

THE FIRST HIT'S FREE. . . OR IS IT? CRIMINAL LIABILITY FOR DRUG- INDUCED DEATH IN NEW JERSEY

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I. INTRODUCTION

"Laws are like cobwebs that entangle the weak, but are broken by the strong."

*Anarcharsis, Ancient Greek Philosopher*¹

On April 23, 1987, the New Jersey Legislature unanimously adopted the Comprehensive Drug Reform Act ("CDRA") of 1987.² The statute,³ enacted in response to the state's increasing drug problems,⁴ wages war against drugs in New Jersey on a number of fronts.⁵ The CDRA ensures stringent, consistent punishment for all drug offenders, both users and dealers;⁶ it provides incentive⁷ and

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¹ Quotes on Good and Evil and Power and Truth, at <http://www.math.usf.edu-mccol/Equotes.html> (last visited Mar. 5, 2004).

² W. Cary Edwards, *An Overview of the Comprehensive Drug Reform Act of 1987*, 13 SETON HALL LEGIS. J. 5, 6 (1989).

³ N.J. STAT. ANN. § 2C:35-1 (West 2004).

⁴ Edwards, *supra* note 2, at 8. In 1986, there was a record 40,690 drug arrests in New Jersey, making approximately 50% of all crime in New Jersey drug related. *See also* DEA Briefs and Background, Drugs and Drug Abuse, State Fact Sheets, New Jersey (Mar. 25, 2002) (noting that New Jersey is an attractive transportation site for drug gangs based on its international airport, proximity to New York City, and its numerous major commercial shipping centers and further noting that in urban areas, such as Elizabeth, Newark, Trenton and Camden, there continues to be widespread crack, heroin and cocaine abuse), *available at* <http://www.usdoj.gov/dea/pubs/states/newjersey.html>; *see also* N.J. STAT. ANN. § 2C:35-1.1(b) (West 2004) (noting in its legislative findings that, "the unlawful use, manufacture, and distribution of controlled dangerous substances continues to pose a serious and pervasive threat to the health, safety, and welfare of the citizens of this state").

⁵ Edwards, *supra* note 2, at 6.

⁶ *Id.*

encouragement⁸ for the state's youth to avoid the dangers of drugs;⁹ it attempts to reduce the drug supply in the state of New Jersey by providing police, prosecutors, and courts with the tools necessary to wage a successful attack against drug traffickers and dealers;¹⁰ and finally, through education, the CDRA attempts to reduce the demand for drugs in the state.¹¹

New Jersey's strict liability for drug-induced death statute, 2C:35-9,¹² was enacted as part of the CDRA in 1987.¹³ Under this statute, a

⁷ *Id.* (noting that in some circumstances the CDRA requires mandatory suspension or postponement of driving privileges upon conviction of a drug related offense and stating that the statute mandates the imposition of cash penalties for all drug convictions).

⁸ *Id.* (quoting former New Jersey Attorney General W. Cary Edwards, "it [CDRA] creates drug 'safety zones' around school yards in recognition of the paramount responsibility of the school to educate our youth . . . [and] mandates the imposition of stiff cash penalties for all drug convictions, and the use of these funds to increase educational preventive and treatment programs throughout the state").

⁹ National Drug Intelligence Center, *New Jersey Drug Threat Assessment* (May 15, 2001) (noting that in 1999 there were 144 cocaine overdoses that resulted in death in Newark. Of 23 U.S. cities surveyed in 1999, Newark had the highest mean heroin purity levels, 67.5%), available at <http://www.usdoj.gov/ndic/pubs/669/cocaine.html>; see also NBC News.com, *Gangs Take Root in the Garden State*, (Nov. 7, 2002) (reporting that the increase of violent crimes in New Jersey is directly correlated with the "super-gangs" that have followed the drug trade east and further noting that a survey of New Jersey police departments has linked one in five murders to drug related gang activity), available at <http://www.wnbc.com/news/1771216/detail.html>.

¹⁰ N.J. STAT. ANN. § 2C:35-1 (West 2004):

[I]n order to be effective, the battle against drugs must be waged aggressively at every level along the drug distribution chain, but in particular, our criminal laws must target for expedited prosecution and enhanced punishment those repeat drug offenders and upper echelon members of the organized narcotics trafficking networks who pose the greatest danger to society.

¹¹ Edwards, *supra* note 2, at 7.

¹² N.J. STAT. ANN. § 2C:35-9 (West 2004). The statute provides in pertinent part:

a. Any person who manufactures, distributes, or dispenses any controlled dangerous substance classified in Schedules I or II (including heroin, cocaine, methamphetamine, lysergic acid diethylamide, phencyclidine, or any analog thereof) is strictly liable for a death which results from the ingestion, injection, or inhalation of that substance and is guilty of a crime of the first degree.

b. For purposes of this offense, to distribute means the transfer, actual or constructive, or attempted, from one person to another. N.J. STAT. ANN. § 2C:35-2 (West 2004).

c. For purposes of this offense manufacture means the production, preparation, propagation compounding, conversion or processing of [insert appropriate substance] either directly or by extraction from substances of natural origin. N.J. STAT. ANN. § 2C:35-2 (West 2004).

d. The defendant's act of manufacturing, distributing, or dispensing, a substance is the cause of death when:

person may be held strictly liable for drug-induced death, a first degree crime punishable by ten to twenty years in prison,¹⁴ if she manufactured, sold, or otherwise provided a person with drugs, if that person subsequently dies as a result of ingestion, inhalation, or injection of those drugs.¹⁵ The New Jersey legislature included this powerful strict liability provision as a way to trace liability back to the “upper echelon” drug dealers or “kingpins” of the organized drug trade.¹⁶ The statute explicitly states,

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- (1) The injection, inhalation or ingestion of the substance is an antecedent but for which the death would not have occurred; and
 - (2) The death was not:
 - (a) too remote in its occurrence as to have a just bearing on the defendant’s liability; or
 - (b) too dependent upon conduct of another person which was unrelated to the injection, inhalation or ingestion of the substance or its effect as to have a just bearing on the defendant’s liability.
- e. It shall not be a defense to a prosecution under this section that the decedent contributed to his own death by his purposeful, knowing, reckless or negligent injection, inhalation or ingestion of the substance, or by his consenting to the administration of the substance by another.

¹³ *Id.*

¹⁴ N.J. STAT. ANN. § 2C:43-6(a)(1) (West 2004). In *State v. Cullum*, 338 N.J. Super. 458, 769 A.2d 1091 (N.J. Super. Ct. App. Div. 2001), the court found that drug-induced death was a “violent crime” under the provisions of the No Early Release Act (NERA), which requires individuals convicted of a violent crime to serve eighty-five percent of their sentence before being eligible for parole. *Id.* at 464, 769 A.2d at 1095. The court defined violent crime under NERA to include any crime that causes death. *Id.* In this case, the defendant provided heroin to a person who overdosed and died a few minutes after injection. *Id.* at 460, 769 A.2d at 1092. The court found that the defendant *caused* the death of the decedent when he distributed the heroin to him and therefore was subject to the provisions of NERA. *Id.* at 464, 769 A.2d at 1095 (emphasis added). Furthermore, N.J. STAT. ANN. § 2C:35-14 (West 2004) makes a person convicted of drug-induced death ineligible for drug dependant persons treatment. N.J. STAT. ANN. § 2C: 35-15(a)(1) (West 2004) imposes a mandatory penalty of three thousand dollars. Finally, N.J. STAT. ANN. § 2C: 35-16 (West 2004) imposes a mandatory suspension of driving privileges for a period of no less than 6 months.

¹⁵ N.J. STAT. ANN. § 2C:35-9.

¹⁶ Upon enactment of the drug-induced death statute, the New Jersey legislature declared it the public policy of the state that

“[I]n particular our criminal laws must target for expedited prosecution and enhanced punishment those repeat drug offenders and *upper echelon* members of organized narcotics trafficking networks who pose the greatest danger to society. In order to ensure the most efficient and effective dedication of limited investigative, prosecutorial, judicial and correctional resources, it is the policy of this State to distinguish between drug offenders based on the seriousness of the offense, considering principally the nature, quality and purity of the

[the statute] must target for expedited prosecution and enhanced punishment those repeat drug offenders and upper echelon members of organized narcotics trafficking networks who pose the greatest danger to society. In order to ensure the most efficient and effective dedication of limited investigative, prosecutorial, judicial and correctional resources, it is the policy of this State to distinguish between drug offenders based on the seriousness of the offense, considering principally the nature, quality and purity of the controlled substance and the role of the actor in the overall drug distribution network. It is the intention of the legislature to provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders, and to facilitate the rehabilitation of drug dependent persons.¹⁷

As the aforementioned statutory language should make clear, the legislature envisioned the statute as a way to cripple the organized drug trade by giving prosecutors the power to attack upper echelon drug dealers, who oftentimes have no interaction with their buyers and are therefore virtually immune to homicide prosecution.¹⁸ Based on the strict liability¹⁹ provision of the New Jersey statute, the prosecutor can gain a conviction without ever proving the mens rea,²⁰ or requisite mental state, normally required for conviction.²¹ The

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N.J. STAT. ANN. § 2C:35-1 (West 2004) (emphasis added).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The strict liability feature of the New Jersey statute allows the prosecutor to carry the burden of persuasion and gain a conviction without proving mens rea. Strict liability does not depend on intent to harm or negligence, rather it is premised on the breach of an absolute duty to engage in safe activity or to make an activity safe. BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

²⁰ Mens rea is the state of mind that the prosecutor must prove in order to carry his burden of persuasion at trial. BLACK'S LAW DICTIONARY 999 (7th ed. 1999).

²¹ The normal rules for causation do not apply to this offense. Gerald D. Miller, *Controlled Dangerous Substance Offenses in the Code and Schedules of Controlled Dangerous Substances*, in 33A NJPRAC § 25.20 (3d ed. 2001). With regard to most other criminal offenses, including prosecutions for sexual assault, robbery, burglary, and most types of murder, the New Jersey Criminal Code rules require that the prosecutor prove the defendant's mental culpability in order to secure a conviction. Essentially, the prosecutor must establish that the defendant acted with the requisite mental state in order to meet his burden of persuasion. See N.J. Stat. Ann. § 2C:14-2 (West 2004); N.J. STAT. ANN. § 2C:11-3 (West 2004); N.J. STAT. ANN. § 2C:15-1 (West 2004); Miller, *supra*, at § 25.20 (noting that strict liability crimes are a deviation from normal New Jersey Criminal Code crimes). In a typical manslaughter prosecution, the mens

prosecutor must only prove that the defendant dispensed drugs to the decedent, or to a third party who dispensed drugs to the decedent, and that the decedent died as a result of ingesting the drugs.²² The statute would enable prosecutors to convict “kingpins” by proving only that they sold drugs to a smaller dealer, who in turn sold drugs to a user who overdosed and died.²³ Theoretically, prosecutors could use this statute to secure a number of convictions every time a user dies from a drug overdose.²⁴

Despite the aforementioned legislative declarations regarding the intended use of 2C:35-9,²⁵ prosecutor’s application of the statute, more often than not, is in direct contravention of such intent.²⁶ In fact, the statute is rarely used to attack “upper echelon drug dealers,”²⁷ who, according to the legislature, are the parties that should be targeted by this powerful statute.²⁸ To the contrary, in the

rea would be recklessness, and therefore require that the prosecutor prove that the defendant was aware of a substantial risk but proceed anyway. N.J. STAT. ANN. § 2C:11-4 (West 2004). In the context of a drug sale, this requirement would only be met if the drug dealer had facts within his knowledge that would create a substantial risk that the buyer would die as a result of ingestion. *Id.* For example, if the seller normally sold the buyer fifty percent heroin but on this occasion was selling him one hundred percent pure heroin, knowing that there was a good chance that the buyer would inject the same amount as he normally does, then the prosecutor could likely gain a conviction under a reckless manslaughter statute if the buyer was to overdose and die as a result of ingestion. *Id.* The New Jersey drug-induced death statute removes this requirement and allows the prosecutor to get a conviction just by proving that the defendant provided the drugs to the decedent and that the decedent died as a result of ingestion of the drugs, the state does not have to prove the defendant’s mental culpability as to causing death. Miller, *supra*, at § 25.20.

²² N.J. STAT. ANN. § 2C:35-9 (West 2004).

²³ *Id.*

²⁴ Jim Edwards, *Making Friends Into Felons*, N.J. LAW J., Sept. 9, 2002, at 1 (citing statements made by Ronald Susswein, counsel to the director of the Director of Criminal Justice, who stated, “it says right in the legislative history, [§ 2C:35-9] can be traced back to some kingpin operating in another country”).

²⁵ See *supra* note 16 and accompanying text for a detailed discussion of the legislative intent of the drug-induced death statute.

²⁶ See *State v. Maldonado*, 137 N.J. 536, 645 A.2d 1165 (1994); *State v. Ervin*, 242 N.J. Super. 584, 577 A.2d 1273 (N.J. Super. Ct. App. Div. 1990); *State v. Cullum*, 338 N.J. Super. 458, 769 A.2d. 1091 (N.J. Super. Ct. App. Div. 2001); *State ex rel. A.J.*, 232 N.J. Super. 274, 556 A.2d 1283 (N.J. Super. Ct. Ch. Div. 1989).

²⁷ In 25 out of 32 cases identified by a poll of county prosecutors, the defendants charged did not deal drugs “in any serious manner.” Edwards, *supra* note 24, at 1.

²⁸ Upon enactment of the Comprehensive Drug Reform Act, the legislature stated,

“[I]n order to ensure the most efficient and effective dedication of limited investigative, prosecutorial, judicial and correctional resources, it is the policy of this State to distinguish between drug offenders based on the seriousness of the offense, considering principally the nature, quality and purity of the controlled substance and the role of the actor

majority of cases the statute has been used to prosecute minors with no record or evidence of prior drug dealing,²⁹ family members who engaged in drug use “recreationally,”³⁰ and “small time users,” whom the legislature expressly stated should be rehabilitated, not incapacitated.³¹

Although the statute’s purpose was to punish dealers as killers, without regard to their intent,³² a closer look at application indicates that very few dealers have been prosecuted and/or convicted under the statute.³³ According to one state prosecutor, “the accused is oftentimes the last person who wanted the decedent to die.”³⁴ Out of thirty-two drug-induced death prosecutions identified and examined by the New Jersey Law Journal,³⁵ twenty-five involved prosecutions of friends of the decedent who did not deal drugs in any significant manner,³⁶ and only three involved prosecutions of actual drug dealers.³⁷ These statistics indicate that almost ninety-percent of drug-induced death prosecutions in New Jersey are in direct contravention of legislative intent.³⁸

This Comment will explore the various consequences of the New Jersey drug-induced death statute. Part II of this Comment will examine the case law surrounding the statute and demonstrate that, more often than not, application of the statute is outside the realm of what the legislature intended. Furthermore, this section will argue

in the overall drug distribution network. *It is the intention of the legislature to provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders, and to facilitate the rehabilitation of drug dependent persons.*

N.J. STAT. ANN. § 2C:35-1 (West 2004) (emphasis added).

²⁹ See *State ex rel. A.J.*, 232 N.J. Super. at 274, 556 A.2d at 1283.

³⁰ See *Ervin*, 242 N.J. Super. at 584, 577 A.2d at 1273; *Cullum*, 338 N.J. Super. at 458, 769 A.2d at 1091.

³¹ The legislative declaration states, “[i]t is the intention of the legislature to provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders, and to facilitate the rehabilitation of drug dependent persons.” N.J. STAT. ANN. § 2C:35-1 (West 2004) (emphasis added). See *Maldonado*, 137 N.J. at 536, 645 A.2d at 1165; *Ervin*, 242 N.J. Super. at 584, 577 A.2d at 1273.

³² See *supra* note 16 and accompanying text for a detailed discussion of the legislative intent.

³³ Edwards, *supra* note 24, at 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* In the other four cases the relationship of the defendant to the decedent was unknown. *Id.*

³⁸ Edwards, *supra* note 24, at 1. It is not known what proportion the thirty-two cases examined represent of the total number of indictments.

that the justifications set forth for this powerful statute by both courts and the legislature are misplaced, as the statute accomplishes none of its asserted objectives. Part III suggests alternatives to the current New Jersey drug-induced death statute and argues that these alternatives reduce the various problems associated with the current statute. Finally, Part IV will conclude that 2C:35-9 has accomplished none of its objectives, demonstrate that the unintended consequences of the statute significantly outweigh any benefits provided by the statute, and argue that the most effective solution to the problems created by the statute would be for the legislature to expressly limit its application to “upper echelon” drug dealers and kingpins.

II. APPLICATION AND CURRENT STATUS OF LIABILITY FOR DRUG-INDUCED DEATH IN NEW JERSEY.

As noted above, in order to carry the burden of persuasion at trial and secure a conviction for drug-induced death under 2C:35-9, the prosecutor must only prove that the defendant dispensed drugs to the decedent, or to a third party who dispensed drugs to the decedent, and that the decedent died as a result of ingesting the drugs.³⁹ The prosecutor does not have to prove any mental state on the part of the defendant, as liability for drug-induced death is strict, and therefore he can carry his burden by proving only that the guilty act took place.⁴⁰ 2C:35-9 states, in pertinent part:

- a. Any person who manufactures, distributes, or dispenses any controlled dangerous substance classified in Schedules I or II (including heroin, cocaine, methamphetamine, lysergic acid diethylamide, phencyclidine, or any analog thereof) is strictly liable for a death which results from the ingestion, injection, or inhalation of that substance and is guilty of a crime of the first degree.
- b. For purposes of this offense, to distribute means the transfer, actual or constructive, or attempted, from one person to another.⁴¹

The legislative declarations regarding 2C:35-9 indicate that the legislature included this powerful strict liability provision as a way to trace liability back to the “upper echelon” drug dealers or “kingpins” of the organized drug trade.⁴² Upon enactment of the statute, the

³⁹ N.J. STAT. ANN. § 2C:35-9 (West 2004).

⁴⁰ See *supra* note 19 for a discussion of the implications of a strict liability statute.

⁴¹ *Id.*

⁴² *Id.*

New Jersey legislature stated, “it is the intention of the legislature to provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders, and to facilitate the rehabilitation of drug dependent persons.”⁴³

In *State v. Maldonado*,⁴⁴ the New Jersey Supreme Court examined the constitutionality of 2C:35-9 for the first time.⁴⁵ On May 7, 1988 Lucy Maldonado bought heroin from a local dealer for her friend Larry and his brother John.⁴⁶ After obtaining the drugs from a local dealer, Ms. Maldonado gave the drugs to Larry and John, receiving no profit for herself in the transaction.⁴⁷ Subsequently, Larry and John went to another location where they injected the heroin.⁴⁸ The next morning John found Larry lying dead on the floor, the result of a heroin overdose.⁴⁹ Ms. Maldonado was charged and convicted of drug-induced death and sentenced to fifteen years in prison.⁵⁰

In upholding the conviction, the New Jersey Supreme Court deferred to the judgment of the legislature and found the strict liability portion of the statute valid, under both state and federal constitutions.⁵¹ The court justified the strict liability provision of the statute, stating,

[a]bsolute liability for regulatory offenses traditionally finds justification in administrative convenience, the need to deter through the most effective forms of prosecution, dispensing with proof of intent, and imposing relatively *minor punishment*,⁵² all adding up to a conclusion that whatever injustice results from strict liability is more than counterbalanced by the benefit to the

⁴³ N.J. STAT. ANN. § 2C:35-1 (West 2004).

⁴⁴ *State v. Maldonado*, 137 N.J. 536, 645 A.2d 1165 (1994).

⁴⁵ *Id.* at 545, 645 A.2d at 1169.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Maldonado*, 137 N.J. at 545, 645 A.2d at 1169

⁵¹ *Id.* at 584, 645 A.2d at 1188-89. Upon rejecting the defendant’s cruel and unusual punishment attack, the court set forth a three-part inquiry to be used, under both state and federal constitutions, in order to determine if punishment is cruel and unusual:

- 1) Does the punishment for the crime conform with contemporary standards of decency?
- 2) Is the punishment grossly disproportionate to the offense?
- 3) Does the punishment go beyond what is necessary to accomplish any penological objective?

Id. at 556-57, 645 A.2d at 1175.

⁵² Ms. Maldonado was sentenced to 15 years in prison. *Id.* at 545, 645 A.2d at 1169.

public.⁵³

Subsequently, the court affirmed the conviction and fifteen-year prison sentence.⁵⁴

Perhaps the most controversial prosecution under 2C:35-9 occurred in the case of *State in the Interest of A.J.*⁵⁵ A.J., and his two friends, including the decedent, a sixteen year old female, decided that they would have a party one evening.⁵⁶ At the request of the decedent, A.J. and the decedent took a train to New York City where A.J. purchased “angel dust”⁵⁷ for use that evening.⁵⁸ Upon returning to Morristown, the juveniles headed to an unused train car where they would “smoke the dust.”⁵⁹ The juveniles smoked two marijuana cigarettes, “rolled” by A.J., which were laced with “dust.”⁶⁰ After smoking the second cigarette,⁶¹ the group decided to return to their respective homes in Morristown.⁶² It was at this time that A.J. and another juvenile noticed that the decedent was lying passed out on the tracks.⁶³ A.J. and the other juvenile attempted to move the decedent but she “felt like a dead weight in their arms.”⁶⁴ A.J. attempted to move the decedent by himself, but was unable to, as he was “fairly messed up from smoking the dust.”⁶⁵ A.J. and the other juvenile decided to leave the decedent on the train tracks, and they returned to their respective homes.⁶⁶ At approximately 12:30 a.m., a

⁵³ *Id.* at 550, 645 A.2d at 1171-72.

⁵⁴ *Id.* at 584, 645 A.2d at 1189.

⁵⁵ *State ex rel. A.J.*, 232 N.J. Super. 274, 556 A.2d 1283 (N.J. Super. Ct. Ch. Div. 1989).

⁵⁶ *Id.* at 276, 556 A.2d at 1284.

⁵⁷ “Angel dust” or “PCP” are the slang terms for phencyclidine, a schedule II controlled dangerous substance. *Id.* at 281, 556 A.2d at 1286. Phencyclidine is a hallucinogen, which can be snorted, smoked, or injected. National Institute on Drug Abuse, Info Facts, at www.nida.nih.gov/Infofax/pcp.html (last Visited March 25 2002). The drug gives users feelings of strength, power, and invulnerability. *Id.* At low to moderate doses, physiological effects include “an increased pulse rate, breathing rate, and blood pressure.” *Id.* At high doses, “physiological effects include a drop in blood pressure, breathing rate and pulse rate, nausea, vomiting, blurred vision, dizziness, seizures, comas, and death.” *Id.*

⁵⁸ *State ex rel. A.J.*, 232 N.J. Super. at 277, 556 A.2d at 1285.

⁵⁹ *Id.*

⁶⁰ *Id.* at 278, 556 A.2d at 1285.

⁶¹ The facts do not indicate the quantity of drugs consumed by each juvenile. *Id.* at 278-80, 556 A.2d at 1284-86.

⁶² *Id.* at 278, 556 A.2d at 1285.

⁶³ *Id.*

⁶⁴ *State ex rel. A.J.*, 232 N.J. Super. at 278, 556 A.2d at 1285.

⁶⁵ *Id.*

⁶⁶ *Id.*

New Jersey Transit train struck and killed the decedent.⁶⁷ A.J. was subsequently convicted under 2C:35-9 for causing the drug-induced death of the decedent.⁶⁸

The appellate court sustained the superior court's decision and found that A.J. knowingly or purposely distributed phencyclidine to the decedent, the decedent died, and distribution to the decedent was the cause⁶⁹ of the death.⁷⁰ The appellate court also agreed with the trial court's determination that A.J. could not be rehabilitated by age nineteen⁷¹ and therefore sustained the waiver into adult court.⁷²

As with the *Maldonado* case discussed earlier, *State in the Interest of A.J.* is illustrative of the plethora of problems that the drug-induced death statute creates.⁷³ In both cases, the strict liability feature of the New Jersey statute allowed the prosecutor to gain convictions against parties who would have faced little or no punishment in the absence of strict liability.⁷⁴ Moreover, as stated earlier, the legislature has justified the strict liability statute in terms of its application to drug lords and kingpins.⁷⁵ However, in both of the aforementioned cases, and in the majority of cases,⁷⁶ the statute has been used to prosecute

⁶⁷ *Id.* at 279, 556 A.2d at 1285.

⁶⁸ *Id.* at 281, 556 A.2d at 1286-87.

⁶⁹ N.J. STAT. ANN. § 2C:35-9(b) (West 2004) states that the act of distribution was the cause of the death if, "the injection, inhalation, or ingestion of the drug was an antecedent but for which the death would not have occurred, and the death was not too remote to have just a bearing on the defendant's liability or too dependant upon the conduct of another person that was unrelated to the use of effects of the drug."

⁷⁰ *State ex rel A.J.*, 232 N.J. Super. at 290, 556 A.2d at 1292. The court approved the trial court's conclusion that there was probable cause to believe that the juvenile (A.J.) knowingly or purposely distributed phencyclidine to S.G. (the decedent) in violation of N.J. STAT. ANN. § 2C:35-5 (West 2004), and that the juvenile's distribution of the drugs to S.G. was the cause of her death within the meaning of N.J. STAT. ANN. § 2C:35-9(b). *Id.* at 290, 556 A.2d at 1292.

⁷¹ Once the state establishes the factual predicate for the waiver, N.J. STAT. ANN. § 2A:4A-26 (West 2004) requires the juvenile, in order to overcome the waiver, to establish: "the probability of his being rehabilitated prior to attaining the age of 19 and that this probability substantially outweighs the reasons for the waiver." *Id.*

⁷² *State ex rel A.J.*, 232 N.J. Super. at 292, 556 A.2d at 1287.

⁷³ In *State ex rel A.J.*, the drug-induced death statute was used to prosecute a juvenile for drug-induced death despite the fact that there was no indication that the juvenile was a drug dealer or delinquent in any manner. *See State ex rel A.J.*, 232 N.J. Super. at 292, 556 A.2d at 1283. The defendant in A.J. was clearly not a "kingpin" of the organized drug trade and therefore his conviction creates precedent that allows drug-induced prosecutions which are clearly outside the realm that the New Jersey Legislature envisioned upon enactment of the statute. *See supra* note 16 for a detailed discussion of the legislative history of the statute.

⁷⁴ *See supra* notes 19-21 and accompanying text.

⁷⁵ *See supra* note 16 and accompanying text.

⁷⁶ *See Edwards, supra* note 24, at 1 (noting that the majority of prosecutions

parties with no record of prior drug dealing.⁷⁷

Out of thirty-two drug-induced death prosecutions examined in a recent study by the New Jersey Law Journal, only three were against actual drug dealers.⁷⁸ The other twenty-nine were against friends of the deceased, family members, and in some cases the people who sought emergency care for the decedent.⁷⁹ As noted earlier, the legislature did not intend for prosecutors to use this powerful tool against drug dependent persons or even small time dealers, as was done in both *Maldonado* and *State in the Interest of A.J.*⁸⁰ The legislature envisioned this statute as a way to trace liability back to the “upper echelon” dealers, whom, in the absence of this statute, were virtually untouchable.⁸¹ Despite this, a sixteen-year-old, drug addicted child, with no record of substantial drug dealing, was convicted under a statute designed to attack “drug kingpins” and will spend the next few decades of his life in jail⁸²—all this in a state where “it is the intention of the legislature to provide for the strict punishment, deterrence, and incapacitation of the most culpable and dangerous drug offenders, and to facilitate the rehabilitation of drug dependant persons.”⁸³

The courts in both *Maldonado* and *State in the Interest of A.J.* attempted to justify their respective decisions by asserting that the deterrent effect⁸⁴ of the statute on drug dealers and organizations⁸⁵

under § 2C:35-9 are against parties who have never dealt drugs).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 14.

⁸⁰ N.J. STAT. ANN. § 2C:35-1 (West 2004) states that § 2C:35-9 should only be used to prosecute upper echelon drug dealers, drug dependant persons should be rehabilitated, not incapacitated. N.J. STAT. ANN. § 2C:35-1 (West 2004); see also *supra* note 16. In both *State ex rel A.J.* and *Maldonado*, the defendants were convicted under this statute notwithstanding the lack of direct evidence that they dealt drugs in any serious manner; they were obviously not drug kingpins or upper echelon members of the organized drug trade. See *State ex rel A.J.*, 232 N.J. Super. 274, 556 A.2d 1283 (N.J. Super. Ct. Ch. Div. 1989); see also *State v. Maldonado* 137 N.J. 536, 645 A.2d 1165 (1994).

⁸¹ However, in *State v. Thomas*, 118 N.J. Super. 377, 288 A.2d 32 (N.J. Sup. Ct. App. Div. 1972), the court found it possible to gain a conviction under reckless manslaughter for distribution of heroin to a party who subsequently dies as a result of injection. *Id.* at 379-80, 288 A.2d at 33-34.

⁸² *State ex rel A.J.*, 232 N.J. Super. at 274, 556 A.2d at 1283.

⁸³ N.J. STAT. ANN. § 2C:35-1.

⁸⁴ For a detailed look at the deterrence theory, see generally, George A. Antunes & A. Lee Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URB. L. 145 (1973).

⁸⁵ In *Maldonado*, the court stated, “absolute liability for regulatory offenses traditionally finds justification in administrative convenience, the need to deter through the most effective forms of prosecution, dispensing with proof of intent, and imposing relatively minor punishment.” *Maldonado*, 137 N.J. at 550, 645 A.2d at

outweighs any potential unfairness to defendants.⁸⁶ The courts and the legislature contend that knowledge of the powerful statute and its harsh penalties will deter individuals from engaging in drug use and drug sales.⁸⁷ Although this justification seems logical, in actuality the statute seems to have little, if any, deterrent effect on drug users or dealers.⁸⁸ This lack of deterrence can be attributed, in large part, to sparse usage of the statute. Since 1987, the statute has been used only five times in Essex county, the state's most urban county, five times in Middlesex county, five times in Hunderton county, and only once in Atlantic, Hudson, and Passaic counties.⁸⁹ Due to the extremely low number of prosecutions sought under 2C:35-9,⁹⁰ it is reasonable to assume that drug dealers do not even know 2C:35-9 exists. If drug dealers are unaware of the existence of the statute, then the statute can have no deterrent effect on their conduct.⁹¹ Deterrence theory is predicated on the notion that criminals weigh their potential gains and losses before they act.⁹² In this case, if drug dealers are unaware of the consequences of their actions, specifically the potential for prosecution under 2C:35-9, then that will not factor into their decision making process and there will be no deterrence.⁹³ Furthermore, even if some drug dealers know of the statute's existence,⁹⁴ the chances that it will be used against them are so

1171-72.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ "There is nothing from which to infer that this particular drug statute [§ 2C:35-9], in all its severity, will deter drug dealers from engaging in their unlawful behavior." Blair Talty, *New Jersey's Strict Liability for Drug-induced Deaths: The Leap From Drug Dealer to Murderer*, 30 RUTGERS L.J. 513, 516 n.14 (1999).

⁸⁹ *Id.* Furthermore, it is important to note that the low number of prosecutions sought under the statute is not attributable of an overall drop in the number of drug overdose deaths in New Jersey. Drug Intelligence Center, *New Jersey Drug Threat Assessment* (May 15 2001) (noting that in 1999 there were over 144 cocaine overdoses that resulted in death in Newark alone), available at <http://www.usdoj.gov/ndic/pubs/669/cocaine.html>.

⁹⁰ Edwards, *supra* note 24, at 14.

⁹¹ John K Cochran, et al., *Deterrence or Brutalization? An impact assessment of Oklahoma's Return to Capital Punishment* (March 25, 2002) (noting that the deterrence theory is predicated on the notion that criminals weigh their gains and losses before they act), available at <http://www.justiceblind.com>. In this case, if drug dealers are unaware of the consequences of their actions, specifically the potential for prosecution under § 2C:35-9, then that will not factor into their decision making process and there will be no deterrence. *See id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Even in those situations where the dealer is aware of the drug-induced death statute there may be no deterrence. *See* Edwards, *supra* note 24, at 14. For example, in January 2001, Leonardo DiPasquale, a seventeen year-old from Hunderton

miniscule that any deterrent effect the statute may have is weak at best.⁹⁵ Finally, it is hard to imagine that a person can be deterred from committing a crime that requires no mens rea for commission. Legislatures would be more successful, in achieving general deterrence, if the punishment was directly related to the sale of the drugs, which requires a mens rea element for conviction.⁹⁶ Therefore, the contention of courts and the legislature that the benefit of the statute to the public, through deterrence, outweighs any unfairness to defendants, is misplaced and inaccurate.⁹⁷

New Jersey courts have also attempted to justify the strict liability statute by noting that it imposes “relatively minor punishment.”⁹⁸ The New Jersey Supreme Court in *Maldonado* stated, “absolute liability for regulatory offenses traditionally finds justification in administrative convenience, the need to deter through the most effective forms of prosecution, dispensing with proof of intent, and *imposing relatively minor punishment.*”⁹⁹ This asserted justification is obviously flawed. Fifteen years imprisonment is clearly not “minor punishment.”¹⁰⁰ Furthermore, in *State v. Cullum*,¹⁰¹ drug-induced death was found to constitute a violent crime as defined by the No Early Release Act,¹⁰² and, therefore, a person convicted must serve eighty-five percent of their sentence before being eligible for parole.¹⁰³

County, was involved in a drug transaction which resulted in the overdose death of one of DiPasquale’s friends. *Id.* Despite facing strict liability prosecution under § 2C:35-9 for the death of the teen, DiPasquale continued selling and using drugs. *Id.* A few months later, while still facing the grand jury indictment, DiPasquale died from a heroin overdose. *Id.*

⁹⁵ Because the chance of prosecution for drug-induced death is so miniscule, based on the extremely low number of convictions sought under the statute, a drug dealer will not seriously consider conviction under the statute as a possibility when weighing his potential gains and losses from the conduct. Therefore, there will be no deterrence. *See Cochran, et al., supra* note 91, at 177; *see also Talty, supra* note 88, at 529.

⁹⁶ Talty, *supra* note 88, at 529 n.75.

⁹⁷ *See supra* notes 91-95 and accompanying text. Legislatures would be more successful in achieving general deterrence if the punishment was directly related to the sale of the drugs, which requires a mens rea element for conviction. Talty, *supra* note 88, at 529 n.75.

⁹⁸ *State v. Maldonado*, 137 N.J. 536, 645 A.2d 1165 (1994).

⁹⁹ *Id.*

¹⁰⁰ Ms. Maldonado was sentenced to 15 years in prison. *Id.* at 545, 645 A.2d at 1119.

¹⁰¹ *State v. Cullum*, 338 N.J. Super. 458, 769 A.2d 1091 (N.J. Super. Ct. App. Div. 2001).

¹⁰² N.J. STAT. ANN. § 2C:43-7.2 (West 2004).

¹⁰³ NERA provides in pertinent part, “[a] court imposing a sentence of incarceration for a crime of the first or second degree shall fix a minimum term of 85 percent of the sentence during which the defendant shall not be eligible for

It should be evident from the foregoing discussion that the New Jersey drug-induced death statute is flawed.¹⁰⁴ The statute allows prosecutors to gain convictions against parties that the legislature expressly excluded from application of 2C:35-9.¹⁰⁵ In fact, almost ninety-percent of the time the statute is used, it is used against parties other than drug dealers. Based on this reality, the unintended consequences of the statute seem to outweigh any potential benefits the statute may have, and therefore demand a reexamination of the statute by the legislature. California Superior Court Judge James Gray, a leader in drug law reform, summarized the problems associated with the New Jersey statute best. Judge Gray stated, “laws such as 2C:35-9 are cleaning out the little people from this whole distribution mess, the ones who aren’t particularly smart, aren’t particularly violent, and aren’t particularly organized, leaving it for everyone else.”¹⁰⁶

III. ALTERNATIVES TO 2C:35-9 AND THE CURRENT STATE OF DRUG-INDUCED DEATH LIABILITY IN NEW JERSEY.

In order to alleviate many of the problems the New Jersey drug-induced statute creates,¹⁰⁷ the New Jersey Legislature should look to similar legislation and case law currently used in other states. Most of these alternatives accomplish the same objectives as the New Jersey statute, while not creating nearly as many problems.¹⁰⁸ These alternatives include removal of the statute in its entirety,¹⁰⁹ creating less harsh penalties for violation,¹¹⁰ restricting liability to inherently dangerous activities which have an immediate and direct causal relationship to the death,¹¹¹ removal of the strict liability feature of the statute, and expressly limiting prosecutions under 2C:35-9 to those parties who meet the statutory definition of a drug kingpin.¹¹²

parole if the crime is a violent crime.” *Id.*

¹⁰⁴ See discussion *infra* Part II.

¹⁰⁵ See *supra* text accompanying notes 25-31.

¹⁰⁶ Judge Gray also noted that users may be hesitant to seek help when another overdoses, out of fear of being prosecuted. He stated, “are we having our children overdosing on drugs when their contemporaries are fearful to get medical treatment for them because they are afraid of the legal consequences?” Edwards, *supra* note 24, at 1.

¹⁰⁷ See *infra* Part II for a discussion of the various problems created by § 2C:35-9.

¹⁰⁸ See *infra* Part III.

¹⁰⁹ See *infra* Part III.A.

¹¹⁰ See *infra* Part III.B.

¹¹¹ See *infra* Part III.C.

¹¹² See *infra* Part III.D and Part III.E.

A. *Remove the Statute in its Entirety and Prosecute Drug-Induced Death as Manslaughter.*

The first alternative to 2C:35-9 is removal of the drug-induced death statute in its entirety.¹¹³ Removal of the statute would allow prosecutors to achieve the same results that 2C:35-9 was intended to produce,¹¹⁴ while at the same time ensuring removal of most of the aforementioned problems associated with the law.¹¹⁵ This alternative would prevent prosecutors from using the statute against unintended parties, as was the case in *Maldonado, State in the Interest of A.J.*,¹¹⁶ and virtually all prosecutions under 2C:35-9.¹¹⁷ Furthermore, based on the fact that the statute is rarely used to prosecute drug dealers or drug kingpins¹¹⁸ and has a very limited deterrent effect on future conduct,¹¹⁹ the public would certainly be no worse off in the absence of the statute.

Removal of the statute would also not have a significant impact on the prosecutions of drug dealers in the state. There are a number of state statutes, also enacted as part of the Comprehensive Drug Reform Act of 1987,¹²⁰ which ensure that drug dealers in New Jersey receive harsh punishment for their crimes.¹²¹ Furthermore, even in

¹¹³ A number of state criminal codes do not contain a statute similar to § 2C:35-9 and instead prosecute drug-induced death as manslaughter. See *infra* notes 129-30.

¹¹⁴ A conviction under § 2C:35-9 is a first degree felony punishable by ten to twenty years in prison. N.J. STAT. ANN. § 2C:43-6(a)(1) (West 2004). A conviction of manslaughter is a second degree felony punishable by ten to thirty years in prison. N.J. STAT. ANN. § 2C:11-4 (West 2004).

¹¹⁵ See *supra* Part II for a discussion of the various problems the current drug-induced legislation creates.

¹¹⁶ The legislative history of the statute indicates that the statute was to be used only to target drug kingpins or upper echelon members of the organized drug trade. See *supra* note 16. However, in *Maldonado* and *State ex rel A.J.* the statute was used to convict a minor and a drug addict, neither of whom dealt drugs in any serious manner.

¹¹⁷ See *supra* text accompanying notes 25-31.

¹¹⁸ See *supra* text accompanying notes 78-79.

¹¹⁹ See *supra* text accompanying notes 88-93.

¹²⁰ N.J. STAT. ANN. § 2C:35-1 (West 2004).

¹²¹ For example, N.J. STAT. ANN. § 2C:35-3 (West 2004) imposes life imprisonment for a party convicted of being the leader of a narcotics trafficking network; N.J. STAT. ANN. § 2C:35-4 (West 2004) makes it a first degree crime to operate or maintain a controlled dangerous substance production facility; and N.J. STAT. ANN. § 2C:35-6 (West 2004) makes it a second degree crime to employ a juvenile in a drug distribution network. See Miller, *supra* note 21, at § 25.20. Furthermore, there is no merger for conviction under 2C:35-9 and distributing controlled dangerous substances near school property. *State v. Maldonado*, 137 N.J. 536, 583, 645 A.2d 1165, 1188 (1994). There is no merger for conviction under § 2C:35-9 and convictions for being the leader of a narcotics trafficking network, or maintaining or operating a controlled dangerous substances facility. N.J. STAT.

those situations 2C:35-9 currently covers,¹²² removal of the statute would have a limited impact on prosecutions of actual drug dealers, as New Jersey case law indicates that the same set of facts that give rise to 2C:35-9 liability may also give rise to liability for manslaughter,¹²³ which carries with it a presumptive sentence of ten to thirty years.¹²⁴

In *State v. Thomas*,¹²⁵ the New Jersey Court of Appeals for Middlesex County found that the sale of heroin to a party who subsequently dies as a result of ingestion is sufficient to establish a prima facie case of manslaughter.¹²⁶ In *Thomas*, the defendant sold three packets of heroin to the decedent, who subsequently overdosed and died as a result of injecting the narcotic.¹²⁷ The court found that the act of delivering narcotics to a party who dies as a result of ingestion may meet the statutory definition of recklessness and therefore give rise to manslaughter liability.¹²⁸ A number of other states also subscribe to this view, including both Connecticut¹²⁹ and

ANN. § 2:35-9(d) (West 2004). Finally, there is a merger for conviction under § 2C:35-9 and convictions for manufacturing, distributing, or dispensing illegal narcotics when they arise out of the same transaction. Miller, *supra* note 21, at § 25.20.

¹²² The drug-induced death statute applies in situations where the defendant distributed illegal narcotics to a party who dies as a result of ingestion of the drugs. N.J. STAT. ANN. § 2C:35-9 (West 2004).

¹²³ See *State v. Thomas*, 118 N.J. Super. 377, 288 A.2d 32 (N.J. Sup. Ct. App. Div. 1972).

¹²⁴ N.J. STAT. ANN. § 2C:11-4 (West 2004).

¹²⁵ See *State v. Thomas*, 118 N.J. Super. 377, 288 A.2d 32 (N.J. Sup. Ct. App. Div. 1972).

¹²⁶ *Id.* at 379; see also *State v. Ervin*, 242 N.J. Super. 584, 577 A.2d 1273 (N.J. Super. Ct. App. Div. 1990), where the court noted that a defendant who sold heroin to a drug user who died from an overdose could be convicted of manslaughter. The court justified its position, stating

“[the court is] satisfied that there can be imputed to defendant either knowledge or reckless disregard of the consequence of his act, and that the jury could have reasonably found from the proofs that beyond a reasonable doubt the regular, natural and likely consequence of the sale of heroin was the user’s death.

Id. at 590, 577 A.2d at 1276.

¹²⁷ *Thomas*, 118 N.J. Super. at 378, 288 A.2d at 34.

¹²⁸ *Id.* at 380, 288 A.2d at 35.

¹²⁹ See *State v. Wassil*, 233 Conn. 174 (1995) (holding that because the state manslaughter statute applies to *all reckless conduct*, there is no reason why the sale of drugs for economic gain that results in death should be summarily exempt from possible prosecution as manslaughter). *But see State v. Dixon*, 109 Ariz. 441 (1973) (finding that the act of selling heroin to a party who dies upon injection does not constitute second degree murder); *People v. Pickney*, 317 N.Y.S. 2d 416 (Ct. Ct. 1971) (holding that a drug dealer is not guilty of homicide if the party who received the drugs dies as a result of ingestion); *United States v. Dillon*, 18 M.J. 340, 16 Fed. R. Evid. Serv. 532 (1984) (holding that conviction for involuntary manslaughter could not be sustained based solely on the fact that the defendant sold the substance

Kentucky.¹³⁰ Therefore, pursuant to *Thomas*, it would still be possible for a prosecutor to secure a homicide conviction against a drug dealer even in the absence of 2C:35-9.¹³¹ In fact, manslaughter convictions carry with them a harsher presumptive sentence than drug-induced death convictions.¹³²

Based on the aforementioned considerations, it seems that a viable alternative to the current state of New Jersey drug-induced death liability is the wholesale abandonment of 2C:35-9. In the absence of 2C:35-9, prosecutors would have to proceed under case law, specifically *State v. Thomas*,¹³³ in order to secure a manslaughter conviction for drug-induced death. While this alternative would increase the prosecutor's burden of persuasion at trial,¹³⁴ such increased burden would be minimal in comparison with the decrease in the number of unintended drug-induced death prosecutions.¹³⁵

B. CREATE LESS HARSH PENALTIES FOR VIOLATION OF 2C:35-9.

The penalty for violation of New Jersey's drug-induced death statute is harsh in comparison to the majority of other states.¹³⁶ Currently, conviction under 2C:35-9 constitutes a first degree

(cocaine) to the decedent which caused his death).

¹³⁰ See *Lofthouse v. Commonwealth*, 13 S.W.2d 236 (Ky. 2000) (finding that the determination as to whether furnishing controlled dangerous substances to a party who dies as a result of ingestion constitutes manslaughter should be made on a case by case basis, after examining all relevant facts).

¹³¹ See *supra* note 127-28 and accompanying text. Prosecutors would just have to proceed under case law, specifically *State v. Thomas*, where the Court found that the same set of facts that currently give rise to liability under § 2C:35-9 may also give rise to manslaughter liability; see also *State v. Thomas*, 118 N.J. Super. 377, 288 A.2d 32 (N.J. Sup. Ct. App. Div. 1972).

¹³² A conviction under 2C:35-9 is a first degree felony punishable by ten to twenty years in prison. N.J. STAT. ANN. § 2C:43-6(a)(1) (West 2004). A manslaughter conviction is a second degree felony punishable by ten to thirty years in prison. N.J. STAT. ANN. § 2C:11-4 (West 2004).

¹³³ *Thomas*, 118 N.J. Super. at 377, 288 A.2d at 32.

¹³⁴ N.J. STAT. ANN. § 2C:11-4. In the absence of § 2C:35-9 prosecutors would have to prove the defendant had the requisite mental state in order to gain a conviction. See *supra* note 19 for a discussion of the implications of the strict liability feature of the statute. With regard to manslaughter, the prosecutor must prove that the defendant was acting recklessly. N.J. STAT. ANN. § 2C:11-4. In *State v. Thomas*, the court defined recklessness as knowledge of or disregard for the consequences of one's actions. *Thomas*, 118 N.J. Super. at 377, 288 A.2d at 32.

¹³⁵ See *supra* notes 25-31 and accompanying text.

¹³⁶ For a discussion on the severity of the New Jersey statute in comparison with similar legislation in other states, see generally Talty, *supra* note 88, at 513. But see FLA. STAT. ANN. 782.04 (West 2004), which makes drug-induced death a capital crime.

felony,¹³⁷ punishable by ten-to-twenty years in prison.¹³⁸ Based on the fact that in most instances the statute is used to prosecute unintended parties,¹³⁹ not “upper echelon” drug dealers, lessening the penalty for violation will serve to create a more just result in the majority of 2C:35-9 prosecutions.¹⁴⁰ While this alternative will not solve the major problems associated with the statute, specifically, its strict application against unintended parties,¹⁴¹ it will lessen the inequity experienced as a result of these unintended prosecutions.¹⁴² Based on the various other statutes often available to prosecutors under the same set of facts which give rise to 2C:35-9 liability,¹⁴³ and because of the infrequency of prosecutions against actual drug kingpins,¹⁴⁴ lessening the penalty for violation will have a minimal impact even on those prosecutions against actual drug dealers. Furthermore, even if lessening the penalty for violation will result in a detriment to prosecutions of actual drug dealers, as they will face shorter sentences upon conviction, such detriment will be substantially outweighed by the benefit given to the unintended parties most often prosecuted under this statute.¹⁴⁵

Finally, lessening the penalty for conviction of drug-induced death would place New Jersey in accord with the majority of states.¹⁴⁶ For example, Nevada¹⁴⁷ and Louisiana¹⁴⁸ punish drug-induced death

¹³⁷ While drug use and drug crimes certainly pose serious problems for the state of New Jersey, first-degree punishment is generally reserved for “the most severe and intolerable criminal acts.” Talty, *supra* note 88, at 513 n.89.

¹³⁸ N.J. STAT. ANN. § 2C:43-6(a)(1) (West 2004).

¹³⁹ See *supra* Part II.

¹⁴⁰ If the legislature and the courts continue to allow prosecutions under § 2C:35-9 that are clearly outside the intended scope of the statute, then reducing the penalty for violation is the only way to lessen the unfairness experienced by unintended parties most often prosecuted under the statute. See *generally* Edwards, *supra* note 24, at 14.

¹⁴¹ See *supra* Part II for a discussion on the various problems created by § 2C:35-9.

¹⁴² See *generally* Edwards, *supra* note 24, at 14.

¹⁴³ See *supra* notes 122-23 and accompanying text.

¹⁴⁴ Almost ninety percent of prosecutions under § 2C:35-9 are against parties with no record of drug dealing. See *supra* notes 25-31 and accompanying text.

¹⁴⁵ See *supra* note 143; see also notes 27-28 and accompanying text.

¹⁴⁶ For a discussion on the severity of the New Jersey statute in comparison to similar legislation in other states, see *generally* Talty, *supra* note 88, at 513.

¹⁴⁷ The Nevada statute states, “If the death of a person is proximately caused by a controlled substance which was made available to him by another person in violation of this chapter, the person who made the substance available to him is guilty of murder. If convicted of murder in the second degree, he is guilty of a category A felony.” NEV. REV. STAT. ANN. § 453.333 (Michie 2004).

¹⁴⁸ The Louisiana statute states that second degree murder is committed “when the offender unlawfully distributes or dispenses a controlled dangerous substance which is the direct cause of the death of the recipient who ingested or consumed the

as a second degree felony, both Pennsylvania¹⁴⁹ and Minnesota¹⁵⁰ punish it as a third degree felony, and Washington imposes a statutory maximum of ten years upon conviction.¹⁵¹ Therefore, while reducing the penalty for conviction of drug-induced death will not solve all of the problems currently created by the New Jersey legislation, it will serve to lessen the unfairness suffered by those unintended parties most often prosecuted under the statute.

C. RESTRICT CRIMINAL LIABILITY FOR DRUG-INDUCED DEATH TO SITUATIONS WHERE THERE IS A STRONG CAUSAL RELATIONSHIP BETWEEN THE ACT OF DISPENSING THE DRUGS AND THE DEATH.

A third alternative to the current New Jersey drug-induced death statute is to restrict prosecutions under the statute to those felonies that are inherently dangerous to human life, and only where there is a demonstrated causal relationship between the distribution of the drugs and the death.¹⁵² Nevada subscribes to this view.¹⁵³

In *Sheriff, Clark County v. Morris*,¹⁵⁴ the Supreme Court of Nevada considered the validity of applying the second degree murder doctrine to a defendant who sold drugs to a party who overdosed and died upon ingestion.¹⁵⁵ In *Morris*, the Court found that drug-induced death was punishable as second degree murder only in limited situations.¹⁵⁶ Specifically, the court stated that drug-induced death constituted second degree murder only in those situations where the evidence indicates that the unlawful sale of drugs was inherently

controlled dangerous substance.” LA. REV. STAT. ANN. § 14:30.1 (West 2004).

¹⁴⁹ The Pennsylvania statute states, “a person commits murder of the third degree who 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.” 18 PA. CONS. STAT. ANN. § 2506 (West 2004). In *Commonwealth v. Highhawk*, 455 Pa. Super. 186 (1996), the court found that drug delivery resulting in death was not merely a sentencing provision, but a separate offense. *Id.* at 190.

¹⁵⁰ The Minnesota statute states, “Whoever, without intent to cause death, proximately causes the death of a human being by, directly or indirectly, distributing a controlled substance is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years.” MINN. STAT. ANN. § 609.195 (West 2004).

¹⁵¹ In Washington, drug delivery resulting in death is a class B felony, punishable by up to ten years in prison. WASH. REV. § CODE. § 69.50.415 (West 2004).

¹⁵² See *Sheriff, Clark County v. Morris*, 659 P.2d 852 (Nev. 1983).

¹⁵³ *Id.*

¹⁵⁴ 659 P.2d 852 (Nev. 1983).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 859.

dangerous to human life in the abstract,¹⁵⁷ where there was an immediate¹⁵⁸ and causal relationship between the felonious conduct and the death,¹⁵⁹ and where the causal relationship extended beyond the mere selling of the drugs to an actual involvement in the ingestion of a lethal dosage by the decedent.¹⁶⁰

Therefore, in Nevada, in order to be convicted of second degree drug-induced death, the prosecutor must prove that selling the drugs to the decedent was inherently dangerous to human life in the abstract, that there was no intervention by a third party or source which contributed to the death, and only where the defendant was actually involved in the consumption of the lethal drugs by the decedent.¹⁶¹ Furthermore, the court noted that being in the presence of the decedent when they ingest the drugs will not, in and of itself, satisfy this requirement.¹⁶²

Abandonment of 2C:35-9 in favor of the approach taken to drug-induced death prosecutions in Nevada would certainly remove many of the problems created by the current legislation.¹⁶³ By requiring that the defendant actually aid the decedent in his ingestion of the lethal dose of drugs, the Nevada approach ensures that prosecutions for drug-induced death are limited to those situations where the defendant did more than just procure the drugs for the decedent, as conviction requires that the defendant be an active participant or contributor to the demise of the decedent.¹⁶⁴

Critics would argue that adoption of this approach in New Jersey would defeat the whole purpose of the statute, which was to trace liability for drug-induced deaths up the ladder to kingpins, regardless

¹⁵⁷ *Id.* When making the determination as to whether a felony is inherently dangerous to human life in the abstract, the court will not look at the specific victim, the court will look at the least dangerous way to commit the felony and ask whether it is inherently dangerous to human life. *Id.* Furthermore, the court refused to find that unlawful distribution of drugs constitutes a felony inherently dangerous to human life in all situations, instead leaving that determination up to the legislature. *Id.*; see also *People v. Patterson*, 49 Cal. 3d 615 (1989) (noting that before applying the felony murder doctrine the court must determine if the predicate felony is inherently dangerous to human life in the abstract). *Id.* at 616.

¹⁵⁸ The court defined immediate as, "without intervention from another source or agency." *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* The court stated, "absent more, the rule would not apply to a situation involving a sale ingested in the defendant's presence." *Id.*

¹⁶³ See *supra* Part II for a discussion of the various problems the New Jersey statute creates.

¹⁶⁴ See *supra* text accompanying note 160.

of whether or not they were directly involved in the drug transaction.¹⁶⁵ However, based on the fact that 2C:35-9 is rarely used in its intended capacity-against drug kingpins-¹⁶⁶ adoption of the Nevada approach would do no more than ensure that prosecutions for drug-induced death in New Jersey are limited to those situations where the defendant actually aided the decedent in his ingestion of the lethal dose of drugs.¹⁶⁷ Under this approach, the all too often repeated fact pattern, a group of friends buy drugs, share them, one of the parties overdoses and dies and the others are charged with drug-induced death,¹⁶⁸ would not lead to an unjust conviction under 2C:35-9,¹⁶⁹ as it currently does.¹⁷⁰ Therefore, while adoption of this approach would serve to completely obliterate the ability of prosecutors to convict drug kingpins under 2C:35-9,¹⁷¹ based on the fact that prosecutors rarely attempt to convict drug kingpins under the statute,¹⁷² abandoning it in favor of the Nevada approach would ensure that future prosecutions for drug-induced death in New Jersey

¹⁶⁵ Because Nevada requires that the defendant be an active participant in administering the lethal dose, it is virtually impossible to gain a conviction against a drug kingpin, who likely has no interaction with his buyers. *See supra* note 19. Upon enacting the drug-induced death statute, the New Jersey legislature declared it the public policy of the state that

in particular our criminal laws must target for expedited prosecution and enhanced punishment those repeat drug offenders and *upper echelon* members of organized narcotics trafficking networks who pose the greatest danger to society. In order to ensure the most efficient and effective dedication of limited investigative, prosecutorial, judicial and correctional resources, it is the policy of this State to distinguish between drug offenders based on the seriousness of the offense, considering principally the nature, quality and purity of the controlled substance and the role of the actor in the overall drug distribution network. *It is the intention of the legislature to provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders, and to facilitate the rehabilitation of drug dependent persons.*

N.J. STAT. ANN. § 2C:35-1 (West 2004) (emphasis added).

¹⁶⁶ *See supra* notes 35-38 and accompanying text.

¹⁶⁷ In *Morris*, in order to be convicted of drug-induced death, the court required that the defendant be involved in the ingestion, through omission or commission, of the lethal dose of the drugs. 659 P.2d 852, 859 (Nev. 1983).

¹⁶⁸ Edwards, *supra* note 24, at 14. This was the fact scenario in *Maldonado, State in the Interest of A.J.* and most other cases prosecuted under 2C:35-9. *See infra* Part II.

¹⁶⁹ *See supra* note 162 and accompanying text. Of course, if one of the parties was to aid the decedent in administering the lethal dose then that party would be liable for drug-induced death, even in Nevada. *Id.*

¹⁷⁰ *See Maldonado*, 137 N.J. at 536, 645 A.2d at 1165; *Ervin*, 242 N.J. Super. at 584, 577 A.2d at 1273; *Cullum*, 338 N.J. Super. at 458, 769 A.2d. at 1091; *State ex rel A.J.*, 232 N.J. Super. at 274, 556 A.2d at 1283.

¹⁷¹ *See supra* note 165 and accompanying text.

¹⁷² *See supra* notes 35-38 and accompanying text.

are reserved to those parties who contributed to the death,¹⁷³ not merely observers and addicts who are currently favorite targets of prosecutors.¹⁷⁴

D. INCLUDE A MENS REA REQUIREMENT IN 2C:35-9

As the foregoing discussion makes clear, the strict liability feature of 2C:35-9 creates a number of problems.¹⁷⁵ Specifically, because the prosecutor can gain a conviction without establishing any mental state,¹⁷⁶ the burden of persuasion is significantly reduced. The prosecutor need only prove that the defendant gave drugs to the decedent in order to carry his trial burden.¹⁷⁷ This feature was included in the New Jersey statute as a way to trace liability for drug-induced death back to the upper echelon drug dealers, despite their lack of knowledge of the transaction.¹⁷⁸ The Legislature envisioned this statute as a powerful weapon against the growing number of drug gangs in New Jersey,¹⁷⁹ but in actuality, the far majority of prosecutions have been against every party except the drug dealer involved in the transaction.¹⁸⁰ These unintended prosecutions would be very difficult, if not impossible, to attain if the prosecutor had to prove mens rea.¹⁸¹

i. Recklessness

Requiring the prosecutor to prove reckless conduct¹⁸² on the

¹⁷³ See *supra* note 167.

¹⁷⁴ See *Maldonado*, 137 N.J. at 536, 645 A.2d at 1165; *Ervin*, 242 N.J. Super. at 584, 577 A.2d at 1273; *Cullum*, 338 N.J. Super. at 458, 769 A.2d. at 1091; *State ex rel A.J.*, 232 N.J. Super. at 274, 556 A.2d at 1283; see also *Edwards*, *supra* note 24, at 14.

¹⁷⁵ See *infra* Part II for a discussion of the various problems created by § 2C:35-9.

¹⁷⁶ See *supra* note 19.

¹⁷⁷ The strict liability feature of the New Jersey statute allows the prosecutor to carry the burden of persuasion and gain a conviction without proving mens rea. See *supra* notes 19-21 for a more detailed discussion.

¹⁷⁸ See *supra* note 21; see also *Edwards*, *supra* note 24, at 14. (stating, “the purpose of [§ 2C:35-9] was to hold dealers responsible for the danger they create by punishing them as killers without regard to intent”).

¹⁷⁹ *Id.*; see also NBC News.com, *Gangs Take Root in the Garden State* (November 7, 2002) (noting that the increase of violent crimes in New Jersey is directly correlated with the “super-gangs” that have followed the drug trade east), available at <http://www.wnbc.com/news/1771216/detail.html>.

¹⁸⁰ *Edwards*, *supra* note 24, at 14 (noting that the majority of prosecutions for drug-induced death are against friends of the decedent, other drug addicts, and parties who sought assistance for the decedent).

¹⁸¹ *Miller*, *supra* note 21, at § 25.20. Under non-strict liability statutes the prosecutor must establish that the defendant acted with the requisite mental state in order to meet his burden of persuasion. *Id.*

¹⁸² Inclusion of a recklessness requirement in 2C:35-9 would be virtually identical

part of the defendant in order to gain a conviction under 2C:35-9 would significantly reduce the number of unintended drug-induced death prosecutions.¹⁸³ If this approach was taken in New Jersey, the prosecutor would have to show, in order to meet his burden at trial, that the defendant had facts within his knowledge that created a substantial risk that his conduct would result in the death of another party.¹⁸⁴ This approach would make it virtually impossible to attack drug kingpins for drug-induced death,¹⁸⁵ instead reserving prosecution for only the most culpable parties, those who knew of the danger but proceeded anyway.¹⁸⁶

ii. Knowledge

The inclusion of a knowledge requirement under 2C:35-9 would also ensure that only the most culpable parties, those with actual knowledge of the dangerousness of their actions, would be convicted of drug-induced death.¹⁸⁷ Although inclusion of a knowledge requirement would prevent many of the problems created by the current statute, as 2C:35-9 would only apply to the most responsible parties,¹⁸⁸ the adoption of a knowledge requirement would be an extreme action for the New Jersey Legislature, as the prosecutor would carry a very difficult burden for all convictions under 2C:35-9.¹⁸⁹

to removing the statute in its entirety and proceeding under manslaughter. *See infra* Part III.A. However, there is limited authority for prosecutors to rely on with regard to prosecuting drug-induced death as manslaughter. *See State v. Thomas*, 118 N.J. Super. 377, 288 A.2d 32 (N.J. Sup. Ct. App. Div. 1972). Therefore inclusion of a recklessness requirement by the legislature would create binding authority which would allow prosecutors to proceed under a recklessness standard.

¹⁸³ *See supra* notes 27-30 and accompanying text.

¹⁸⁴ In *Thomas*, 118 N.J. Super. at 377, 288 A.2d at 32, the court defined recklessness as knowledge of or disregard for the consequences of one's actions. *Id.* at 380, 288 A.2d at 34.

¹⁸⁵ Under non-strict liability statutes the prosecutor must establish that the defendant acted with the requisite mental state in order to meet his burden of persuasion. *See supra* note 19. Based on the fact that drug kingpins likely have little, if any, interaction with their buyers, it would be nearly impossible for the prosecutor to establish recklessness, knowledge, or negligence. *See supra* notes 19-21.

¹⁸⁶ For an example of a state that has a recklessness requirement, *see Commonwealth v. Catalina*, 407 Mass. 779 (1990); *Commonwealth v. Auditor*, 407 Mass. 793 (1990).

¹⁸⁷ The Model Penal Code states that a person acts knowingly if he is aware, with practical certainty, that his conduct will cause a certain result. MODEL PENAL CODE § 2.02.

¹⁸⁸ *Id.*

¹⁸⁹ In order to secure a conviction the prosecutor must prove that the defendant was practically certain that his conduct would cause a particular result. *Id.*

E. Expressly Restrict Prosecutions Under 2C:35-9 to Drug Kingpins or Leaders of Narcotic Trafficking Networks.

The final alternative to the current statute would be for the New Jersey Legislature to expressly limit application of 2C:35-9 to drug kingpins. The New Jersey Legislature stated in 2C:35-9's legislative history that use of the drug-induced death statute should be reserved only for prosecution of the most culpable drug dealers, "those that pose the greatest danger to society."¹⁹⁰ However, the legislature did not specifically limit application of the statute to such parties in the statutory language,¹⁹¹ instead declaring such intention only in the legislative history.¹⁹² Critics will argue that the omission was intentional, that the legislature never intended the statute to apply only to "upper echelon" drug dealers or kingpins.¹⁹³ While this argument may be valid, it is hard to imagine why the legislature would have included a detailed legislative statement pronouncing it the policy of the state to rehabilitate drug dependant persons,¹⁹⁴ not incarcerate them,¹⁹⁵ and then enact a statute that not only incarcerates them, but also makes them ineligible for drug rehabilitation programs upon conviction.¹⁹⁶ However, even assuming that the omission was intentional, based on the current state of prosecutions under 2C:35-9 and the fact that drug dependant persons, whom the legislature expressly sought to protect,¹⁹⁷ are by far the most frequently prosecuted parties under 2C:35-9,¹⁹⁸ the statute certainly needs to be reconsidered.

Expressly limiting application of the statute to the most dangerous drug dealers, as is done in a number of other New Jersey state statutes,¹⁹⁹ would be the most effective solution to the plethora of problems created by the current statute.²⁰⁰ The legislature could expressly limit prosecutions to drug kingpins, defined as "individuals who conspire with at least two other persons in a scheme or course of

¹⁹⁰ See *supra* note 16.

¹⁹¹ N.J. STAT. ANN. § 2C:35-9 (West 2004).

¹⁹² See *supra* note 28.

¹⁹³ Edwards, *supra* note 24, at 14.

¹⁹⁴ See *supra* note 16.

¹⁹⁵ *Id.*

¹⁹⁶ N.J. STAT. ANN. § 2C:35-14 (West 2004).

¹⁹⁷ See *supra* note 16.

¹⁹⁸ See *supra* notes 25-31 and accompanying text.

¹⁹⁹ See N.J. STAT. ANN. § 2C:35-3 (stating, "a person is a leader of a narcotics trafficking network if he conspires with two or more other persons in a scheme or course of conduct to unlawfully manufacture, distribute, dispense, bring into or transport in this State [illegal narcotics]").

²⁰⁰ See *supra* Part II for a discussion on the various problems created by the statute.

conduct to unlawfully manufacture, distribute, dispense, bring into or transport in this State illegal narcotics.”²⁰¹ This alternative would give prosecutors the power to protect citizens, by allowing them to prosecute drug kingpins. At the same time, it would limit the power of prosecutors to unfairly prosecute low-level dealers and drug dependant persons, parties who, according to the legislature, should be rehabilitated, not punished.²⁰²

IV CONCLUSION

The majority of prosecutions for drug-induced death in New Jersey are in direct contravention of legislative intent and therefore result in inequitable and unfair consequences.²⁰³ 2C:35-9 was envisioned by the New Jersey legislature as a way to attack the drug trade in New Jersey, a way for prosecutors to hold drug kingpins responsible for deaths that result from their indirect actions.²⁰⁴ In theory, the aforementioned justification is both an attainable goal and one that is in the best interest of New Jersey citizens.²⁰⁵ However, in actuality, due to inconsistent, infrequent and contradictory application, 2C:35-9 achieves none of its objectives.²⁰⁶

The most viable alternative to the current statute would be for the legislature to expressly restrict prosecution under 2C:35-9 to upper echelon drug dealers or kingpins,²⁰⁷ defined in the New Jersey criminal code as “individuals who conspire with at least two or more other persons in a scheme or course of conduct to unlawfully manufacture, distribute, dispense, bring into or transport illegal narcotics.”²⁰⁸ This alternative would give prosecutors the power to attack upper level drug dealers, in accordance with the original intent of the statute. At the same time, this alternative would significantly reduce the number of unintended prosecutions under

²⁰¹ N.J. STAT. ANN. § 2C:35-3 (West 2004).

²⁰² See *supra* note 28.

²⁰³ See *supra* Part II.

²⁰⁴ See *supra* note 16; see also Edwards, *supra* note 24, at 1-14; Blair Talty, *New Jersey's Strict Liability for Drug-induced Deaths: The Leap From Drug Dealer to Murderer*, 30 RUTGERS L.J. 513 (1999).

²⁰⁵ The incapacitation of drug dealers is in the best interests of society because the offender is incapable, for the time he is incarcerated, from offending again. RICHARD G. SINGER & MARTIN GARDNER, CRIMES and PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW 298 (2d ed. 1996).

²⁰⁶ See *supra* notes 160-62 and accompanying text; see also Edwards, *supra* note 24, at 14 (noting that eight prosecutors interviewed acknowledge that § 2C:35-9 is not as useful against dealers as the public had hoped).

²⁰⁷ See *supra* Part III.E.

²⁰⁸ See N.J. STAT. ANN. § 2C:35-3 (West 2004).

the statute, as low level drug dealers and users would not meet the statutory definition of drug kingpin.²⁰⁹

Present application of 2C:35-9 has no significant impact on the New Jersey drug trade, has no deterrent effect on future criminal conduct,²¹⁰ and more often than not is used to prosecute unintended parties, most notably drug addicts,²¹¹ whom the legislature expressly sought to protect from the statute.²¹² Based on these realities, it seems that the unintended and negative consequences of the statute outweigh the positive ones. As such, the statute needs to be reconsidered by the New Jersey legislature.

²⁰⁹ *Id.*; see also text accompanying notes 204-05.

²¹⁰ See *supra* notes 85-97 and accompanying text.

²¹¹ See *supra* note 38 and accompanying text.

²¹² See *supra* note 16.