Northeastern University
School *of* Law

RE: Massachusetts should reject counterproductive, costly mandatory minimums, and instead invest in sensible, evidence-based public health strategies

November 9, 2017

Dear members of the Commonwealth of Massachusetts House of Representatives:

As an associate professor of Law and Health Sciences at Northeastern University, I study the use of law to improve health and safety. My current research focuses on the deployment of legal and programmatic tools to address the current overdose crisis—work that draws on over 15 years of experience in the fields of substance use and drug policy. Over the course of my career, I have been honored to contribute my expertise to the work of local, state, national, and international bodies including the US Department of Justice, City of Baltimore, and United Nations Office on Drugs and Crime. Today, I am writing to share several concerns about the criminal justice reform proposals working their way through the Massachusetts legislature.

In recent years, this Commonwealth has made significant strides towards being smart on crime, while also beginning to bend the curve on the opioid crisis that has devastated our communities. To build on these important gains, I urge you to support evidence-based sentencing reform, while rejecting counterproductive and costly punitive strategies included in the proposed legislation.

I. Harsh New Drug Sentences Take the Commonwealth Backwards

First, I am highly troubled by the Senate's passage of the provision Controlled Substances Causing Death or Great Bodily Harm, which imposes new mandatory minimums as part of second-degree murder charges for drug delivery resulting in death—also known as "drug-induced homicide." I urge the House to reject this and any similar proposals as it considers criminal justice reform.

The language in the proposed statute on the Senate side is dangerously broad, opening the door to highly punitive responses in a variety of fault-free scenarios. Surely, the Legislature does not intend to impose a mandatory 10-year minimum sentence on a parent whose only contribution to an overdose (or any number of other adverse physical reactions) is providing their child with medication the child had been legitimately prescribed. Seemingly far-fetched, analogous charges have nonetheless been brought against parents in other states that adopted vague statutes of this sort.[1]

A more precise drafting of this provision would not cure its faults, however, because it's not just bad law—it's also bad policy. Below I outline how such policies interfere with the public health response, effectively compounding the tremendous loss of life our communities face every day.

Furthermore, the Commonwealth's statutory framework already authorizes charging drug dealers for bodily injury in drug users. Prosecutors have had demonstrable success in bringing charges and securing at least 116 convictions in such cases.[2] In fact, by some estimates, Hampden County in our state tracks one of the highest number of such charges among all counties in the United States.[3] This is on top of an existing arsenal of drug distribution, conspiracy, and other drug-related prosecutorial tools already on the books. Individuals charged or convicted on drug-related provisions—many serving sentences of 5 years or more—dominate our state prisons and jail populations.

In short, Massachusetts' overdose crisis is not a result of insufficiently harsh or inadequate tools for drug law enforcement.

Five Reasons "Drug-induced Homicide" and Other Mandatory Minimum Sentences are Counterproductive

1. There is broad consensus among Criminology scholars that **harsh sentencing laws do not measurably deter drug dealing.**[4]

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[1] David Owens & Josh Kovner, *Stafford Mom Charged with Manslaughter in Toddler's Methadone Overdose Death,* HARTFORD COURANT (Oct. 10, 2017), *available at* http://www.courant.com/breaking-news/hc-br-stafford-toddler-overdose-death-1011-story.html

[2] Lindsay LaSalle, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POL. ALLI. (2017), *available at* https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf

[3] Health In Justice Initiative, *Most Active Counties In Pursuing Drug-induced Homicide Charges*, NORTHEASTERN UNIVERSITY SCHOOL OF LAW (2017), *available at* https://www.healthinjustice.org/geography

[4] Public Safety Performance Project, *Pew Analysis Finds No Relationship Between Drug Imprisonment and Drug Problems,* T. PEW CHAR. TRUSTS (2017), *available at* http://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2017/06/pew-analysis-finds-no-relationship-between-drug-imprisonment-and-drug-problems; Roger Przybylsk, *Correctional and sentencing reform for drug offenders.* CO. CRIM. JUST. REF. CLTN (2009), *available at* http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf

2. Contrary to conventional wisdom, there is also no evidence that incapacitating drug sellers for extended periods of time by "taking them off the street" results in sustained reductions in illicit drug supplies, increases in drug prices, suppression in overdose rates, or other trends these policies are intended to produce.[5] There is, however, evidence that **such interventions inadvertently produce higher levels of drug-related violence and unpredictable fluctuation and adulteration in street drug supplies**.[6]

3. As applied, "drug-induced homicide" and similar charges too often ensnare friends, partners, or other individuals whose role in an overdose event cannot be characterized as a dealer.[7] Largely because the legal elements of these crimes require a close relationship with the deceased and an uninterrupted chain of custody, our national analysis suggests that ***a majority* of the individuals accused of these crimes are non-dealers.**[8]

4. Illicit drug use often occurs in peer groups, blurring the line between "users" and "dealers." With their money pooled, one user may purchase drugs for use by the others. If one were to overdose, the drug purchaser—not a "dealer"—can face a murder charge. **Charging a person who has substance use disorder with second degree murder criminalizes an already stigmatized illness**—contravening the "public health approach" we so often espouse in the Commonwealth.

5. Our recent analysis further suggests that drug induced-homicide charges are deployed unevenly. In our national dataset, ***more than half* of all charges brought using such provisions involved a person of color as a dealer and a white victim**.[9] This, despite evidence that drug users typically buy drugs from members of their own race, class and peer group.[10] These data underscore the danger that, as has been the case with other harsh penalties for drug-related crimes, the application

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[5]Harold Pollack & Peter Reuter, *Does tougher enforcement make drugs more expensive?*, 109 ADDICTION 1959 (2014), *available at* http://faculty.publicpolicy.umd.edu/sites/default/files/reuter/files/pollack_and_reuter.pdf.

[6]Dan Werb et al., *Effect of drug law enforcement on drug market violence: A systematic review.* 22 INT. J. OF DRUG POL. 87 (2011), *available at* http://www.sciencedirect.com/science/article/pii/S0955395911000223

[7]Zachary Siegel, *Despite 'public health' messaging, law enforcement increasingly prosecutes overdoses as homicides.* IN JUST. TODAY (2017), *available at* https://injusticetoday.com/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7

[8] Health In Justice Initiative, *Relationship Between Accused and Victim,* NORTHEASTERN UNIVERSITY SCHOOL OF LAW (2017), *available at* https://www.healthinjustice.org/demographics

[9] Health In Justice Initiative, *Race of Accused (Buyer) and Victim (Dealer),* NORTHEASTERN UNIVERSITY SCHOOL OF LAW (2017), *available at* https://www.healthinjustice.org/demographics

[10] Dr. Carl Hart, *The Real Opioid Emergency*, NY TIMES (2017), *available at* https://www.nytimes.com/2017/08/18/opinion/sunday/opioids-drugs-race-treatment.html?_r=0

of mandatory minimums and drug-induced homicide is catalyzed by racial stereotypes and can exacerbate existing disparities in sentencing and incarceration.

Drug-induced Homicide Prosecutions Undermine the Public Health Response to Overdose

As a Public Health scholar, I am especially concerned with the potential collateral detriment that can result from the enactment of this and similar drug induced-homicide provisions. Research suggests that many witnesses to overdose events are reluctant to call 911 during overdose events because of the fear of legal consequences.[11] Many states, including the Commonwealth, have passed Good Samaritan Laws, designed to send a supportive message by carving out limited criminal amnesty for overdose victims and witnesses who call for help, and encouraging drug users not to use alone. These laws have been widely heralded and supported by public health, law enforcement, and family stakeholders across the state.

Prosecuting overdose witnesses for murder **sends the *opposite* message, creating a documented chilling effect** among those who may seek life-saving help.[12] Prosecutors often seek broad press coverage when these charges are brought and a conviction is secured. Our national analysis suggests that media coverage of these prosecutions has increased dramatically since 2008.[13] The bottom line is that by acting at cross-purposes with public health messaging and Good Samaritan Laws encouraging people to call 911, these prosecutions risk lives. The Senate's amendment on drug-induced homicides will therefore exacerbate the very problems it purports to solve, and I strongly urge the House to reject any similar proposals.

Finally, severe penalties such as mandatory minimums for drug-induced homicide sets the Commonwealth up to waste finite public resources on lengthy investigations and decades-long prison sentences. It thus threatens to crowd out investments urgently needed to support proven interventions, such as naloxone distribution, expansion of substance use treatment, and public education about overdose risk and response.

II. Public Health Policies and Interventions will Save Lives and Resources

Instead of doubling down on failed mandatory minimum approaches, Massachusetts has an opportunity to lead the nation on two important criminal justice reform fronts:

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[11] Amanda Latimore & Rachel Bergstein, "*Caught with a body" yet protected by law? Calling 911 for opioid overdose in the context of the Good Samaritan Law,* 50 INT. JOUR. OF DRUG POL. 82 (2017), *available at* http://www.sciencedirect.com/science/article/pii/S0955395917302888?via%3Dihub

[12] Amanda Latimore & Rachel Bergstein, "*Caught with a body" yet protected by law? Calling 911 for opioid overdose in the context of the Good Samaritan Law,* 50 INT. JOUR. OF DRUG POL. 82 (2017), *available at* http://www.sciencedirect.com/science/article/pii/S0955395917302888?via%3Dihub

[13] Health In Justice Initiative, *Drug- Induced Homicide Charges (2000-2017),* NORTHEASTERN UNIVERSITY SCHOOL OF LAW (2017), *available at* https://www.healthinjustice.org/time-trends

Sensible reform in mandatory minimum sentences for minor drug crimes. In view of the evidence cited above, such reductions are both pragmatic and just. By shifting the approach away from legal interventions and prosecutorial strategies that have not produced results, the Commonwealth has an opportunity to return critical discretion to its judges and encourage innovation. Such reform also frees up critical resources for reinvestment in approaches that have much more promise of positive impact.

Providing evidenced-based addiction treatment for opioid addiction under Representative O'Day's Amendment 116 presents precisely such an opportunity. It is designed to scale up access to substance use treatment behind bars, with specific focus on opioid substitution therapy. Such an effort potentiates a number of benefits and cost savings:

1. It is estimated that up to 60% of **correctional populations suffer from substance use disorder**, with a significant percentage of those inmates affected specifically by opioid use disorder (OUD).[14] Not taking the opportunity to provide adequate treatment behind bars threatens inmate health and can result in life-threatening events and even deaths.

2. Since many inmates are forced to undergo unmanaged withdrawal from opioids and other drugs, **failure to provide treatment also creates a stressful work environment for correctional staff**, who suffer from elevated rates of depression and other stress-related conditions, resulting in burn-out and high turn-over.

3. Paucity of appropriate care behind bars and lack of linkages to care after release also means that SUD-affected inmates are placed at an extraordinarily high risk of overdose death upon re-entry. In fact, **newly-released inmates are 120 times more likely to overdose and die** during the first month after re-entry than the general population, according to Chapter 55 analysis by the Massachusetts Department of Public Health.[15] Therefore, providing such treatment is a clear opportunity to reduce the overall community burden of overdose morbidity and mortality in our state.

4. Opioid substitution therapy has been shown to substantially decrease criminal justice involvement[16]. Therefore, initiating OST in correctional settings and linking

[14] *New Casa Report Finds: 65% Of All U.S. Inmates Meet Medical Criteria For Substance Abuse Addiction, Only 11% Receive Any Treatment,* NTNL. CNTR. ON ADDTN. AND SUB. ABUSE (2010), *available at* https://www.centeronaddiction.org/newsroom/press-releases/2010-behind-bars-II

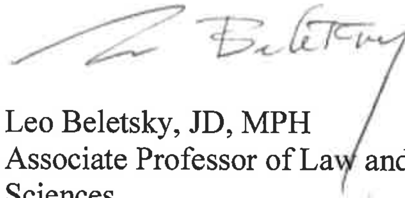
[15] *An Assessment of Opioid-Related Overdoses in Massachusetts 2011-2015,* MDPH DATA BRIEF (2017), *available at* http://www.mass.gov/eohhs/docs/dph/stop-addiction/data-brief-chapter-55-aug-2017.pdf

[16] Peter Friedmann et al., *Medication-assisted treatment in Criminal Justice Agencies Affiliated with the Criminal Justice-Drug Abuse Treatment Studies (CJ-DATS): Availability, Barriers & Intentions.* 33 SUBST. ABUSE 9 (2012), *available* at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3295578/

individuals to care upon release is **almost certain to reduce recidivism and cut law enforcement and correctional costs**.

Provision of opioid substitution therapy in correctional settings is not new. Such treatment is broadly and successfully deployed in most peer countries and is an established international best practice. It is also available in selected facilities in New York State, Rhode Island, and also in Massachusetts. By expanding the roll-out of this lifesaving therapy, Massachusetts has an opportunity to invest in a proven approach that promotes public health and public safety.

Sincerely,



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