimately consume the drug loses any potential viability when viewed in light of the Commonwealth's evidence that Michelle informed Ludwig that she was purchasing two pills for her friends, and that those friends were present when Ludwig sold the pills to Michelle.

unsecured by seat belts); Commonwealth v. Comer, 716 A.2d 593, 597 (Pa. 1998) (evidence showed that appellee acted with degree of recklessness contemplated by involuntary manslaughter statute when he drank four or five beers, took muscle relaxer pills, and then drove at an excessive rate of speed). Thus, as I would find that section 2506 incorporates a *mens rea* of recklessness, and that the evidence was sufficient to show that Appellant committed the offense of drug delivery resulting in death with a *mens rea* of recklessness, I would reverse the trial court's order granting Ludwig's Petition for Writ of Habeas Corpus with respect to the offense of drug delivery resulting in death.

Messrs. Justice Saylor and Eakin join.

(...continued)

⁶ Clearly, this risk was one that a reasonable person would have avoided if placed in Ludwig's situation.

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

SOMWANG LAOS KAKHANKHAM

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 712 MDA 2014

Appeal from the Judgment of Sentence entered April 1, 2014
In the Court of Common Pleas of Cumberland County
Criminal Division at No: CP-21-CR-0003607-2012

BEFORE: MUNDY, STABILE, and FITZGERALD,* JJ.

OPINION BY STABILE, J.:

FILED OCTOBER 28, 2015

Appellant, Somwang Laos Kakhankham, appeals from the judgment of sentence entered April 1, 2014 in the Court of Common Pleas of Cumberland County. For the reasons stated below, we affirm.

The trial court summarized the relevant factual background as follows:

On February 6, 2012, [victim] was found deceased in his home at 328 West Penn Street in the borough of Carlisle. A search of [victim]'s home resulted in the discovery of a syringe, two (2) empty bags, stamped with the name Blackout, in addition to six (6) bags of heroin, also stamped with the name Blackout. A witness[, JL,] told police officers that [Appellant] entered [victim]'s home at approximately 1 A.M. the day [victim] was found. [Appellant] told a second witness that [Appellant] had

* Former Justice specially assigned to the Superior Court.

provided the heroin to [victim].^[1] This same witness, identified as DS, also purchased \$100 worth of heroin from [Appellant], which was stamped with the name Blackout. The next day, DS met with police officers to conduct a controlled purchase of heroin from [Appellant], during which DS purchased two (2) bags of Blackout-stamped heroin using \$40 of official funds. On February 8, 2012, a probation check of [Appellant]'s residence found two (2) bags of heroin stamped with the name Blackout as well as \$656 in cash which contained the \$40 in official funds from the prior day's controlled purchase. On February 16, 2012, a third witness told police [that he, the witness] had purchased heroin with the stamp Blackout from [Appellant]. [Another witness, witness number four,] additionally told the police that [Appellant] told them he provided the heroin to [victim].^[2,3] Finally, a Cumberland County Coroner's report dated October 4, 2012 stated that the level of morphine in [victim]'s bloodstream was 295 nanograms per millimeter. Heroin metabolizes into morphine upon being absorbed by the body. The therapeutic level for morphine is ten (10) nanograms per millimeter. The level of metabolized heroin was the cause of [victim]'s death.

Trial Court Opinion, 8/4/14, 1-3 (citation to stipulated record omitted).

As a result, Appellant was charged with drug delivery resulting in death, 18 Pa.C.S.A. § 2506, and possession of a controlled substance with intent to deliver, 35 P.S. § 780-113(a)(30). Following a preliminary hearing, Appellant filed a petition for writ of habeas corpus alleging that the

¹ "During the purchase, [Appellant] told the witness, DS, that he had fronted the victim heroin the day before his death." N.T. Stipulated Record, 1/14/14, at 6.

² Appellant "told this witness that [Appellant] had supplied the victim with the heroin that resulted in victim's death." N.T. Stipulated Record, 1/14/14, at 7.

³ Another witness, witness number five, stated that Appellant stated to the witness that "he had fronted the victim a bundle of heroin stamped Blackout." N.T. Stipulated Record, 1/14/14, at 8.

Commonwealth “failed to present sufficient evidence to establish a prima facie case of the elements of [18 Pa.C.S.A. § 2506,]” requiring dismissal of the charges. Petition for Writ of Habeas Corpus, 8/28/14, at 1. After a hearing, the court denied the petition. **See** Order of Court, 12/18/13.

Following a trial,⁴ Appellant was found guilty of drug delivery resulting in death. 18 Pa.C.S.A. § 2506. The trial court sentenced Appellant, *inter alia*, to 78 months to 156 months’ imprisonment. This appeal followed.

Appellant raises the following issues for our review:

1. Did the [h]abeas and [t]rial courts err in finding Pennsylvania’s [d]rug [d]elivery [r]esulting in [d]eath [s]tatute (18 Pa.C.S.A. § 2506) not unconstitutionally vague when (1) the statute fails to clearly indicate the requisite *mens rea* for conviction, and (2) the statute fails to clearly indicate the requisite level of causation for the result-of-conduct element, and the vagueness of the statute will result in arbitrary and discriminatory enforcement of the law?
2. Did the [h]abeas and [t]rial courts err in finding the Commonwealth established a *prima facie* case when the Commonwealth did not present any evidence related to [Appellant]’s culpability regarding the result-of-conduct element of Pennsylvania’s [d]rug [d]elivery [r]esulting in [d]eath [s]tatute (18 Pa.C.S.A. § 2506)?

Appellant’s Brief at 4.

In his brief, Appellant essentially asks us to “measure the challenged statutory proscription, not against the specific conduct involved in this case,

⁴ Appellant’s trial consisted of a stipulated record whereby the district attorney read into the record the facts of the case. **See** Trial Court Opinion, 8/4/14, at 1.

but against hypothetical conduct that the statutory language could arguably embrace.” **Commonwealth v. Heinbaugh**, 354 A.2d 244, 245 (Pa. 1976). However, “[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” **Id.** (quotation omitted). “Therefore, we will address the alleged vagueness of § [2506] as it applies to this case.” **Commonwealth v. Mayfield**, 832 A.2d 418, 422 (Pa. 2003).

We review Appellant’s claims under the following standard:

Analysis of the constitutionality of a statute, and whether the Commonwealth met its *prima facie* case under Section 2506, are both questions of law, therefore, our standard of review is de novo. **Commonwealth v. MacPherson**, 561 Pa. 571, 752 A.2d 384, 388 (2000); Pa.R.A.P. 2111(a)(2). Our scope of review, to the extent necessary to resolve the legal questions before us, is plenary, i.e., we may consider the entire record before us. **Buffalo Township v. Jones**, 571 Pa. 637, 813 A.2d 659, 664 n.4 (2002); Pa.R.A.P. 2111(a)(2).

Commonwealth v. Ludwig, 874 A.2d 623, 628 n.5 (Pa. 2005).

In reviewing challenges to the constitutionality of a statute, and in particular whether a statute is unconstitutionally vague,

[we presume the statute] to be constitutional and will only be invalidated as unconstitutional if it “clearly, palpably, and plainly violates constitutional rights.” [**MacPherson**, 752 A.2d at 388] (citation omitted). Related thereto, courts have the duty to avoid constitutional difficulties, if possible, by construing statutes in a constitutional manner. **Harrington v. Dept. of Transportation, Bureau of Driver Licensing**, 563 Pa. 565, 763 A.2d 386, 393 (2000); see also 1 Pa.C.S. § 1922(3) (setting forth the presumption that the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth). Consequently, the party challenging a

statute's constitutionality bears a heavy burden of persuasion. **MacPherson**, 752 A.2d at 388.

Turning to the constitutional challenge raised in this appeal, as a general proposition, statutory limitations on our individual freedoms are reviewed by courts for substantive authority and content, in addition to definiteness or adequacy of expression. **See, Kolender v. Lawson**, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). A statute may be deemed to be unconstitutionally vague if it fails in its definiteness or adequacy of statutory expression. This void-for-vagueness doctrine, as it is known, implicates due process notions that a statute must provide reasonable standards by which a person may gauge his future conduct, i.e., notice and warning. **Smith v. Goguen**, 415 U.S. 566, 572, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); [**Heinbaugh**, 354 A.2d at 246].

Specifically with respect to a penal statute, our Court and the United States Supreme Court have found that to withstand constitutional scrutiny based upon a challenge of vagueness a statute must satisfy two requirements. A criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." **Kolender**, 461 U.S. at 358, 103 S.Ct. 1855; [**Mayfield**, 832 A.2d at 422]; **Commonwealth v. Mikulan**, 504 Pa. 244, 470 A.2d 1339, 1342 (1983); **see also Heinbaugh**, 354 A.2d at 246; **see generally** Goldsmith, THE VOID-FOR-VAGUENESS DOCTRINE IN THE SUPREME COURT, REVISITED, 30 Am. J. Crim. L. 279 (2003).

In considering these requirements, both High Courts have looked to certain factors to discern whether a certain statute is impermissibly vague. For the most part, the Courts have looked at the statutory language itself, and have interpreted that language, to resolve the question of vagueness. **See Kolender**, 461 U.S. at 358, 103 S.Ct. 1855; **Mayfield**, 832 A.2d at 422; **Commonwealth v. Cotto**, 562 Pa. 32, 753 A.2d 217, 220 (2000). In doing so, however, our Court has cautioned that a statute "is not to be tested against paradigms of legislative draftsmanship," **Heinbaugh**, 354 A.2d at 246, and thus, will not be declared unconstitutionally vague simply because the Legislature could have "chosen 'clear and more precise language'" **Id.** (citation omitted). The Courts have also looked to the

legislative history and the purpose in enacting a statute in attempting to discern the constitutionality of the statute. **See *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers***, 413 U.S. 548, 570–575, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); ***Cotto***, 753 A.2d at 221. Consistent with our prior decisions, as well as United States Supreme Court case law, we will first consider the statutory language employed by the General Assembly in determining whether Section 2506 is unconstitutionally vague.

Ludwig, 874 A.2d at 628-29 (footnote omitted).

The statute challenged here, Section 2506, reads as follows:

(a) Offense defined.--A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.

(b) Penalty.-- A person convicted under subsection (a) shall be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years.

18 Pa.C.S.A. § 2506 (2011).

The crime described above consists of two principal elements:⁵ (i) [i]ntentionally administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substance and (ii) death caused by (“resulting from”) the use of that drug. “It is sufficiently definite that ordinary people can understand what conduct is prohibited, and is not so vague that men of common intelligence must

⁵ **See also** the Pennsylvania Suggested Jury Criminal Instructions 15.2506.

necessarily guess at its meaning and differ as to its application.” **Mayfield**, 832 A.2d at 423 (internal quotation marks and citations omitted). As applied to Appellant, Section 2506 could not be any clearer. The record shows that Appellant intentionally dispensed, delivered, gave or distributed heroin to victim, and that victim died as a result of the heroin. **See** N.T. Stipulated Record, 1/14/14, at 6-7; **see also** Trial Court Opinion, 8/4/14, at 4. Appellant’s conduct is precisely what the legislature intended to proscribe when it enacted Section 2506. Accordingly, Section 2506 is not unconstitutionally vague.

We do not need to address Appellant’s argument advocating possible interpretations of Section 2506. “[An appellant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.” **Commonwealth v. Costa**, 861 A.2d 358, 362 (Pa. Super. 2004) (quoting **Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.**, 455 U.S. 489, 495 (1982)). “In cases that do not implicate First Amendment freedoms, facial vagueness challenges may be rejected where an appellant’s conduct is clearly prohibited by the statute in question.” **Id.** (citing **Mayfield**, 832 A.2d at 467-68). Because Appellant failed to present any argument or analysis on how the statute was vague as applied to him, he is not entitled to relief. **See Costa**, 861 A.2d at 365.

To the extent we can construe Appellant's argument as an as-applied challenge, we would nonetheless find the statute is not unconstitutionally vague.

Appellant argues the statute is vague as to the *mens rea* for the offense. We disagree. The statute is as clear and direct as a statute can be. The mental state required is "intentionally" doing one of the acts described therein, namely, administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substances. Additionally, the Crimes Code defines "intentionally" as follows:

(1) A person acts intentionally with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

18 Pa.C.S.A. § 302(b)(1).

Thus, under the statute, the first element of the crime is met if one "intentionally" administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substances. The first challenge is, therefore, meritless because the statute clearly defines the required *mens rea* for establishing guilt under Section 2506.

Appellant next argues the statute is unconstitutional because it is vague as to the level of causation necessary for guilt. We disagree. The

statute uses the phrases “results from,” a concept which is defined also in the Crimes Code.⁶ Section 303 of the Crimes Code, in relevant part, provides:

Causal relationship between conduct and result

(a) General rule.--Conduct is the cause of a result when:

- (1) it is an antecedent but for which the result in question would not have occurred; and
- (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense.

18 Pa.C.S.A. § 303(a).⁷ The statute, therefore, is clear as to the level of causation. It requires a “but-for” test of causation. Additionally, criminal causation requires “the results of the defendant’s actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible.” **Commonwealth v. Nunn**, 947 A.2d 756, 760 (Pa. Super. 2008) (citing **Commonwealth v. Rementer**, 598 A.2d 1300, 1305 (Pa. Super. 1991), *appeal denied*, 617 A.2d 1273 (Pa.

⁶ “Where there is no textual or contextual indication to the contrary, courts regularly read phrases like ‘results from’ to require but-for causality.” **Burrage v. United States**, 134 S. Ct. 881, 888 (2014). 18 Pa.C.S.A. § 303(a)(1) “establishes the ‘but-for’ test of causation. Under existing law causation is established if the actor commits an act or sets off a chain of events from which in the common experience of mankind the result is natural or reasonably foreseeable.” 18 Pa.C.S.A. § 303, Comment.

⁷ Subsection 303(a)(2) is not applicable here because there is no additional causal requirement imposed by Title 18 or Section 2506.

1992)); **see also** 18 Pa.C.S.A. § 303(b)-(c); **Commonwealth v. Devine**, 26 A.3d 1139 (Pa. Super. 2011). Thus, Section 2506 is not unconstitutionally vague as to the causal relationship under Section 2506 necessary to impose criminal liability.⁸

Appellant also argues that Section 2506 could be read to subject the second element of the crime (“results from”) to the same *mens rea* required for the first element (conduct), *i.e.*, “intentionally.”⁹ As noted by the learned

⁸ In this context, Appellant argues that the “Commonwealth failed to present any evidence that heroin was the sole or even the primary cause of [victim’s] death.” Appellant’s Brief at 13. Appellant fails to recognize that he stipulated that heroin caused the victim’s death. **See** Stipulated Record, 1/14/14, at 8. We also note that:

Defendant’s conduct need not be the only cause of the victim’s death in order to establish a causal connection. Criminal responsibility may be properly assessed against an individual whose conduct was a direct and substantial factor in producing the death even though other factors combined with that conduct to achieve the result.

Nunn, 947 A.2d 760 (citations and quotations marks omitted). Here, as noted, Appellant stipulated that he “fronted” a bundle of heroin and that the victim died of a heroin overdose. Appellant’s criminal liability for the victim’s death cannot be any clearer.

⁹ **See** Section 302(d):

Prescribed culpability requirement applies to all material elements.--When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(Footnote Continued Next Page)

trial court, such a reading would make Section 2506 superfluous, for intentionally causing the death of another person is already criminalized (*i.e.*, first degree murder). **See** Trial Court Opinion, 8/7/14, at 4 n.2.

Appellant finally argues Section 2506 can also be read not to require any *mens rea* as to the second element of the crime. It would be, in essence, a case of absolute liability. The trial court disagreed with this potential reading of the provision, noting that strict liability criminal statutes are generally disfavored.¹⁰ The trial court found that the mere absence of an explicit *mens rea* requirement should not be read as an indication that the legislature intended to create a strict liability statute. According to the trial court, Section 302(c) provides the culpability requirement for the second element of the crime, *i.e.*, death must be intentional, knowing, or reckless.

(Footnote Continued) _____

18 Pa.C.S.A. 302(d).

¹⁰ **See Costa, supra:**

Absolute criminal liability statutes are an exception to the centuries old philosophy of criminal law that imposed criminal responsibility only for an act coupled with moral culpability. A criminal statute that imposes absolute liability typically involves regulation of traffic or liquor laws. Such so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulation of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt.

Costa, 861 A.2d at 363-64 (citation omitted).

18 Pa.C.S.A. § 302(c).¹¹ In support, the trial court notes two statutes, as currently interpreted, provide support for its conclusion, namely 75 Pa.C.S.A. § 3735 (relating to homicide by vehicle while driving under the influence) and 18 Pa.C.S.A. § 2502(b) (relating to murder of the second degree). These statutes, according to the trial court, while they do not require any specific *mens rea* as to the result, are not interpreted as imposing absolute criminal liability.

While Section 302 of the Crimes Code provides default culpability standards to be applied where such standards are not provided, this provision is not applicable to summary offenses and offenses wherein the legislature's intent to impose absolute liability "plainly appears." 18 Pa.C.S.A. § 305(a)(2).¹² The issue here is whether it plainly appears the

¹¹ Section 302(c) reads as follows: "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." 18 Pa.C.S.A. § 302(c).

¹² Section 305(a) reads as follows:

(a) When culpability requirements are inapplicable to summary offenses and to offenses defined by other statutes.--The requirements of culpability prescribed by section 301 of this title (relating to requirement of voluntary act) and section 302 of this title (relating to general requirements of culpability) do not apply to:

(1) summary offenses, unless the requirement involved is included in the definition of the offense or the court

(Footnote Continued Next Page)

legislature intended not to subject the second element of Section 2506 (“results from”) to any *mens rea*.

No intent to impose absolute liability plainly appears in Section 2506. “The omission of an explicit *mens rea* element in a criminal statute is not alone sufficient evidence of the legislature’s plain intent to dispense with a traditional *mens rea* requirement and impose absolute criminal liability.” ***Commonwealth v. Parmar***, 710 A.2d 1083, 1089 (Pa. 1998) (OISA) (citation omitted); ***see also Commonwealth v. Gallagher***, 924 A.2d 636, 638-39 (Pa. 2007). In the absence of plain legislative intent, “we must consider the purpose for the . . . statute[], the severity of punishment and its effect on the defendant’s reputation and, finally, the common law origin of the crimes to determine whether the legislature intended to impose absolute criminal liability.” ***Parmar***, 710 A.2d at 1089.¹³

(Footnote Continued) —————

determines that its application is consistent with effective enforcement of the law defining the offense; or

(2) offenses defined by statutes other than this title, in so far as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

18 Pa.C.S.A. § 305(a).

¹³ ***See also Commonwealth v. Gallagher***, 874 A.2d 49, 52 n.3 (Pa. Super. 2005), *aff’d*, 924 A.2d 636 (Pa. 2007); ***Costa***, 861 A.2d at 363-64 (Pa. Super. 2004).

Section 2506 does not regulate conduct “that is the subject of the typical public welfare offense for which the legislature imposes absolute criminal liability” (*i.e.*, traffic and liquor laws). ***Id.*** The purpose of the statute is to criminalize conduct not otherwise covered by the Crimes Code, *i.e.*, death resulting from using illegally transferred drugs. ***See*** Legislative Journal—House (2011) pages 757-58. The penalty imposed for its violation, *i.e.*, a sentence of imprisonment of up to 40 years, is clearly serious. Finally, the common law origin of the crime involved (homicide), traditionally has a *mens rea* requirement. These considerations strongly indicate that the legislature did not intend to impose absolute liability as to the second element of Section 2506. Accordingly, we conclude Section 302(c) provides the *mens rea* requirement for the second element of Section 2506, *i.e.*, death must be at least “reckless.” 18 Pa.C.S.A. § 302(c).

The Crimes Code defines “recklessly” as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation.

18 Pa.C.S.A. § 302(b)(3).

Additionally, when recklessly causing a particular result is an element of an offense,

the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(1) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(2) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a bearing on the liability of the actor or on the gravity of his offense.

18 Pa.C.S.A. § 303(c).

Here, Appellant “fronted” victim a bundle of heroin. Eight packets were found next to the victim, two used and six unused. Victim died of a heroin overdose. Appellant’s conduct, therefore, satisfied both parts of the causation test. **See** Pa.C.S.A. § 303; **Devine, supra**; **Nunn, supra**. But for Appellant selling victim a bundle of heroin, victim would not have died of a heroin overdose. Victim’s death was a natural or foreseeable consequence of Appellant’s conduct.

[I]t is certain that frequently harm will occur to the buyer if one sells heroin. Not only is it criminalized because of the great risk of harm, but in this day and age, everyone realizes the dangers of heroin use. It cannot be said that [unauthorized heroin provider] should have been surprised when [victim] suffered an overdose and died. While not every sale of heroin results in an overdose and death, many do.

Minn. Fire and Cas. Co. v. Greenfield, 805 A.2d 622, 624 (Pa. Super. 2002), *aff’d*, 855 A.2d 854 (Pa. 2004).

On appeal, then-Justice Castille noted:

Although the overwhelming majority of heroin users do not die from a single injection of the narcotic, it nevertheless is an inherently dangerous drug and the risk of such a lethal result certainly is foreseeable. **See Commonwealth v. Bowden**, 456 Pa. 278, 309 A.2d 714, 718 (1973) (plurality opinion) (“although we recognize heroin is truly a dangerous drug, we also recognize that the injection of heroin into the body does not generally cause death”). The intravenous self-administration of illegally-purchased heroin . . . is a modern form of Russian roulette. Indeed, that is one of the reasons the drug is outlawed and why its use, no less than its distribution, is so heavily punished. [FN]

[FN]. The General Assembly has classified heroin as a Schedule I controlled substance, which is the most serious of designations, and carries the heaviest of punishments. **See** 35 P.S. § 780–104(1)(ii)(10). A drug falls within this schedule because of its “high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision.” **Id.** § 780–104(1).

Minn. Fire and Cas. Co. v. Greenfield, 855 A.2d 854, 870-71 (Pa. 2004) (Castille, J., concurring).¹⁴ Accordingly, we conclude that reckless conduct, such as that in this case, may result in criminal liability under Section 2506.

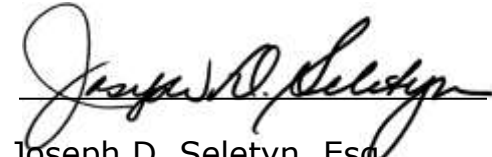
Finally, Appellant argues that the Commonwealth did not establish a *prima facie* case at the preliminary hearing, and that the trial court erred in finding otherwise. The claim fails. It is well-known that any defect in the preliminary hearing is cured by subsequent trial. “Once a defendant has gone to trial and has been found guilty of the crime or crimes charged,

¹⁴ **See also Commonwealth v. Catalina**, 556 N.E.2d 973, 980 (Mass. 1990) (“[O]ne can reasonably conclude that the consumption of heroin in unknown strength is dangerous to human life, and the administering of such a drug is inherently dangerous and does carry a high possibility that death will occur.”)

however, any defect in the preliminary hearing is rendered immaterial.”
Commonwealth v. Melvin, 103 A.3d 1, 35 (Pa. Super. 2014) (citation omitted).

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/28/2015

2019 PA Super 8

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
MITCHELL GREGORY PECK, JR.	:	
	:	
	:	
Appellant	:	No. 226 MDA 2018

Appeal from the Judgment of Sentence Entered September 1, 2017
In the Court of Common Pleas of York County Criminal Division at No(s):
CP-67-CR-0000880-2017

BEFORE: GANTMAN, P.J., NICHOLS, J., and FORD ELLIOTT, P.J.E.

OPINION BY NICHOLS, J.:

FILED JANUARY 08, 2019

Appellant Mitchell Gregory Peck, Jr. appeals from the judgment of sentence of twenty to forty years' imprisonment imposed after a jury found him guilty of drug delivery resulting in death.¹ Appellant contends that there was insufficient evidence to sustain his conviction under Section 2506 because the subject delivery occurred in Maryland. Appellant also challenges the discretionary aspects of the sentence. We affirm.

The facts relevant to this appeal are not in dispute. Kevin Hunt (Decedent) lived with his father, James Hunt (Mr. Hunt), in Fawn Grove, York County. Mr. Hunt last saw Decedent alive at around 9:30 p.m. on December 9, 2014, when Mr. Hunt returned home, spoke briefly with Decedent in the kitchen, and then went to bed.

¹ 18 Pa.C.S. § 2506.

Based on a series of text messages between Decedent and Appellant,² it was determined that Decedent and Appellant met later that same evening, at some time after 11:00 p.m. Appellant sent Decedent directions indicating that Appellant and Decedent met at a High's convenience store in Maryland, approximately ten miles south of the Pennsylvania border. At the meeting in Maryland, Appellant sold Decedent heroin. Following the sale, Appellant and Decedent continued to exchange text messages. Decedent expressed concern that the heroin looked like a "rock." Appellant boasted that the heroin was "off the brick, purest of pure" and told Decedent to "try it." Further messages between 11:36 p.m. to 11:47 p.m. indicated that Decedent tried the heroin, complimented Appellant, and thanked Appellant for the delivery.

On the following morning, December 10, 2014, Mr. Hunt left for work at 6:45 a.m., but did not see Decedent. Mr. Hunt returned home from work on December 10, 2014, at 6:30 p.m. Mr. Hunt checked on Decedent, but Decedent's bedroom was locked. Mr. Hunt unlocked the door, entered the room, and discovered Decedent hunched over on the floor. Mr. Hunt shook Decedent, but Decedent fell over. Decedent's body was stiff and his face was blue and had blood on it. Mr. Hunt called a neighbor who, in turn, called 911.

Pennsylvania State Police Trooper Thomas Grothey responded and found a "rock" of heroin on Decedent's nightstand and Decedent's cell phone

² Appellant and Decedent had been friends since elementary school. Appellant was twenty-two years old at the time of the offense. Decedent was twenty-three years old at the time of his death.

on the floor of Decedent's bedroom. Trooper Grothey read the text messages between Decedent and Appellant from Decedent's phone.

A criminal complaint was filed against Appellant on September 6, 2016. The Commonwealth filed an information charging Appellant with delivery of heroin (Count 1) and drug delivery resulting in death (Count 2) on February 9, 2017.

On July 7, 2017, Appellant filed a motion to dismiss Count 1. Specifically, Appellant asserted that the trial court did not have subject matter jurisdiction over "a matter that allegedly took place" in Maryland. Mot. to Dismiss Count 1, 7/7/17, ¶ 4. Appellant conceded that neither "[t]he location of the alleged delivery, nor the dismissal of Count 1 of the Information will have any effect upon Count 2 of the Information." *Id.* at ¶ 6.

On July 17, 2017, the trial court entered an order dismissing Count 1 without prejudice.³ Immediately thereafter, Appellant proceeded to a jury trial on Count 2 for drug delivery resulting in death. On July 19, 2017, the jury found Appellant guilty.

On September 1, 2017, the trial court sentenced Appellant to a statutory maximum sentence of twenty to forty years' imprisonment. Appellant timely filed post-sentence motions requesting, in relevant part, the dismissal of the

³ The order indicated that the Commonwealth agreed that the trial court did "not have jurisdiction over the delivery charge since that occurred in the State of Maryland or at least is alleged to have occurred [in Maryland]." Order, 7/17/17.

conviction or a resentencing hearing. The trial court denied Appellant's post-sentence motions on January 26, 2018.

Appellant timely appealed and complied with the trial court's order to submit a Pa.R.A.P. 1925(b) statement. This appeal followed.

Appellant presents the following issues for review:

[1.] Whether the evidence was insufficient to sustain [Appellant's] conviction for drug delivery resulting in death where the charge was premised on a delivery occurring in Maryland, and thus did not satisfy the element that the delivery was in violation of Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act.

[2.] Whether the trial court erred in imposing the statutory maximum sentence based principally on factors inherent in the offense of drug delivery resulting in death: the sale of drugs and the death of the victim.

Appellant's Brief at 4.

Appellant first raises a challenge to the sufficiency of the evidence. Appellant claims that a violation of Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act (CSDDCA) is a necessary element of drug delivery resulting in death. ***Id.*** at 14. Appellant continues that "the only delivery here, however, occurred in Maryland" and suggests that he could not be convicted for that delivery under Pennsylvania's CSDDCA. ***Id.*** Appellant therefore asserts that his conviction for drug delivery resulting in death must also fail as a matter of law. ***Id.***

Notably, Appellant goes to some length to distinguish his sufficiency claim from a jurisdictional analysis under 18 Pa.C.S. § 102, which defines the

territorial applicability of Pennsylvania's Crimes Code. ***Id.*** at 15-16. Appellant asserts that an analysis of Section 102 "conflate[es] jurisdiction" with his argument based on "proof of an essential element of the offense." ***Id.*** at 16.

The Commonwealth responds that under Section 102, the trial court properly exercised jurisdiction based on Decedent's death in Pennsylvania. Commonwealth's Brief at 21. The Commonwealth suggests that under Section 102(a)(1), the fact that Decedent died in Pennsylvania made the location of the delivery irrelevant to Appellant's liability under Section 2506 in Pennsylvania. ***See id.*** The Commonwealth summarizes its position as follows: "[Appellant] sold heroin to [Decedent] and [Decedent] died in Pennsylvania as a result of using that heroin, Pennsylvania properly exercised subject matter jurisdiction over [Appellant] and [Appellant] was criminally liable for [Decedent]'s death." ***Id.***

A challenge to the sufficiency of the evidence requires this Court to determine "whether the evidence admitted at trial, and all the reasonable inferences derived therefrom viewed in favor of the Commonwealth as verdict winner, supports the jury's finding of all the elements of the offense beyond a reasonable doubt." ***Commonwealth v. Packer***, 168 A.3d 161, 163 n.3 (Pa. 2017) (citation and quotation marks omitted).

The provision criminalizing a drug delivery resulting in death is set forth under Chapter 25 of the Crimes Code, which relates to homicide.⁴ Section 2506 states, in relevant part:

(a) Offense defined.—A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64),[□] known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.

18 Pa.C.S. § 2506. Section 2506 “consists of two principal elements: (i) [i]ntentionally administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substance and (ii) death caused by (‘resulting from’) the use of that drug.”⁵

⁴ Section 2501 defines “criminal homicide” as “[a] person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being.” 18 Pa.C.S. § 2501(a).

⁵ We note that a former version of Section 2506 explicitly defined a drug delivery resulting in death as murder of the third degree. **See Commonwealth v. Ludwig**, 874 A.2d 623, 629-31 (Pa. 2005) (holding that former version of Section 2506 required the Commonwealth to establish malice due to the statute’s express reference to drug delivery resulting in death as murder of the third degree). However, the current version of the Section 2506 does not expressly classify drug delivery resulting in death as a recognized category of homicide. **See** 18 Pa.C.S. § 2506(a); **see also** 18 Pa.C.S. § 2501(b) (indicating that “[c]riminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.”). Therefore, under the present version of Section 2506, the Commonwealth must demonstrate that a defendant was at least “reckless” as to the death caused by the use of an illicitly delivered drug. **Commonwealth v. Kakhankham**, 132 A.3d 986, 995 (Pa. Super. 2015). Because “the dangers of heroin are so great and well-known,” this Court has concluded that a delivery of heroin alone

Commonwealth v. Kakhankham, 132 A.3d 986, 991-92 (Pa. Super. 2015) (citation and footnote omitted).

The territorial applicability of Pennsylvania Crimes Code is defined in Section 102, which states, in relevant part:

(a) General rule.—Except as otherwise provided in this section, a person may be convicted under the law of this Commonwealth of an offense committed by his own conduct or the conduct of another for which he is legally accountable if either:

(1) the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth[.]

* * *

(c) Homicide.—When the offense is homicide or homicide of an unborn child, either the death of the victim, including an unborn child, or the bodily impact causing death constitutes a “result” within the meaning of paragraph (a)(1) of this section, and if the body of a homicide victim, including an unborn child, is found within this Commonwealth, it is presumed that such result occurred within this Commonwealth.

18 Pa.C.S. § 102(a)(1), (c).

Instantly, Appellant has not demonstrated that the elements of Section 2506 preclude a conviction for drug delivery resulting in death where the drug delivery occurred outside of Pennsylvania. Section 102 clearly establishes that acts occurring outside of Pennsylvania may be subject to criminal prosecution in Pennsylvania, particularly when a death occurs within Pennsylvania. **See** 18 Pa.C.S. § 102(c). Contrary to Appellant’s assertion, an analysis of Section

satisfies the recklessness requirement when a death occurs as a result of the sale.” ***Commonwealth v. Storey***, 167 A.3d 750, 757 (Pa. Super. 2017) (citation omitted).

102 is critical to determine whether (1) the trial court properly exercised subject matter jurisdiction to convict him of an offense under Section 2506, **see Commonwealth v. Seiders**, 11 A.3d 495, 496-97 (Pa. Super. 2010), and (2) the evidence presented was sufficient to sustain the conviction based on Decedent's death in Pennsylvania.

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. **See Storey**, 167 A.3d at 757. Therefore, even if the trial court lacked jurisdiction to convict Appellant of the delivery under Section 102, the Commonwealth still established the sufficiency of the evidence of a drug delivery resulting in death. **See Packer**, 168 A.3d at 161 n.3. Accordingly, we find no merit to Appellant's sufficiency of the evidence challenge based solely on the fact that the predicate drug delivery occurred outside Pennsylvania.

Appellant next challenges the discretionary aspects of the sentence. Appellant argues that the trial court improperly relied on the facts that Appellant sold Decedent a "deadly drug" and that the delivery resulted in death when imposing a statutory maximum sentence of twenty to forty years' imprisonment.⁶ Appellant's Brief at 21. According to Appellant, this resulted

⁶ The offense gravity score of drug delivery resulting in death was 13 and Appellant's prior record score was 5. The sentencing guidelines suggested a

in a “double counting” of sentencing factors. **Id.** at 21-23 (citing **Commonwealth v. Goggins**, 748 A.2d 721, 732 (Pa. Super. 2000) (*en banc*), and **Commonwealth v. Johnson**, 758 A.2d 1214, 1219 (Pa. Super. 2000)). Specifically, Appellant asserts that there was “little about” the present offense “that was worse than any other” drug delivery resulting in death. **Id.** Appellant notes that the trial court’s references to the need to protect society and deterring the conduct of others were accounted for in the offense and failed to establish a proper basis to aggravate the sentence based on the circumstances of the present offense. **Id.** at 23.

Additionally, Appellant contends that the trial court impermissibly relied on his prior drug convictions. **Id.** at 22-23. Lastly, Appellant contends that the trial court’s consideration of the potency of the heroin and the fact that Appellant and Decedent were friends did not warrant an extreme departure from the sentencing guidelines. **Id.** at 23-24.

It is well settled that

[c]hallenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right. An appellant challenging the discretionary aspects of his sentence must invoke this Court’s jurisdiction by satisfying a four-part test:

We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) whether appellant’s

standard range minimum sentence of 8 to 9½ years, plus or minus 1 year for aggravating or mitigating factors. Therefore, the trial court’s sentence was outside the sentencing guidelines.

brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.[] § 9781(b).

Commonwealth v. Proctor, 156 A.3d 261, 273 (Pa. Super.) (some citations omitted), *appeal denied*, 172 A.3d 592 (Pa. 2017). “A substantial question exists only when the appellant advances a colorable argument that the sentencing judge’s actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.” ***Id.*** (citation omitted).

Instantly, Appellant has preserved his sentencing issues in a post-sentence motion, a timely appeal, and a Rule 2119(f) statement in his brief. ***See id.*** Furthermore, Appellant’s assertions that the trial court relied on improper sentencing factors raise substantial questions for our review. ***See Goggins***, 748 A.2d at 732.

Our review is governed by the following principles:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

When imposing a sentence, the sentencing court is required to consider the sentence ranges set forth in the Sentencing Guidelines, but i[s] not bound by the Sentencing Guidelines. . . . A court may depart from the guidelines “if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the

particular offense as it relates to the impact on the life of the victim and the community.” When a court chooses to depart from the guidelines however, it must “demonstrate on the record, as a proper starting point, his awareness of the sentencing guidelines.” Further, the court must “provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines.”

When reviewing a sentence outside of the guideline range, the essential question is whether the sentence imposed was reasonable. An appellate court must vacate and remand a case where it finds that “the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.” 42 Pa.C.S.[] § 9781(c)(3).

Commonwealth v. Sheller, 961 A.2d 187, 190 (Pa. Super. 2008) (some citations omitted). The inquiry into the reasonableness of a sentence is difficult to define. ***Commonwealth v. Walls***, 926 A.2d 957, 964 (Pa. 2007).

When reviewing the record, 42 Pa.C.S. § 9781 requires that we consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

“[A] sentence may be found to be unreasonable after review of Section 9781(d)’s four statutory factors.” ***Walls***, 926 A.2d at 964. Additionally, a sentence may also be unreasonable if it was imposed “without express or implicit consideration” of the protection of the public, the rehabilitative needs

of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community as required by 42 Pa.C.S. § 9721(b).⁷ **Id.**

This Court has held that

[w]here the trial court deviates substantially from the sentencing guideline range “it is especially important that the court consider all factors relevant to the determination of a proper sentence.” Such factors justifying an upward departure, however, may not include those already taken into account in the guidelines['] calculations.

Commonwealth v. Messmer, 863 A.2d 567, 573 (Pa. Super. 2004) (citations omitted). However, this Court should not reweigh the proper sentencing factors considered by the trial court and impose our own judgment in the place of the trial court. **Commonwealth v. Macias**, 968 A.2d 773, 778 (Pa. Super. 2009).

Here, the trial court provided the following statement before imposing sentence:

Well, we’ve listened carefully to everything said this morning in this courtroom regarding this sentencing hearing or regarding the sentencing of [Appellant], and, again, we’ve read and reviewed

⁷ The **Walls** Court cautioned:

Even though the unreasonableness inquiry lacks precise boundaries, we are confident that rejection of a sentencing court’s imposition of sentence on unreasonableness grounds would occur infrequently, whether the sentence is above or below the guideline ranges, especially when the unreasonableness inquiry is conducted using the proper standard of review.

Walls, 926 A.2d at 964.

the pre-sentence investigation report as well as [the] Commonwealth's [sentencing] memorandum.

In sentencing anyone who's committed a crime, this [c]ourt takes into consideration the nature of the crime, the probability or possibility of rehabilitating the criminal, and the need to protect society. The crime charged for which [Appellant] has been convicted is a very serious crime. It's a first-degree felony, as, for example, is third-degree murder. Both those crimes carry the same statutory maximum of 20 to 40 years['] incarceration.

[Appellant] in this case caused the death of an old friend by selling him heroin. [Appellant]'s prior record score indicates that he has in the past been involved in trafficking of drugs and, in fact, has been convicted on several occasions for those kinds of offenses. We recognize that [Appellant] here today, after spending several years in incarceration, indicates that he regrets committing this crime and is remorseful, but there's nothing in the record of the trial or in the pre-sentence investigation report that would indicate that prior to today he's expressed any remorse, and we well understand that drug addiction may be an explanation for why a crime was committed but is no excuse for the commission of the crime.

We would posit that there are many drug addicts who, in fact, do not engage in the trafficking of drugs or the business of drug selling, and while the [Appellant] today has indicated that he on several occasions asked the authorities for help to deal with his drug addiction and claims he was turned down, there's nothing to indicate that during the time that he was addicted and not incarcerated, he, himself, took any initiative to try to deal with his drug addiction.

We do not consider [Appellant] a good prospect for rehabilitation since the history of [Appellant] and his addiction indicates that apparently since his addiction came to fruition, the only time he's been clean is when he's been incarcerated.

Finally, a young man is dead because of [Appellant]'s actions. [Appellant] sold the victim in this case a deadly drug. He was, in fact, a peddler of death.

Finally, we believe the protection of society from this individual is of paramount concern in this particular case given the circumstances. [Appellant] has had several chances to mend his ways to stop dealing in drugs, but apparently to no avail. I'm

firmly convinced that society is safer with [Appellant] incarcerated rather than not. And while I'm certainly sympathetic to the other people still living that [Appellant] has hurt through his criminal actions, I cannot give more consideration to those hurts than I can give to the danger he poses to the public.

And I would point out that clearly his actions were predatory in nature. They were preying upon a very vulnerable group of people, those who are addicted to drugs. [Appellant] didn't have to sell that purest of the pure heroin to his old friend that night, but he did it. He bragged about it. He touted the quality of the merchandise he was selling as much as a car salesman would tout the quality of the car he's seeking to sell to a customer.

Society should not have to take another chance that this [Appellant], when left to his own devices, will not simply return to his drug dealing ways. Therefore, we impose the following sentence, and we hope that the sentence we are about to impose will, in fact, deter those who seek to make an easy buck selling deadly poison to drug addicts or even those who seek an easy way to support their own drug habits by selling those deadly drugs. As [defense counsel] aptly pointed out, there are many addicts who do not turn to crime, but [Appellant] in this case certainly has, and it's not the first time.

. . . [Appellant]'s prior record score is 5 but, as [the Commonwealth] pointed out, does not take into consideration the number of prior drug trafficking and drug-involved crimes that make up that prior record score. . . .

We are satisfied given the considerations just mentioned by this Court that the [Appellant]'s conduct, not only regarding this crime, but prior crimes for which he has committed, as well as what would appear to be his poor prospects for rehabilitation when not incarcerated, and the need for the protection of society from him, as well as the deterrent effect of the sentence about to be imposed will have, we sentence the [Appellant] to the maximum 20 to 40 years['] incarceration in a state correctional institution. . . .

N.T., 9/1/17, at 19-23.

Following our review of the factors set forth in Section 9781(d), we conclude that the trial court properly considered the nature and circumstances

of the offense and the history and characteristics of Appellant, as well as the sentencing guidelines. **See** 42 Pa.C.S. § 9781(1). Moreover, the court had ample opportunity to observe Appellant at trial and sentencing, and it had the benefit of a pre-sentence investigation report. **See id.** The court's reasons for its sentence expressed an appropriate consideration of the protection of the public, the gravity of the offense as it related to the impact on the life of Decedent and on the community, and the rehabilitative needs of Appellant. **See** 42 Pa.C.S. § 9721(b).

Contrary to Appellant's arguments, we do not find the trial court's reasons to be improper or unreasonable. The court's explanation for its sentence included proper aggravating factors, such as the nature of the drug that Appellant sold, Appellant's salesmanship of the heroin he sold, and Appellant's existing relationship with Decedent. The court's references to Appellant's prior convictions for drug offenses were proper, as the specific nature of those offenses was relevant to the court's consideration of Appellant's rehabilitative potential.⁸ **See Messmer**, 863 A.2d at 573 (noting

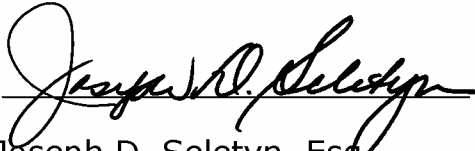
⁸ Appellant relies on **Goggins** to support his claim that the trial court improperly double counted his prior drug convictions. We note that **Goggins** held that the trial court's references to the defendant's prior convictions in that case were improper where those factors were accounted for in a mandatory minimum sentence based, in part, on the defendant's prior convictions. **See Goggins**, 748 A.2d at 732. In **Johnson**, this Court held that the defendant's prior rape conviction was a pre-condition of his conviction for failing to register. **Johnson**, 758 A.2d at 1218. Therefore, **Johnson** concluded that there was no double counting in that case. **Id.** Thus, although **Goggins** and **Johnson** state the general principles against double counting sentencing factors, they are not controlling in this case.

that although the prior record score accounted for the defendant's prior driving-under-the-influence convictions, the score did not reflect the defendant "complete absence of regard for the law" and the need to protect the public). Similarly, the court's reference to deterrence was adequately related to the protection of the public in light of Appellant's poor rehabilitative potential. Accordingly, we see no merit to Appellant's claim that the trial court double counted factors already included in the sentencing guidelines. ***See id.***

Therefore, following a review of the record, and mindful of our standard of review, we see no reason to disturb the trial court's decision to impose a maximum sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/8/2019

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 215 MAL 2019
	:	
Respondent	:	
	:	Petition for Allowance of Appeal from
	:	the Order of the Superior Court
v.	:	
	:	
	:	
MITCHELL GREGORY PECK, JR.,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 24th day of September, 2019, the Petition for Allowance of Appeal is **GRANTED, LIMITED TO** the issues set forth below. Allocatur is **DENIED** as to the remaining issue. The issues, as stated by petitioner, are:

- (1) Where the drug delivery resulting in death (“DDRD”) statute explicitly applies only to deliveries occurring “in violation of section 13(a)(14) or (30) of” the Controlled Substance, Drug, Device and Cosmetic Act (“The Act”), is violation of the Act an essential element of DDRD?
- (2) Where a drug delivery occurs wholly in another state, can that delivery violate the Act, which explicitly applies only to deliveries occurring “within the Commonwealth?”
- (3) If a violation of the Act is an element of DDRD and an out-of-state delivery does not violate the Act, did the Superior Court err in affirming [Petitioner’s] DDRD conviction based on a delivery occurring wholly in Maryland?