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## THE IMPOSSIBLE DELIVERY: CODIFYING THE JOINT-ACQUISITION DEFENSE

*Taylor Glass\** and *Christopher Maidona\*\**

### I. INTRODUCTION

Jenny Werstler and Emma Semler struggled with addiction. They met each other in rehab when they were teenagers.<sup>1</sup> In 2014, on Werstler's twentieth birthday, the two purchased a small amount of heroin and used it inside a public bathroom.<sup>2</sup> As a result of the heroin, Werstler died of an overdose. Semler was indicted under 21 USC § 841(a)(1), Distribution Resulting in Death. Semler's lawyers argued that "while Semler had contacts and money, Werstler was just as much a participant in the drug buy."<sup>3</sup> She drove Semler and her sister to pick up the drugs and waited in the car while the transaction was carried out."<sup>4</sup> Semler was ultimately convicted, but she appealed her conviction to the Third Circuit Court of Appeals.<sup>5</sup>

On June 1, 2021, the Third Circuit Court of Appeals stated: "[D]istribute' under the Controlled Substances Act does not cover individuals who jointly and simultaneously acquire possession of a small amount of a controlled substance solely for their personal use."<sup>6</sup> As a result, Semler's conviction was overturned, and her case was remanded so that a lower court could determine questions of fact.<sup>7</sup>

While the *Semler* opinion is non-binding on lower courts outside of the Third Circuit, the holding in this case is among the growing number of opinions that have applied the concept of Joint-Acquisition Defense ("JAD") in various

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\* J.D., West Virginia University College of Law, 2022. I am grateful to my co-author for his insight, contributions, guidance, and support, and I am grateful to my mother, father, and sister for their faith in me.

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<sup>1</sup> Jeremy Roebuck & Aubrey Whelan, *U.S. Appeals Court Overturns Conviction for Montco Woman Serving a 21-Year Sentence for Friend's Overdose Death*, PHILA. INQUIRER (June 2, 2021), <https://www.inquirer.com/news/emma-semler-third-circuit-jenny-werstler-drug-delivery-resulting-in-death-case-20210602.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *United States v. Semler*, 858 F. App'x 533, 536 (3d Cir. 2021).

<sup>7</sup> *Id.* at 541.

drug cases. Specifically, this common-law defense negates the delivery element in most drug offenses.

Part II of this article explores the evolution and applications of competing legal standards relating to the JAD. Part II also identifies the elements of the JAD and how they vary in different jurisdictions. Part II concludes by bringing attention to the specific drug-induced homicide statutes within West Virginia and noting the absence of case law on the issue in West Virginia. Part III of this article argues that the JAD should be codified to clarify inconsistencies, provide guidance to courts, and allow prosecutors to better engage with their gatekeeping function when exercising prosecutorial discretion. Finally, Part IV of this article concludes by reiterating the importance of codifying the JAD at either the federal or the state level, but especially in states that are still struggling with the opioid crisis. This article is a call for action.

## II. BACKGROUND

If one individual gives another a controlled substance, and the recipient dies from an overdose, the person supplying the controlled substance can be convicted of murder.<sup>8</sup> Twenty states and the federal government have adopted some variation of this law, generally called drug-induced homicide statutes,<sup>9</sup> some of them are sentence enhancers.<sup>10</sup> These statutes codify the essence of the felony-murder doctrine.<sup>11</sup> They were enacted, beginning in the 1970s, as part of the war on drugs, but prosecutors really started using these statutes beginning in the 1990s.<sup>12</sup>

State and federal legislatures intended to extend the reach of prosecutors up the criminal ladder through drug-induced homicide statutes.<sup>13</sup> However, in practice, those indicted under these statutes are rarely drug kingpins; normally, they are low-level distributors or friends sharing drugs.<sup>14</sup> These statutes have subjected end-users to the harsh penalties reserved for drug distributors. As such,

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<sup>8</sup> See, e.g., W. VA. CODE ANN. § 61-2-1 (West 2022) (“Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.”) (emphasis added).

<sup>9</sup> Valena E. Beety et al., *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 711 (2019).

<sup>10</sup> 21 U.S.C.A § 841(a)(1) (West 2022).

<sup>11</sup> See generally Kaitlin S. Phillips, *From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process*, 70 DUKE L.J. 659, 673–74 (2020).

<sup>12</sup> Beety et al., *supra* note 9, at 709.

<sup>13</sup> See Alex Kreit, *The Opioid Crisis and the Drug War at a Crossroads*, 80 OHIO ST. L.J. 887, 895–96, 898 (2019).

<sup>14</sup> *Id.* at 898.

drug-induced-homicide statutes have been used to undermine the widely shared legislative purpose of most drug-sentencing schemes—to punish drug dealers and rehabilitate drug users.<sup>15</sup>

Several courts have created a common-law defense to the charge of Delivery Resulting in Death that negates the element of delivery for users who jointly purchase drugs for shared, personal use.<sup>16</sup> Some opinions call this exception the joint possession defense or joint user defense, but in this article, we denote this exception as the joint-acquisition defense. Legislatures should codify this common law doctrine.

West Virginia, as a state that has been devastated by the opioid crisis, should implement harm-reduction practices, and its drug-induced-homicide statute, as written, is at odds with this goal.<sup>17</sup> Amending the statute would mitigate the strong disincentive that end-users currently have to call 911 during an overdose.<sup>18</sup> Removing this disincentive is consistent with our legislature's intent to rehabilitate rather than punish drug addicts.<sup>19</sup>

Part II.A discusses the variations in the JAD developed at the federal and state level; focusing primarily on Massachusetts, California, New Jersey, and across the federal circuits. Part II.B discusses the various elements and policy reasons that constitute the JAD as applied by various courts, often inconsistently.

#### A. *Development of the JAD doctrine in the case law*

What is the JAD? How have states applied the JAD? Is it subject to abuse? These questions will be addressed throughout the article, but a thorough discussion of the JAD should begin at its inception, the Second Circuit case *US v. Swiderski*. In *Swiderski*, the defendant and his fiancé picked up a police informant at a hotel in New York City, and they drove him to a small apartment.<sup>20</sup> There, the defendant was given a package containing four ounces of cocaine from a supplier.<sup>21</sup> Both the defendant and his fiancé sampled the product and paid for

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<sup>15</sup> See *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977).

<sup>16</sup> See *People v. Edwards*, 702 P.2d 555 (Cal. 1985); *Commonwealth v. Johnson*, 602 N.E.2d 555 (Mass. 1992); *State v. Carithers*, 490 N.W.2d 620 (Minn. 1992); *State v. Morrison*, 902 A.2d 860 (N.J. 2006).

<sup>17</sup> Brendan Saloner, Rachel Landis, Bradley D. Stein & Colleen L. Barry, *The Affordable Care Act in the Heart of the Opioid Crisis: Evidence from West Virginia*, 38 HEALTH AFFS. 633 (Apr. 2019).

<sup>18</sup> See Amanda D. Latimore & Rachel S. Bergstein, "Caught with a Body" Yet Protected by Law? Calling 911 for Opioid Overdose in the Context of the Good Samaritan Law, 50 INT'L J. OF DRUG POL'Y 82 (2017); Katherine McLean, *Good Samaritans vs. Predatory Peddlers: Problematizing the War on Overdose in the United States*, 41 J. OF CRIME & JUST. 1 (2018); Andrew Parker, Daniel Strunk & David A. Fiellin, *State Responses to the Opioid Crisis*, 46 J. LAW, MED. & ETHICS 337 (2018).

<sup>19</sup> *Swiderski*, 548 F.2d at 450.

<sup>20</sup> *Id.* at 448.

<sup>21</sup> *Id.*

it.<sup>22</sup> the defendant remarked that the cocaine was not fit for his personal use, but he could sell it to others.<sup>23</sup> When the defendant and his fiancé were arrested, the fiancé had actual possession of both the cocaine and the money.<sup>24</sup> Both defendants were charged with possession with intent to distribute under Title 21 U.S.C. § 841(a)(1).<sup>25</sup> The prosecutor argued that the intent-to-distribute element was satisfied even though the defendants bought the cocaine only to share it between themselves.<sup>26</sup> The court disagreed, holding that “passing of a drug between joint possessors who simultaneously acquired possession at the outset for their use” is not distribution.<sup>27</sup> Where two individuals simultaneously and jointly acquire possession of a drug for their use, the only crime is personal drug use and simple possession because neither intends to distribute the drug further.<sup>28</sup> Furthermore, because neither of the co-purchasers intends to distribute the drug further, they do not continue the criminal enterprise of drug trafficking and should not be subject to the harsher punishments that Congress reserved for links in the chain of drug distribution.<sup>29</sup> The federal record is replete with cases that have distinguished their facts from *Swiderski* or declined to comment on whether it is good law.<sup>30</sup>

This ruling did not take place in a vacuum. 21 U.S.C. § 841(a)(1), a recently enacted statute, eliminated the acquiring agent defense, which is similar to the JAD in that it is available to defendants who merely got drugs on behalf

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 447.

<sup>26</sup> *Id.* at 448.

<sup>27</sup> *Id.* at 450–51.

<sup>28</sup> *Id.* at 450.

<sup>29</sup> *Id.* at 451.

<sup>30</sup> See *United States v. Mancuso*, 718 F.3d 780, 798 (9th Cir. 2013) (“[*Swiderski*] would not apply to Mancuso’s case, because the record does not support finding that any of the witnesses pooled money with Mancuso and traveled with him to acquire the cocaine jointly, intending only to share it together.”); *United States v. Wallace*, 532 F.3d 126, 131 (2d Cir. 2008) (“Wallace had ‘sole possession’ of the drugs, even if he ‘handed’ over a small amount’ to his occasional visitor.”); *United States v. Speer*, 30 F.3d 605, 609 (5th Cir. 1994) (declining to determine whether *Swiderski* is good law because, as part of the drug transaction, the defendants picked up drugs for another person); *United States v. Washington*, 41 F.3d 917, 920 (4th Cir. 1994) (“Washington, from the time he purchased the cocaine until the time he was found with it, intended to distribute the cocaine to his friends. Although Washington did not intend to sell the cocaine to his friends, he intended to deliver cocaine to those friends.”); *United States v. Taylor*, 683 F.2d 18, 21 (1st Cir. 1982) (finding the JAD inapplicable because “the complex nature of the operation and the amount of marijuana confiscated belies defendants’ contention that they did not intend to transfer the drugs to other persons”).

of another.<sup>31</sup> Note that the acquiring agent defense serves the same purpose as the JAD, which is to protect mere users from the harsh penalties intended for dealers. But almost all of the cases discussing the JAD agree that a defendant's status as an intermediary is not enough to trigger the JAD.

Where is a joint-acquisition instruction applicable? In *People v. Coots*, the court distinguishes between two paradigmatic examples of a narcotics transaction.<sup>32</sup> In the first example, A and B both pool their money, travel to a dealer to buy drugs, and then do drugs.<sup>33</sup> In the second example, A asks B to buy drugs and gives B money for the purchase, and then B buys the drugs alone, returns to A, and gives A the drugs.<sup>34</sup> A joint-acquisition jury instruction is appropriate in the first example but not the second.<sup>35</sup> Through its examination of the case law, the *Coots* court argues convincingly that the difference between these two paradigmatic examples is at the core of the doctrine.<sup>36</sup>

Our purpose in outlining the factors and discussing the rationale behind them is to create an analytic framework that is consistent with the actual results in the case law. So, in the discussion below, we may claim that one rationale guided the application of an element in a case where that element is never discussed.<sup>37</sup> These interpretations are not meant to put words in the mouths of courts but to fill in the gaps of the doctrine so that it is consistent with the results in cases. We divide the JAD into three elements: (1) joint and simultaneous acquisition; (2) partnership; and (3) presence. In this section, we discuss the rules for each of these elements as they have developed in the case law at the federal level and among the states. After stating what we believe to be the general consensus, we will discuss the benefits of codifying the JAD.

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<sup>31</sup> *Swiderski*, 548 F.2d at 451 (“The [‘agency’] clause was intended by Congress simply to ensure elimination of the so-called “‘procuring agent’ defense” that had existed under the drug laws.”).

<sup>32</sup> *People v. Coots*, 968 N.E.2d 1151, 1160–61 (Ill. App. Ct. 2012); *see also* *Speer*, 30 F.3d at 608.

<sup>33</sup> *Coots*, 968 N.E.2d at 1160.

<sup>34</sup> *Id.* at 1160–61.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> For example, below we discuss that the *Walmsley* court applied *Edwards* pooling rule. The *Walmsley* court does not discuss pooling, but applying the *Edwards* pooling rule explains the result in the case and is consistent with the *Walmsley* court's reasoning.

### B. *The Elements*

This section discusses the elements as applied by different courts at the state and federal levels.

#### 1. Joint and Simultaneous acquisition

Joint and simultaneous acquisition is the element that is most closely related to the doctrine of constructive possession.<sup>38</sup> It has two requirements: (1) that the co-purchasers simultaneously take possession of a single package of drugs;<sup>39</sup> and (2) that the purchasing parties pool their money to buy the drugs.<sup>40</sup>

##### i. *One Drug Parcel*

First, most courts agree that co-purchasers must take total possession of a single drug parcel.<sup>41</sup> Purchasing a single parcel of drugs does not include circumstances where a purchaser buys narcotics and then transfers a portion of the parcel to a third party without compensation (a gift) or where the purchaser and the third party did not jointly acquire the narcotics and the purchaser can be convicted of distribution (separate purchases that occurred at the same time).<sup>42</sup>

In *Ogbechie*, a girl and her boyfriend ran away from Ohio to California.<sup>43</sup> While prostituting herself, the girl lived with and bought cocaine from the defendant.<sup>44</sup> Later, California prosecutors charged the defendant with pimping,

<sup>38</sup> *Swiderski*, 548 F.2d at 448; *Coots*, 968 N.E.2d at 1160–62; *Commonwealth v. Carrillo*, 131 N.E.3d 812, 831 (Mass. 2019); *State v. Carithers*, 490 N.W.2d 620, 622 (Minn. 1992); *State v. Morrison*, 902 A.2d 860, 871 (N.J. 2006). *But see* *United States v. Wright*, 593 F.2d 105, 108 (9th Cir. 1979).

<sup>39</sup> *People v. Camunias*, No. 3-15-0583, 2018 IL App (3d), at \*1 (Ill. App. May 14, 2018), *People v. Ogbechie*, No. G055162, 2019 WL 1349692, at \*11 (Cal. Ct. App. Mar. 26, 2019); *State v. Jones*, No. A-5698-06T4, 2010 WL 3185779, at \*5 (N.J. Aug. 11, 2010).

<sup>40</sup> *United States v. Mancuso*, 718 F.3d 780, 798 (9th Cir. 2013); *People v. Edwards*, 702 P.2d 555, 560 (Cal. 1985); *People v. Bland*, No. D050556, 2008 WL 344782, at \*2 (Cal. Ct. App. Feb. 8, 2008); *State v. Myles*, No. A-2284-06T4, 2009 WL 365445, at \*4 (N.J. Super. Ct. App. Div. Feb. 17, 2009); *State v. Ali*, No. A 5157-09T1, 2011 WL 2349977, at \*4 (N.J. Super. Ct. App. Div. June 1, 2011).

<sup>41</sup> *Coots*, 968 N.E.2d at 1160-61; *see also* *Speer*, 30 F.3d at 608.

<sup>42</sup> *Camunias*, 2018 IL App (3d), at \*1 (finding that giving three of fourteen bags of heroin for a ride constituted distribution within the meaning of the Illinois statute); *Ogbechie*, 2019 WL 1349692, at \*11 (finding that a joint-acquisition instruction was inappropriate when the defendant bought a large amount for one person and a small amount for himself); *Jones*, 2019 WL 3185779, at \*5 (finding “no joint possession because the defendant was never in constructive or actual possession” of the heroin purchased by his coworker).

<sup>43</sup> *Ogbechie*, 2019 WL 1349692, at \*2.

<sup>44</sup> *Id.*

rape, and furnishing a minor with cocaine.<sup>45</sup> The appellate court considered whether or not it had a *sua sponte* duty to issue a JAD instruction at the defendant's trial.<sup>46</sup> Here, the court reasoned that a JAD instruction was inconsistent with the defendant's theory of the case that "he paid the drug seller for his small bag of cocaine and [the girl] purchased a big bag for her and [her friend. They] picked up cocaine from the dealer. Thus, he did not commingle funds . . . ."<sup>47</sup> Co-purchasers need to buy one drug package that they will split later, not separate packages for personal use.<sup>48</sup>

## ii. Pooling

Pooling is where one or more co-purchasers give their money to one person, and that collected money is used to purchase narcotics.<sup>49</sup> Money is not pooled if it comes from one person.<sup>50</sup> Several cases have identified pooling as a requirement for the joint acquisition defense.<sup>51</sup>

### 2. Partnership

The two cases that most clearly outline the partnership test are *Edwards* and *Morrison*.<sup>52</sup> Though Massachusetts does not have a partnership requirement, those courts have developed a cluster of rules that are analogous to such a requirement.<sup>53</sup>

In *Edwards*, the defendant and his girlfriend, Rogers, were hitchhiking.<sup>54</sup> One night they met a stranger in a bar.<sup>55</sup> After discussing heroin, the stranger convinced the couple to pool their money with him.<sup>56</sup> They bought some heroin

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<sup>45</sup> *Id.* at \*1.

<sup>46</sup> *Id.* at \*5.

<sup>47</sup> *Id.* at \*11.

<sup>48</sup> *Id.*

<sup>49</sup> See *People v. Edwards*, 702 P.2d 555 (Cal. 1985).

<sup>50</sup> *State v. Myles*, No. 05-07-1051, 2009 WL 365445, at \*4 (N.J. Super. Ct. App. Div. Feb. 17, 2009).

<sup>51</sup> *People v. Bland*, No. D050556, 2008 WL 344782, at \*2 (Cal. Dist. Ct. App. Feb. 8, 2008) (finding there was no evidence that purchasers mutually agreed to pool funds); *Myles*, 2009 WL 365445, at \*4 (finding the defendant was the sole possessor of the drugs purchased with only the defendant's money).

<sup>52</sup> *Edwards*, 702 P.2d at 559.

<sup>53</sup> *Commonwealth v. Blevins*, 775 N.E.2d 1259, 1262 (Mass. App. Ct. 2002); *Commonwealth v. Mitchell*, 711 N.E.2d 924, 928 (Mass. App. Ct. 1999); *Commonwealth v. DePalma*, 673 N.E.2d 882, 886 (Mass. App. Ct. 1996).

<sup>54</sup> *Edwards*, 702 P.2d at 557.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



and traveled back to the stranger's house to do the drugs.<sup>57</sup> Rogers overdosed.<sup>58</sup> The court stated that partnership is a prerequisite condition for the JAD and that participants in a group transaction must be equal partners.<sup>59</sup> To determine whether or not Rogers and the defendant were equal partners, the court examined whether the funds were shared, whether both had similar levels of experience with heroin, and whether one of the parties instigated the transaction.<sup>60</sup> The court found that Rogers and the defendant were equal partners in the transaction because neither was an experienced heroin user, joint funds were used, and the stranger instigated the purchase.<sup>61</sup> However, the court clarified its partnership requirement:

“We expect there will be few cases involving a co-purchase by truly equal partners. Where one of the purchasers takes a more active role in instigating, financing, arranging, or carrying out the drug transaction, the ‘partnership’ is not an equal one and the more active ‘partner’ may be guilty of furnishing to the less active one.”<sup>62</sup>

In the end, the court reversed the defendant's third-degree murder conviction.<sup>63</sup>

The New Jersey Supreme Court articulated its partnership test in *State v. Morrison*.<sup>64</sup> In that case, Morrison and Shore pooled their money (ten from Morrison and thirty from Shore), and Morrison called his dealer to buy four decks of heroin for forty dollars.<sup>65</sup> After acquiring the heroin, the two returned to Morrison's home, where they consumed the drugs they just purchased.<sup>66</sup> The next day, Morrison went outside to feed his horses.<sup>67</sup> When he came back inside, he found Shore unresponsive on his couch.<sup>68</sup> Morrison was charged with strict liability for drug-induced death, second-degree reckless manslaughter, and third-degree distribution of a controlled dangerous substance.<sup>69</sup> In this case, the trial court dismissed the indictment on the grounds that, as a matter of law, “two or more defendants cannot intend to distribute to each other drugs they jointly

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 559.

<sup>60</sup> *Id.* at 559 n.5.

<sup>61</sup> *Id.* at 559–60.

<sup>62</sup> *Edwards*, 702 P.2d at 559 n.5.

<sup>63</sup> *Id.* at 118.

<sup>64</sup> *Morrison*, 902 A.2d at 870.

<sup>65</sup> *Id.* at 863.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 867.

possess.”<sup>70</sup> The prosecution appealed, and the appellate court disagreed because, in its view, the dispositive issue was a question of fact for a jury rather than a question of law for a judge.<sup>71</sup> The state supreme court held that the trial court did not abuse its discretion when it dismissed the indictment on the grounds that the defendants in a personal relationship who jointly and simultaneously acquire exclusive possession over a controlled substance cannot legally deliver those drugs to similarly situated co-purchasers.<sup>72</sup> The fact that Shore had contributed more money and that Morrison had used his usual contacts was not enough to make their relationship a commercial one.<sup>73</sup>

The court relied on multiple factors to determine if the relationship between the parties is commercial or personal. Those factors include:

“[1] The statements and conduct of the parties, [2] the degree of control exercised by one over the other, [3] whether the parties traveled and purchased the drugs together, [4] the quantity of the drugs involved, and [5] whether one party had sole possession of the controlled dangerous substance for any significant length of time.”<sup>74</sup>

New Jersey’s test is less focused on whether or not the parties have an equal claim to the drugs, and instead focuses on whether the relationship between the parties is commercial or personal, i.e., whether or not one party is a drug dealer and the other is a drug user.<sup>75</sup>

Massachusetts does not have a case that unambiguously states a partnership test. As such, we treat the partnership requirement in Massachusetts like a waste-basket taxon. If a Massachusetts court considers something that is not related to pooling or presence, but that thing speaks to either the relationship between co-purchasers or their unequal participation, then we treat that consideration as if it is part of the agency factor. Recently in *Carrillo* the court cited the *Edwards* test after listing the facts that precluded a JAD in the case before it: “What is dispositive is that the defendant’s active role . . . differed substantially from [the decedent’s] passive role—the defendant knew the supplier, negotiated prices, traveled alone to obtain the heroin, and determined whether he would share the heroin.”<sup>76</sup>

The *Blevins* case gives an example of co-purchasers in an equal partnership.<sup>77</sup> In *Blevins*, the appellate court found that the trial court erred by

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<sup>70</sup> *Id.* at 869.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 871.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Commonwealth v. Carrillo*, 131 N.E.3d 812, 833 (2019).

<sup>77</sup> *Blevins*, 775 N.E.2d at 1263.

not issuing a joint acquisition instruction.<sup>78</sup> Three friends decided to buy cocaine. The defendant contributed 200 dollars, and altogether they had eight-hundred-fifty dollars.<sup>79</sup> The three friends traveled to a dealer's house to buy an ounce and a half of cocaine.<sup>80</sup> All three "participated in the negotiation and were present during the exchange of money for drugs."<sup>81</sup> Many small plastic bags were bound together into two larger packages of cocaine.<sup>82</sup> One of the friends dropped a package which split as it hit the floor, spilling its contents.<sup>83</sup> The cocaine on the floor was repackaged, but the friends correctly suspected someone took some of their cocaine during the process.<sup>84</sup> After some threats, the three friends, left the apartment with all of their cocaine but were picked up by the police shortly after leaving the dealer's apartment<sup>85</sup>. In one fell swoop, the court distinguished this case from three other cases cited by the prosecution because in this case, unlike the others, the defendants had been *physically present* for the entire drug transaction and were equal partners in the transaction.<sup>86</sup>

In addition to establishing that participation in negotiation is required for a JAD, *Blevins* is instructive because it arguably satisfies the *Edwards* and *Morrison* test. All three friends equally financed and carried out the drug transaction in roughly equal measure.<sup>87</sup> Though one co-purchaser made the initial suggestion to buy cocaine, the opinion suggests all three intended to recreationally use cocaine while clubbing over the weekend.<sup>88</sup> They were going to buy more cocaine regardless of who suggested it. Regarding the *Morrison* test, the statements and conduct of the parties all evidence a shared purpose to recreationally use cocaine.<sup>89</sup> There is no disparity between how much control one of the co-partners could exercise over the contraband.<sup>90</sup> They traveled together. And finally, no co-purchaser had sole possession of the drugs for a significant length of time.<sup>91</sup> *Blevins* demonstrates that sustained equal participation in a drug transaction is strong evidence that the co-purchasers satisfy the partnership requirement.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1262.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1262–63.

<sup>88</sup> *Id.* at 1261–62.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1263.

<sup>91</sup> *Id.*

### 3. Presence

Presence is related to both the other elements of the JAD. For joint and simultaneous acquisition, a party's ability to exercise dominion and control over the controlled substance is dramatically reduced when they are not physically present.

In *Edwards*, the test regarding the transaction speaks to the degree of participation in the transaction, and presence is reflected directly in the third factor of the *Morrison* test.<sup>92</sup> Presence is its own factor because the lack of presence is cited as a dispositive reason for denying a JAD instruction, especially at the federal level.<sup>93</sup>

Massachusetts has a very high threshold for presence.<sup>94</sup> That state has held the presence requirement is not satisfied where the defendant merely traveled with others and contributed money to the pool to obtain the drugs.<sup>95</sup> For example, if the defendant cannot hear the dealer, then the presence requirement is not satisfied.<sup>96</sup> In Massachusetts—for almost all drug deals—joint purchasers would have to be in the same car, or in close physical proximity to the dealer to warrant a joint-acquisition instruction.<sup>97</sup> However, in dicta from recent cases, Massachusetts is considering replacing its strict presence requirements with one that is consistent with the reasoning in *Weldon*.

In *Weldon*,<sup>98</sup> Weldon, his girlfriend, and their mutual friend Roth pooled one-hundred-twenty dollars to buy heroin from Weldon's dealer.<sup>99</sup> Roth drove the three of them in his car to the dealer, and Weldon got out of the car and

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<sup>92</sup> See, e.g., *Edwards*, 702 P.2d 555 (Cal. 1985); *Morrison*, 902 A.2d at 871.

<sup>93</sup> *United States v. Pearson*, 391 F.3d 1072, 1076–77 (9th Cir. 2004) (reasoning that the fact that a co-purchaser was not physically present supported the prosecution's argument that the defendant acted as a link in the chain of drug distribution); *United States v. Speer*, 30 F.3d 609 (5th Cir. 1994) (holding that defendants were not entitled to jury charge that persons acting in concert to obtain drugs for personal use could not be guilty of possession with intent to distribute); *United States v. Martel*, 324 F. Supp. 2d 24, 27 (D. Me. 2004) (holding that joint possession was not established because not all the defendants were physically present, even though there was a conspiracy to acquire drugs).

<sup>94</sup> *Commonwealth v. Carrillo*, 131 N.E.3d 812, 832 (Mass. 2019).

<sup>95</sup> *Commonwealth v. Huggins*, No. 00-P-477, 2001 WL 883542, at \*1 (Mass. App. Ct. Aug. 7, 2001) (“[T]he term distribute means to actually deliver a controlled substance to a person. It is irrelevant whether any money or other compensation was involved.”) (internal quotations omitted).

<sup>96</sup> *Commonwealth v. DePalma*, 673 N.E.2d 882, 886 (Mass. App. Ct. 1996) (finding that the physical presence requirement was not satisfied when the defendant was away from the car where the drugs were actually exchanged for money); see *Commonwealth v. Carrillo*, 131 N.E.3d 812, 832 (Mass. 2019) (suggesting that “drugs can be jointly possessed for personal use only where all persons were present when the drugs were acquired”).

<sup>97</sup> See *DePalma*, 673 N.E.2d at 886; *Carrillo*, 131 N.E.3d at 832.

<sup>98</sup> *Weldon v. United States*, 840 F.3d 865 (7th Cir. 2016).

<sup>99</sup> *Id.* at 866.

exchanged the money for the heroin.<sup>100</sup> Weldon gave the heroin to his girlfriend, and the three returned to Roth's home.<sup>101</sup> The girlfriend dissolved all the heroin in water, and the three intravenously injected an equal amount of the drug.<sup>102</sup> Roth died.<sup>103</sup> The prosecution in *Wheldon* argued that a JAD did not apply because the defendant "was the only one of the three to get out of Roth's car and conduct a hand-to-hand exchange of money for heroin with the dealer."<sup>104</sup> Judge Posner refutes this argument by claiming that the state's theory would lead to absurd results and that what matters is that the defendants participated in the same transaction.<sup>105</sup> He points out that a narrow application of the JAD would mean that defendants would have to go to dealers in large groups, and each person would hand over their own money before the dealer tendered the drugs.<sup>106</sup> And then all the co-purchasers would have to jointly carry the drugs back to their car.<sup>107</sup> What the opinion does not discuss is that the prosecution could only reach this theory by implicitly relying on a narrow concept of presence.

Recently, in *Carrillo*, Massachusetts stated that it might reconsider its narrow presence requirements.<sup>108</sup> *Carrillo*, a graduate student at the University of Massachusetts Amherst, sold heroin to Eric Sinacori, an undergraduate student.<sup>109</sup> After Sinacori took the drugs and died of an overdose, *Carrillo* was convicted of involuntary manslaughter.<sup>110</sup> He appealed, arguing that he did not have the requisite mental state required for involuntary manslaughter and that the trial court erred in not issuing a JAD instruction.<sup>111</sup> The state high court was convinced by his first argument but rejected his second argument.<sup>112</sup> The court pointed to the fact that *Carrillo* was a link in the chain of distribution because he traveled several hours out of state specifically to get the heroin.<sup>113</sup> The court stressed that the decedent was not physically present and that a long list of Massachusetts cases had firmly established that physical presence is required to issue a JAD instruction.<sup>114</sup> However, the court stated:

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Commonwealth v. Carrillo*, 131 N.E.3d 812, 832 (Mass. 2019).

<sup>109</sup> *Id.* at 816.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 833.

<sup>113</sup> *Id.* at 832.

<sup>114</sup> *Id.* at 831.

[i]f we were faced with facts comparable to those in *Weldon*, where equal partners participated in a drug purchase but only one partner walked to the supplier’s vehicle to receive the drugs, we might need to revisit the rule in *Johnson* that drugs can be jointly possessed for personal use only where all persons were present when the drugs were acquired.<sup>115</sup>

It speculated that where “the defendant giving the drugs to [the decedent]—rather than vice-versa—was . . . the result of a *mere fortuity or convenience*,” then a JAD instruction may be appropriate although all the co-purchasers were not physically present.<sup>116</sup>

### C. West Virginia Law

The law in West Virginia on the application of the joint-acquisition defense has not been developed. However, West Virginia has two clear drug-induced-homicide statutes<sup>117</sup>—three if you consider the felony murder rule.

Specifically, the legislature has criminalized both distribution resulting in death and failure to render aid resulting in death.<sup>118</sup> Pursuant to W. Va. Code § 60A-4-401(a):

Any persons who knowingly and willfully delivers a controlled substance or counterfeit controlled substance in violation of the provisions of section four hundred one [§ 60A-4-401], article four of this chapter for an illicit purpose and the use, ingestion or consumption of the controlled substance or counterfeit controlled substance alone or in combination with one or more other controlled substance, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for a determinate sentence of not less than three nor more than fifteen years.<sup>119</sup>

The above section of the code criminalizes the distribution of a controlled substance where the use of that controlled substance proximately causes the death of another. On the other hand, W. Va. Code § 60A-4-401(b) criminalizes the conduct of the user of a controlled substance who fails to seek medical assistance<sup>120</sup> after engaging in the use of a controlled substance with

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<sup>115</sup> *Id.* at 832.

<sup>116</sup> *Id.* at 833 (emphasis added).

<sup>117</sup> See generally W. VA. CODE ANN. § 60A-4-16 (West 2022); see also W. VA. CODE ANN. § 61-2-1 (West 2022) (felony murder).

<sup>118</sup> See § 60A-4-16(a)–(b); see also § 61-2-1 (West 2022) (felony murder).

<sup>119</sup> W. VA. CODE ANN. § 60A-4-401(a) (West 2022).

<sup>120</sup> It is worth noting that the Supreme Court of Appeals of West Virginia has ruled that “[t]he phrase ‘seek medical assistance,’ within the context of West Virginia Code § 60A-4-416(b), means

another who then dies as a result.<sup>121</sup> Specifically, W. Va. Code § 60A-4-401(b) states:

Any person who, while engaged in the illegal use of a controlled substance with another, who knowingly fails to seek medical assistance for such other person when the other person suffers an overdose of the controlled substance or suffers a significant adverse physical reaction to the controlled substance and the overdose or adverse physical reaction proximately causes the death of the other person, is guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one year nor more than five years.<sup>122</sup>

The legislative intent behind the drug-induced homicide and failure to render aid provisions of the code is not clearly articulated but instead can be inferred from the acts that the statute seeks to criminalize. Specifically, it can be inferred that, pursuant to subdivision (a), the legislature intended to punish dealers of a controlled substance as opposed to the mere user of a controlled substance. Meanwhile, it can be inferred that the legislature sought to encourage the mere user of a controlled substance to seek aid for those suffering an adverse reaction to a substance used along with the mere user and punish those who fail to seek medical assistance. However, neither section of this code includes any version of language codifying the joint-acquisition defense as proposed by this article.

### III. ANALYSIS

Part III.A argues that the punishment for DIH statutes falls short of having proportional punishments when non-dealers are unintentionally captured. Part III.B advocates for the development of the JAD through codification and not just case law. Finally, Part IV.C provides additional benefits offered through the codification of the JAD.

#### *A. Proportional Punishment*

“The punishment of wrongdoings is typically categorized in the following four justifications: retribution, deterrence, rehabilitation and incapacitation.”<sup>123</sup> Among other reasons, prosecutors and law enforcement

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seek medical services of a health care professional licensed, registered, or certified under . . . West Virginia [law] acting within his or her lawful scope of practice.” *State v. Conner*, 855 S.E. 2d 902, 904 (2021).

<sup>121</sup> W. VA. CODE ANN. § 60A-4-401(b) (West 2022).

<sup>122</sup> *Id.*

<sup>123</sup> Jennifer Marson, *The History of Punishment: What Works for State Crime?*, 7 HILLTOP REV. 2, 19 (2015).

justify DIH statutes because they can reach dealers that distribute large quantities of drugs.<sup>124</sup> DIH statutes enable the state to punish a dealer with a harsh sentence for each person that died consuming his product. In this argument, retribution—specifically proportional punishment—justifies the existence of DIH statutes. The drug dealer should have to account for each and every person who overdosed on the drugs he sold.

The retributive argument that DIH statutes are a uniquely powerful weapon that can hold dealers that are high up in the chain of drug distribution is appealing in theory but falls apart in practice. In DIH cases where the JAD is applicable, the defendant is not a large distributor that deserves harsh punishment and has already suffered consequences that are worse than incarceration. In most above-cited cases that discuss the JAD favorably, the defendant and the decedent were in a special relationship—they are friends, siblings, or spouses. Bad luck and the defendant's addiction caused the death of someone they love. In cases where there is a special relationship, the defendant is, at worst, sharing controlled substances with a few other people.<sup>125</sup> Importantly, they are not kingpins finally brought to justice. They are users subjected to the harsh penalties intended for dealers. The defendant has already experienced consequences that not only arise directly from his addiction but are worse than the consequences a court can impose.

In these special-relationship cases, the punishment imposed is not proportional to the defendant's conduct. Codifying an exception to a DIH statute that includes the three elements discussed above would filter out many of the cases where friends, siblings, or spouses share drugs and then one tragically dies.

### *B. The JAD Should not Be Developed Through Case Law Alone*

When faced with a situation where applying the law as written will result in an unfair outcome, judges get creative. They can use a procedural defect to avoid an unfair outcome. They can stretch existing doctrine to create an exception. Or, they can develop a new doctrine from whole-cloth that protects litigants from the unfair application of the law as written. Superficially, this judicial creativity protects litigants from unfair laws, but it has less obvious consequences like stunting the development of the law, creating inconsistent results, or creating the conditions where a future court can limit the applicability of a common-law doctrine. The JAD suffers from many of these consequences. Naturally, the judges favorable to the JAD used different arguments to justify its application, resulting in messy case law. Codifying the JAD would both clarify the circumstances where the doctrine is appropriate and it would encourage judges to apply it.

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<sup>124</sup> See Phillips, *supra* note 11.

<sup>125</sup> United States v. Semler, 858 F. App'x 533, 535 (3d Cir. 2021); Weldon v. United States, 840 F.3d 865, 866 (7th Cir. 2016); People v. Edwards, 702 P.2d 555, 558 (Cal. 1985); State v. Carithers, 490 N.W.2d 620, 622 (Minn. 1992); State v. Morrison, 902 A.2d 860, 862 (N.J. 2006).



*Swiderski* is the first case to apply the JAD.<sup>126</sup> Forty-five years have passed, and the scope and application of the JAD are still unclear. With some exceptions, the JAD has not been clarified by the federal circuit courts. Most of those courts have declined to rule on whether *Swiderski* is good law.<sup>127</sup> Similarly, other federal courts have declined to extend *Swiderski*'s holding without discussing when the doctrine is applicable. Federal courts have not clarified the blurry edges of concepts such as partnership and joint-simultaneous acquisition.

Most of the development of JAD case law has taken place at the state level. Because states have different laws and smaller caseloads, only a few states have a robust discussion of the JAD. Relatedly, some state courts have made contradictory statements—for example, Washington and Indiana. In *State v. Brown*,<sup>128</sup> the defendant was a drug addict living with her boyfriend, a dealer.<sup>129</sup> The police raided their home and found a substantial quantity of methamphetamine and heroin.<sup>130</sup> The State charged Brown with possession with the intent to distribute, and she testified that she had shared drugs with others by passing around a pipe.<sup>131</sup> The *Brown* court states plainly, “sharing drugs is a form of delivery,” and affirmed the trial court’s conviction.<sup>132</sup>

This result is incompatible with the reasoning in *State v. Dale*,<sup>133</sup> where officers observed the defendant selling drugs to a man in a car.<sup>134</sup> The officers then observed the defendant walking under a bridge with a girl.<sup>135</sup> The police arrested the defendant, and they found heroin on his person.<sup>136</sup> At trial, the defendant contended that the heroin belonged to the girl and that he neither possessed or delivered it.<sup>137</sup> He requested a JAD instruction, which the trial court refused.<sup>138</sup> The appellate court agreed with Dale that “[o]ne cannot deliver to another that which the other already possesses, and thus that joint possessors

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<sup>126</sup> See *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977).

<sup>127</sup> See, e.g., *United States v. Mancuso*, 718 F.3d 780, 798 (9th Cir. 2013); *Edwards*, 702 P.2d at 559–60; *accord* *People v. Bland*, No. D050556, 2008 WL 344782, at \*2 (Cal. Ct. App. Feb. 8, 2008); *State v. Myles*, No. 05-07-1051, 2009 WL 365445, at \*4 (N.J. Super. Ct. App. Div. Feb. 17, 2009); *State v. Ali*, No. A 5157-09T1, 2011 WL 2349977, at \*4 (N.J. Super. Ct. App. Div. June 1, 2011).

<sup>128</sup> No. 20700-1-II, 1998 WL 703403 (Wash. Ct. App. Oct. 9, 1998).

<sup>129</sup> See *id.* at \*1.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*2.

<sup>133</sup> No. 20636-6-II, 1997 WL 404070 (Wash. Ct. App. July 18, 1997).

<sup>134</sup> *Id.* at \*1

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*2.

cannot deliver to each other.”<sup>139</sup> However, the appellate court affirmed the trial court’s conviction because there was no evidence that the girl ever owned the heroin.<sup>140</sup>

These are the only cases in Washington that discuss the JAD and they make contradictory statements about the law: “[s]haring drugs is a form of delivery,”<sup>141</sup> and “[o]ne cannot deliver to another that which the other already possesses, and thus that joint possessors cannot deliver to each other.”<sup>142</sup>

Similarly, Indiana acknowledges that its case law is contradictory. *In Graham v. State*,<sup>143</sup> the defendant pooled money with his friends to purchase illicit substances and had gotten the drugs.<sup>144</sup> Police arrested the defendant.<sup>145</sup> The appellate court found that the defendant’s statements that he intended to share the drugs were sufficient to uphold the trial court’s conviction.<sup>146</sup> However, *Walmsley* court found that under the JAD there is a limited exception for sharing drugs.<sup>147</sup> The *Walmsley* court acknowledged that it was sending mixed messages. It stated, “to the extent that *Graham* and *Moore* conflict with the *Swiderski* line of cases, we think that *Swiderski* got it right.”<sup>148</sup>

Finally, in *State v. Carithers*,<sup>149</sup> the Minnesota Supreme Court stated each spouse has constructive possession of drugs from the moment of acquisition.<sup>150</sup> Thus, spouses cannot transfer possession or share drugs with one another. Unlike other cases that have found the JAD applicable, in *Carithers*, marriage is the preeminent factor.<sup>151</sup> Minnesota courts give considerably less weight to other factors that are discussed in this article.<sup>152</sup> Subsequent decisions in Minnesota have substantially narrowed the circumstances where the JAD is applicable. The Court in *State v. Whitford*, states the history of the holding in *Carithers*:

[T]he holding in *Carithers* is narrow, and the existence of a marriage relationship is an important element in establishing joint acquisition and possession for purposes of a defense. . . .

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at \*3.

<sup>141</sup> *Brown*, 1998 WL 703403, at \*2.

<sup>142</sup> *Dale*, 1997 WL 404070, at \*1.

<sup>143</sup> 971 N.E.2d 713 (Ind. Ct. App. 2012).

<sup>144</sup> *Id.* at 715.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 719.

<sup>147</sup> *Walmsley v. State*, 131 N.E.3d 768 (Ind. Ct. App. 2019).

<sup>148</sup> *Id.* at 773.

<sup>149</sup> 490 N.W.2d 620 (Minn. 1992).

<sup>150</sup> *Id.* at 622.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

[A]n exchange of sexual favors for drugs constituted a sale . . . *Carithers* [does not apply when] none of the parties involved were married[.] *Carithers* [is not applicable where the defendant gives] drugs to his wife, [but] the drugs had not been jointly acquired[.] . . . See *Carithers* . . . (limiting holding to facts presented in certified question of married couple jointly acquiring drugs) (internal citations and quotation omitted).<sup>153</sup>

Because the Minnesota court did not connect the JAD to the factors discussed by other courts, subsequent decisions have made it very difficult for defendants successfully invoke it.

Further, it is not unimaginable for the West Virginia legislature to include exceptions to crimes as defenses where there may actually be a delivery. For instance, the West Virginia legislature has already made it such that first-time offenses for distributing marijuana less than 15 grams without remuneration shall be disposed of consistent with § 60A-4-407.<sup>154</sup> This exception to the delivery statute paves a path to reveal that the JAD can just the same be codified.

Still, the lack of guidance on when to apply the JAD has caused inconsistent results that have harmed defendants. If just one state codified the JAD, courts could look to that legislation to help them determine its applicability. This is more desirable than letting the doctrine develop through judge-made law for the reasons discussed above. Codifying the JAD will not only serve the interest of the legislature in West Virginia, but it will encourage courts everywhere to look to clear guidelines concerning the applicability of the doctrine.

### C. *Codifying the JAD Clarifies Inconsistencies and Ensures Safeguards*

Included in the codification of the joint-acquisition defense is the safeguard that aligns with legislature's intended rationale of the statute. Specifically, the legislature intended to criminalize the conduct of dealers. However, the statute unintentionally includes the mere user struggling with substance use disorder.

Pursuant to W. Va. Code § 60A-4-416(a), the elements for a delivery resulting in death are provided along with the penalties.<sup>155</sup> Absent legislative

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<sup>153</sup> State v. Whitford, No. A17-1366, 2018 WL 944812, at \*3 (Minn. Ct. App. Feb. 20, 2018).

<sup>154</sup> W. VA. CODE ANN. § 60A-4-402(c) (West 2022) (“Notwithstanding any other provision of this act to the contrary, any first offense for distributing less than 15 grams of marihuana without any remuneration shall be disposed of under section 407.”); see also W. VA. CODE ANN. 60A-4-407 (West) (provides for deferral of a defendant’s adjudication of guilt to allow for the Defendant to complete certain terms of the deferral, with the ultimate goal of discharge and dismissal of the allegation upon fulfillment of those terms and conditions).

<sup>155</sup> W. VA. CODE ANN. § 60A-4-416(a) (West 2022) (“Any person who knowingly and willfully delivers a controlled substance or counterfeit controlled substance in violation of the provisions of [§ 60A-4-401] for an illicit purpose and the use, ingestion or consumption of the controlled

materials, it is reasonable to infer that West Virginia's DIH statute has the same policy rationale as other DIH statutes; namely to target dealers distributing controlled substances for profit and personal gain.<sup>156</sup> However, given the broad drafting of the language within the statute, there is potential for capturing the conduct of the mere user. For instance, consider the scenario where two individuals are merely users of a controlled substance, like the first example described in *Coots*. While engaged in the use of a controlled substance, the two pass the substance from one another. Shortly thereafter, one of the two has an adverse reaction to the controlled substance and subsequently dies. While there is an actual transfer of a substance from one person to another, both individuals are users of a controlled substance, and not a dealer distributing a substance for personal gain or profit.

In this scenario, the surviving individual is not the type of subject the legislature intended to include within the provisions of W. Va. Code § 60A-4-416(a). However, the surviving person described in this scenario could be charged with a delivery resulting in death as criminalized in W. Va. Code § 60A-4-416(a) or perhaps even murder pursuant to the felony murder doctrine as contained in W. Va. Code § 61-2-1. Codification of the joint-acquisition defense would act as a safeguard in this situation by not only putting prosecutors and law enforcement on notice when exercising their charging discretion but would also act as a safeguard for the mere user of controlled substances by clearly permitting judges to dismiss allegations as a matter of law. Furthermore, without codifying the joint-acquisition defense, subdivision (b) of the statute seems at odds with the legislative intent of subdivision (a).

W. Va. Code § 60A-4-416(b) criminalizes the conduct of a person engaging in the illegal use of a controlled substance with another where that person fails to seek medical assistance for an individual suffering from an overdose and subsequently dies.<sup>157</sup> Consider the same fact scenario above where two individuals who are merely users of a controlled substance engage in the use of a controlled substance, pass it between each other, and one dies as a result of an overdose. Should the surviving person fail to seek medical assistance by calling for emergency services, that person would violate subdivision (b) of the code. However, while the surviving person calling for emergency services should

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substance or counterfeit controlled substance alone or in combination with one or more other controlled substances . . . is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for a determinate sentence of not less than three nor more than fifteen years.”).

<sup>156</sup> See *supra* Part II.C.

<sup>157</sup> W. VA. CODE ANN. § 60A-4-416(b) (West 2022) (“Any person who, while engaged in the illegal use of a controlled substance with another, who knowingly fails to seek medical assistance for such other person when the other person suffers an overdose of the controlled substance or suffers a significant adverse physical reaction to the controlled substance and the overdose or adverse physical reaction proximately causes the death of the other person, is guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one year nor more than five years.”).

be inoculated against a violation of subdivision (b), the person may still be charged with a violation of subdivision (a) for the transfer of the controlled substance despite not being an actual dealer of controlled substances. Consequently, this creates a situation where one is “damned if you do, damned if you don’t.”

These two provisions of the code are at odds with one another. Subdivision (a) makes it so that regardless if you call for assistance, your conduct may be criminalized. Thus, subdivision (a) tends to act contrary to the intention behind subdivision (b). Specifically, by criminalizing the failure to act, it can be argued that the legislature intended to encourage those who are present and participating in drug use to assist others in the case of an overdose. However, subdivision (a) would seem to discourage someone from calling out of fear that they may be prosecuted under that provision.

Codifying the joint-acquisition defense would serve the legislative intention by limiting the wide-sweeping effects that the statute—in its current version—has of capturing the mere user of controlled substances. Codification would allow prosecutors and law enforcement to exercise their charging discretion from an informed perspective while further acting as a safeguard where judges can review and dismiss allegations as a matter of law.

#### IV. CONCLUSION

While lawyers, judges, and policy advocates continue to debate the law as it is applied to the JAD, at the center of many of these cases—including the *Semler* case—there are usually families on both sides that have been forever impacted by addiction. Werstler’s death and Semler’s conviction provide yet another tragic example of the devastating effects of the opioid epidemic.<sup>158</sup>

The court in *Semler* vacated her conviction and ordered a new trial.<sup>159</sup> In the years after Werstler’s death, “Semler achieved sobriety and began working for rehab facilities helping others overcome their addiction.”<sup>160</sup> However, she has spent three difficult years in prison so far.<sup>161</sup> In the *Semler* case, codification of the JAD would have provided the necessary guidance to the trial judge, and perhaps then the trial judge may not have denied Semler’s motion to instruct the jury on the JAD.<sup>162</sup> Were the JAD codified and available at the time of Semler’s trial, much of the time wasted for Semler in prison and traversing the legal process may have been avoided.

Codifying the JAD also provides for other benefits. Specifically, codifying the JAD would clarify inconsistencies, provide guidance to Courts, and

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<sup>158</sup> See Roebuck & Whelan, *supra* note 1.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> United States v. Semler, 858 F. App’x 533, 535 (3d Cir. 2021).

allow prosecutors to better engage with their gatekeeping function when exercising prosecutorial discretion. Codifying the JAD in West Virginia, where the opioid epidemic has severely impacted the community, will further focus on the intended target of the statute by criminalizing the conduct of the dealer while further insulating the mere user unintentionally captured within the scope of DIH statutes—mere users who should not be subject to the harsher penalties meant for dealers. Until such codification occurs, the pitfalls described will continue to occur.