WASHTENAW COUNTY

OFFICE OF THE PROSECUTING ATTORNEY

ELI SAVIT
PROSECUTING ATTORNEY

VICTORIA BURTON-HARRIS
CHIEF ASSISTANT PROSECUTING ATTORNEY

POLICY DIRECTIVE 2021-07: POLICY REGARDING BUPRENORPHINE

I. Introduction and Background

America is in the midst of a devastating opioid epidemic. Since 1999, the annual number of drug overdose deaths in the United States has more than quadrupled.[1] Nearly 70% of those drug-overdose deaths involve opioids.[2] And Michigan has been hit particularly hard. Since 1999, the number of opioid deaths in Michigan has increased by *more than 17 times*.[3] In Michigan, moreover, opioid overdoses account for nearly 80% of all drug-related deaths.[4]

Historically, opioid users have been stigmatized (and criminalized). But opioid addiction[5] does not stem from moral failings, or a failure of willpower. Rather, opioid addiction is fundamentally a physical chemical dependency. Opioids—which include prescription medications like oxycodone and hydrocodone, as well as illicit drugs such as heroin and fentanyl analogs—are a class of drugs containing molecules that bind to naturally occurring opioid receptors in the human brain.[6] They also cause a massive release of dopamine, the brain's "feel-good" chemical.[7] Opioid use can thus fundamentally alter the brain's reward structure. That, in turn, leads to a powerful physical addiction.[8]

Opioids can be as dangerous as they are addictive. Though lower doses of opioids are often prescribed for pain relief, higher opioid doses can lead to fatal overdose by causing the body to stop breathing.[9] Highly potent opioids, such as heroin and fentanyl, are responsible for

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[1] Centers for Disease Control and Prevention, *Understanding The Epidemic* (Mar. 19, 2020), *available at* https://www.cdc.gov/drugoverdose/epidemic/index.html.
[2] *Id*.
[3] Michigan Health and Hospital Association, *Michigan Hospitals Are Fighting This Deadly Epidemic, available at* https://www.mha.org/Issues-Advocacy/Opioid-Epidemic.
[4] National Institutes of Health, *Michigan: Overdose Related Deaths and Related Harms* (April 3, 2020), *available at* https://www.drugabuse.gov/drug-topics/opioids/opioid-summaries-by-state/michigan-opioid-involved-deaths-related-harms
[5] Or, the DSM-V term: "opioid use disorder."
[6] *See, e.g.,* National Institute on Drug Abuse, *Opioids, available at* https://www.drugabuse.gov/drug-topics/opioids.
[7] The Mayo Clinic, *How Opioid Addiction Occurs* (Feb. 16, 2018), *available at* https://www.mayoclinic.org/diseases-conditions/prescription-drug-abuse/in-depth/how-opioid-addiction-occurs/art-20360372.
[8] *See id*.
[9] Centers for Disease Control and Prevention, *Preventing an Opioid Overdose: Know the Signs, Save a Life, available at* https://www.cdc.gov/drugoverdose/pdf/patients/Preventing-an-Opioid-Overdose-Tip-Card-a.pdf.

tens of thousands of deaths in the United States each year.[10]

Because opioids cause a physical chemical dependency—and often result in permanent changes to neurochemical balance—recovery from opioid addiction can be particularly difficult. To be sure, abstinence-based treatment approaches, under which a person is expected to completely abstain from substance use, have been successful for many people. But abstinence does not work for everyone. For many, a more viable path to recovery involves medication for addiction treatment ("MAT"). Under a MAT approach, abstinence from illicit opioids is aided by longer-acting opioid medications that help to normalize brain chemistry, relieve physiological cravings, and block the euphoric effects of opioids.[11] According to the U.S. Department of Health and Human Services, "MAT has proved to be clinically effective and to significantly reduce the need for inpatient detoxification services."[12] Research has demonstrated that those who received medically assisted treatment are significantly less likely to be victims of a fatal opioid overdose than those who do not.[13] What is more, medically assisted treatment decreases overall opioid use, criminal activity, and infectious disease transmission.[14]

One particularly effective medical treatment for opioid addiction is buprenorphine (often known by the brand name Suboxone).[15] Buprenorphine is an partial opioid agonist, which means that it "activate[s] the opioid receptors in the brain, but to a much lesser degree than" drugs such as heroin and oxycodone.[16] Though buprenorphine is technically an opioid, it does not cause the same physiological effects as drugs like heroin that fully activate the brain's opioid receptors. Patients who use buprenorphine do not generally become intoxicated.[17] They demonstrate significantly improved cognitive function.[18] And they are generally safe to drive.[19]

In recent years, buprenorphine has been widely—and effectively—prescribed for those recovering from opioid addiction. Buprenorphine stabilizes the neurochemistry of those with an

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[10] National Institutes of Health, *Overdose Death Rates* (Mar. 10, 2020), *available at* https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates.

[11] U.S. Department of Health and Human Services, *Medication Assisted Treatment (MAT)* (Sept. 1, 2020), *available at* https://www.samhsa.gov/medication-assisted-treatment.

[12] *Id*.

[13] Matthias Pierce, Sheila M. Bird, Matthew Hickman, John Marsden, Graham Dunn, Andrew Jones, & Tim Millar, *Impact of treatment for opioid dependence on fatal drug-related poisoning: a national cohort study in England,* Addiction 111, 298-308 (2015).

[14] National Institutes of Health, *Policy Brief: Effective Treatment for Opioid Addiction* (Nov. 2016), *available at* https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction.

[15] Suboxone comprises the vast majority of outpatient opioid prescriptions, and is co-formulated with naloxone—an opioid reversal agent. Buprenorphine is absorbed through the cheeks or under the tongue, but naloxone is not. Thus, when Suboxone is taken orally, the patient benefits from the therapeutic effects of buprenorphine alone; the naloxone has no effect. But if one were to try to melt down Suboxone and inject the drug intravenously, the naloxone will (1) reverse any effects the user was trying to get out of the buprenorphine, and (2) prevent a fatal overdose. *See* John Mendelson & Reese T Jones*, Clinical and pharmacological evaluation of buprenorphine and naloxone combinations: why the 4: 1 ratio for treatment?,* 70 Drug Alcohol Depend. S29-S37 (May 2003).

[16] U.S. Department of Health and Human Services, *Pharmacological Treatment, available at* https://www.ihs.gov/opioids/recovery/pharmatreatment/.

[17] Jennifer R. Velander, *Suboxone: Rationale, Science, Misconceptions*, Ochsner J. 2018 Spring; 18(1): 23–29.

[18] *Id.*

[19] *Id.*

opioid addiction by providing relief from intense opioid cravings and withdrawal symptoms. In Michigan, state policymakers have thus acted to remove barriers to buprenorphine treatment, and to affirmatively encourage its use. In 2019, the State of Michigan eliminated "prior authorization" requirements for buprenorphine, which required doctors to obtain approval from a patient's insurer before prescribing buprenorphine.[20] In so doing, the State noted that buprenorphine, combined with counseling and behavioral therapy, represented the "gold standard" for treating people with opioid use disorder.[21]

Yet despite that endorsement, buprenorphine use and possession can carry severe criminal consequences in Michigan. Buprenorphine is categorized as a Schedule III drug, meaning that its use or possession without a prescription can subject a person to felony charges.[22] And buprenorphine-related charges are regularly filed in the Michigan courts.[23]

The theory behind criminalization of buprenorphine is straightforward. Buprenorphine is an opioid. Like other opioids, it causes a physical response in people. And, *in general*, non-prescription use and sale of opioids can cause severe repercussions. Indeed, the modern opioid epidemic was fueled largely by the diversion of prescription opioids (like Purdue Pharmaceutical's signature drug OxyContin) to the black market. During the 1990s and 2000s, opioids that had been diverted onto the black market were sold to former pain patients, recreational users, and to children and teenagers. A tsunami of addiction followed. And "[w]hen addicted people became unable to afford prescription drugs—or when they reached a point where prescription opioids no longer satiated their withdrawal symptoms—many of them turned to an even deadlier opioid: heroin."[24]

Simply put, though, buprenorphine is different. Unlike drugs such as Oxycontin or heroin, buprenorphine is a *partial* opioid agonist. For most users of buprenorphine—who already are experiencing opioid addiction—the drug does not generally lead to a euphoric high.[25] It does not generally cause addiction.[26] And crucially, buprenorphine is not typically used recreationally. Instead, "[a]lmost everybody takes it to manage their addiction, to stave off withdrawal, to self-treat."[27]

This is not to say that non-prescription use or sale of buprenorphine never occurs. It does. But "black-market buprenorphine isn't a gateway drug for first-time users."[28] It does not cause

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[20] Robin Erb, *Opioid addiction treatment just got easier for thousands in Michigan,* Bridge Magazine (Dec. 3, 2019), *available at* https://www.bridgemi.com/michigan-health-watch/opioid-addiction-treatment-just-got-easier-thousands-michigan.

[21] *Id.*

[22] *See* MCL 333.7403(2)(b)(*ii*).

[23] *See, e.g., People v. Heck,* 2020 WL 4906210, at *1 (Mich. Ct. App. Aug. 20, 2020); *People v. Villalobos*, 2020 WL 6110955, at *1 (Mich. Ct. App. Oct. 15, 2020).

[24] Complaint at 3, *City of Detroit v. Purdue Pharma, L.P.,* Doc. #1 in 2:17-cv-14075-LVP-SDD (E.D. MI), Dec. 18, 2017.

[25] Verlander, *supra* n. 17.

[26] *Id.*

[27] Peter Hirschfeld, *Health Experts Push To Decriminalize Addiction Treatment Drug*, Vermont Public Radio (Mar. 22, 2019) (quoting Burlington, Vermont police chief Brandon Del Pozo).

[28] *Id.*

addiction. Instead, buprenorphine is "a lifeline . . . for long-term users looking for some way out of addiction."[29]

In short, buprenorphine users, in general, are using it to get better. And that is true no matter how buprenorphine users obtain it.

Against that backdrop, it makes little sense to continue prosecuting people for the unauthorized use, possession, or sale of buprenorphine. Deterring people from using buprenorphine (or from selling it to people fighting addiction) will cause many in recovery to backslide. Without buprenorphine, some will turn back to more dangerous opioids, like heroin and fentanyl analogs. Some will die of overdoses. And those who don't will once again become mired in a struggle with a severe chemical dependency—ruining their lives, if not ending them.

But it does not have to be so. Other communities have effectively decriminalized buprenorphine, and with unambiguously positive results. In 2018, for example, the State's Attorney in Chittenden County, Vermont announced that she would no longer prosecute misdemeanor buprenorphine crimes.[30] In response, the police department in Burlington, Vermont—the largest municipality in Chittenden County—stopped arresting people for such offenses entirely.[31] Per Burlington's police chief, "there's been absolutely no collateral consequences of a negative kind."[32] Just the opposite: In the year after buprenorphine was effectively decriminalized, overdose deaths in Chittenden County fell by 50%.[33]

Accordingly, in light of the observed experience of other communities and the nature of buprenorphine itself, the Washtenaw County Prosecutor's Office will no longer prosecute the use or possession of buprenorphine. In addition, absent exceptional circumstances, the Prosecutor's Office will no longer prosecute cases involving the sale or distribution of buprenorphine.

II. Policy Directive

1. Use and Possession: The Washtenaw County Prosecutor's Office will no longer file criminal charges for unauthorized use or possession of buprenorphine. Assistant Prosecuting Attorneys (APAs) are prohibited from authorizing any such charges.

2. Distribution: In addition, the Washtenaw County Prosecutor's Office has a general presumption against filing criminal charges relating to the unauthorized sale or distribution of buprenorphine. Many people who are unlawfully selling buprenorphine in active addiction, and are selling life-saving medicine to others suffering from addiction. It is not in the interests of justice, public safety, or public health to charge such conduct.

APAs may, however, opt to file charges against large-scale manufacturers or distributors of buprenorphine who are engaged in the black-market sale of buprenorphine for profit.

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[29] *Id.*

[30] Mike Riggs, *This Vermont Prosecutor Is Pushing Back Against the DOJ's Drug Warriors*, Reason (June 15, 2018), *available at* https://reason.com/2018/06/15/this-vermont-county-prosecutor-is-pushin/.

[31] Hirschfeld, *supra* n. 27.

[32] *Id.*

[33] *Id.*

Buprenorphine is a medicine that should ideally be taken with a prescription, and as part of a medically supervised recovery program. A large-scale, for-profit buprenorphine manufacture or sales operation might deter people from obtaining and using medicine in a manner that is most amenable to long-term recovery.

3. Other Substances: Nothing in this Policy should be interpreted to prohibit charges relating to other controlled substances. If, for example, the evidence demonstrates that a person possessed, sold or manufactured a "designer drug" which contains both buprenorphine and fentanyl, an APA may authorize charges, if they are supported by the evidence and in the interests of justice.

4. Forensic Processing and Confiscation: Nothing in this Policy shall be interpreted to prohibit or discourage the forensic processing, or confiscation and destruction, of any contraband seized as a result of any law enforcement action.

5. Other Charges Not Covered By This Policy: Nothing in this Policy shall be interpreted to prohibit or discourage the filing of charges that are not covered by this Policy.

For example: if, following a lawful search of a home, an officer discovers buprenorphine and also discovers a weapon that links a suspect to a homicide, the Prosecutor's Office may, consistent with this Policy, file homicide charges if the evidence dictates.

6. Charges Should Be Supported by Evidence and in the Interests of Justice: Nothing in this Policy shall be interpreted to mandate or encourage the filing of charges that are not covered by this Policy. If an APA believes that filing charges other than those covered by this Policy are not supported by the evidence, or are not in the interest of justice, the APA should not file those charges.

7. Provision of Addiction-Related Services: Nothing in this Policy shall be interpreted to preclude the provision of treatment or resources to individuals who possess, use, or sell buprenorphine, including, but not limited to, through a Law Enforcement Assisted Diversion (LEAD) program.

8. Expungement: The Prosecutor's Office will not contest any application for expungement where the underlying charge was for the possession, use, or distribution of buprenorphine.

9. No Substantive Rights Created: This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney's Office. Nothing in this Policy purports to affect the legality or propriety of any law enforcement officer's actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.

10. Exceptions: All cases are different, and this Policy accordingly provides guidance that is presumptive only. Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.

Eli Savit
Prosecuting Attorney, Washtenaw County

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