



# WASHTENAW COUNTY

## OFFICE OF THE PROSECUTING ATTORNEY

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### POLICY DIRECTIVE 2025-01: POLICY REGARDING QUANTITATIVE DRUG CHECKING

#### I. Introduction and Background

For decades, America has been in the throes of a devastating overdose crisis. Opioid overdoses, in particular, have claimed the lives of over a million Americans since 1999.<sup>1</sup> Tragically, drug overdose deaths nationally have continued to rise on an annualized basis.<sup>2</sup> No community has been spared from the overdose crisis's devastation.

Washtenaw County is no exception. From 2016-2022, between 60-80 people Washtenaw County residents lost their lives each year to opioid overdoses.<sup>3</sup> The most recent year's data suggests a downward trend for opioid overdoses in particular, with 56 Washtenaw residents losing their life to an opioid overdose in 2023.<sup>4</sup> But even one overdose death is too many. And troublingly, *non*-opioid overdose deaths have increased in Washtenaw County every year since 2019.<sup>5</sup>

Encouragingly, several government actors in Michigan have taken important steps to prevent fatal drug overdoses. At the state level, the Legislature has enacted a so-called "Good Samaritan" law. That law is geared towards encouraging those who may be at risk of overdose to seek medical attention for themselves or others. It provides that a person cannot be charged for (1) possessing a controlled substance "in an amount sufficient only for personal use" if (2) the "evidence of his or her violation" of the law came as a result of the individual's attempts to procure medical assistance for themselves or others.<sup>6</sup>

Here in Washtenaw County, several sites and governmental agencies offer free naloxone—a "safe and life-saving medication designed to reverse an opioid overdose."<sup>7</sup> Among

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<sup>1</sup> Gisele Galoustian, *U.S. Drug Overdose Deaths More Than Quadrupled From 1999 to 2020*, Sept. 12, 2023, <https://www.fau.edu/newsdesk/articles/drug-overdose-deaths.php>.

<sup>2</sup> National Institute on Drug Abuse, *Drug Overdose Death Rates*, <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates>.

<sup>3</sup> Washtenaw County Health Department, *Opioid Data*, <https://www.washtenaw.org/1921/Opioid-Data>.

<sup>4</sup> *Id.* Annual trends in overdose deaths should be interpreted with caution, as they may represent a "wobble" in data—i.e., a temporary deviation from a broader trend. See, e.g., Stephanie Strong & Stephen Martin, *A "Wobble" is not a Win: Why We Cannot Yet Declare Victory on America's Devastating Overdose Trend*, Being Boulder, May 22, 2024, <https://being.boulder.care/articles/a-wobble-is-not-a-win>.

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

<sup>6</sup> MCL 333.7403(3).

<sup>7</sup> Washtenaw County Health Department, *Naloxone (Narcan)*,

other sites, naloxone is available at Ann Arbor and Ypsilanti libraries<sup>8</sup>, at the Ann Arbor Fire Department and at City Hall in Ann Arbor<sup>9</sup>, at the Washtenaw County Sheriff’s Office<sup>10</sup>, and at Northfield Township’s Human Services center in Whitmore Lake.<sup>11</sup> (For additional sites, please visit <https://www.washtenaw.org/1837/Naloxone>). This Office, moreover, has previously issued policy directives presumptively prohibiting prosecution of the use, possession, or small-scale distribution of buprenorphine and methadone. Those are two medicines used by people in recovery to help normalize brain chemistry, relieve physiological cravings, and block the euphoric attempts of opioids.<sup>12</sup>

Nevertheless, the overdose crisis continues to claim far too many lives—both from opioid overdoses and from non-opioid overdoses. With respect to opioids: one major issue is that fentanyl, a potent synthetic opioid, is now present in “all kinds of drugs, including heroin, cocaine, and methamphetamines.”<sup>13</sup> Fentanyl is also present in “fake prescription pills . . . that are sold on the street,” including medications used for anxiety and pain relief.<sup>14</sup>

Put more succinctly: one reason opioid overdose deaths remain rampant in the United States is because “fentanyl is in everything.”<sup>15</sup> Many people are therefore using fentanyl unknowingly. Still others may recognize that their drug supply is contaminated with fentanyl—but be unaware of how *much* fentanyl is present in their supply. Especially for those without “physical tolerance to fentanyl,”<sup>16</sup> the results can be deadly.

And fentanyl is not the only opioid that presents risk of overdose. By way of example, nitazenes—“a new group of synthetic drugs even more powerful than fentanyl”—have been detected in drug supplies across the nation since 2019.<sup>17</sup> “[A] specific subclass of opioids that work on a particular opioid receptor” in the brain,<sup>18</sup> nitazenes have been detected in heroin, “counterfeit medicines . . . including benzodiazepines and oxycodone,” as well as in cocaine and synthetic cannabis.<sup>19</sup>

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<https://www.washtenaw.org/1837/Naloxone>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Amber Ainsworth, *Washtenaw County Sheriff’s Office Adds Vending Machine With Naloxone Free to Public*, Fox 2 Detroit, July 12, 2022, <https://www.fox2detroit.com/news/washtenaw-county-sheriffs-office-adds-vending-machine-with-naloxone-free-to-public>.

<sup>11</sup> Northfield Township, *Naloxone Vending Machine Now Available at Northfield’s Human Services*, [https://twp-northfield.org/newsdetail\\_T10\\_R360.php](https://twp-northfield.org/newsdetail_T10_R360.php).

<sup>12</sup> See Washtenaw County Prosecutor’s Office, *Policy Directive 2021-07: Policy Regarding Buprenorphine* (Jan. 13, 2021); Washtenaw County Prosecutor’s Office, *Policy Directive 2021-15: Policy Regarding Methadone* (Aug. 31, 2021).

<sup>13</sup> Carrie MacMillan, *Why is Fentanyl Driving Overdose Deaths?*, Yale Medicine, March 18, 2024, <https://www.yalemedicine.org/news/fentanyl-driving-overdoses>.

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

<sup>15</sup> NBC10 Philadelphia, *Fentanyl is in Everything: Philadelphia Says Overdose Rates Skyrocketing*, Jan. 20, 2021, <https://www.nbcphiladelphia.com/news/health/fentanyl-is-in-everything-philadelphia-says-overdose-deaths-skyrocketing/2674262/>.

<sup>16</sup> MacMillan, *supra* n. 11.

<sup>17</sup> Ruben Castaneda, *What Are Nitazenes?*, U.S. News and World Report, May 26, 2022, <https://health.usnews.com/drugs/articles/nitazenes>.

<sup>18</sup> *Id.*

<sup>19</sup> Emma Wilkinson, *Everything You Need to Know About Nitazenes*, The Pharmaceutical Journal, Feb. 8,

Non-opioids, too, frequently can contribute to overdose deaths. By way of example only, communities across the nation have recently seen an increased prevalence of xylazine—frequently known as “tranq”—in drug supplies. “When combined with fentanyl or other synthetic opioids, xylazine can increase the potential for fatal overdoses, as the similarity in pharmacological effects can further reduce the already decreased respiratory function.”<sup>20</sup> Those who use drug mixtures with xylazine also “often develop soft tissue injuries that . . . may result in amputation at rates higher than those who inject other drugs without xylazine.”<sup>21</sup>

The foregoing issues are examples only. It bears emphasis that different substances may be prevalent in drug supplies at different times. Emerging health and safety threats related to the drug supply, moreover, can emerge rapidly.

Accordingly, there has never been a more critical moment to know precisely what compounds (and how much) are present in drug supplies. Those who use drugs should be able to avoid unwittingly taking drugs that could lead to overdose. And knowing what is in a community’s drug supply is crucial for public-health and law-enforcement officials—who are charged with crafting and implementing strategies to combat the prevalence of dangerous drugs.

That is where drug-checking services come in. “A public health intervention operating for more than 50 years, drug checking services . . . allow the public to submit drug samples from unregulated drug markets . . . for chemical analysis.”<sup>22</sup> Broadly speaking, drug-checking services allow people to know whether certain substances are present in their drug supply. Such services can save lives. And they do. A meta-analysis of 90 studies regarding drug-checking services concluded that they appear to influence behaviors.<sup>23</sup> Specifically, the evidence suggests that people are less likely to use drugs if drug-checking results are “unexpected,” “questionable,” or “suspicious.”<sup>24</sup>

In short: drug-checking services allow people to avoid taking drugs that may unexpectedly contain fatal doses of substances. That can (and does) have life-saving effects.

Yet the sheer prevalence of fentanyl in the drug supply has led to a need for more advanced drug-checking services. One commonly used drug-checking tool, for example, is the fentanyl “test strip.” Fentanyl test strips detect whether fentanyl is present or absent in a drug sample. This tool is broadly used, and has undoubtedly saved countless lives. But again: at least trace amounts of fentanyl are present in much of the national drug supply. That can frequently render binary tools like test strips insufficient, as they provide no indication of how *much*

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2024, <https://pharmaceutical-journal.com/article/feature/everything-you-need-to-know-about-nitazenes>.

<sup>20</sup> DEA Joint Intelligence Report, *The Growing Threat of Xylazine and its Mixture with Illicit Drugs*, 2022, <https://www.dea.gov/sites/default/files/2022-12/The%20Growing%20Threat%20of%20Xylazine%20and%20its%20Mixture%20with%20Illicit%20Drugs.pdf>, at 2.

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

<sup>22</sup> N. Maghsoudi, *et al*, *Drug Checking Services for People Who Use Drugs: A Systemic Review*, *Addiction*, 2022 Mar; 117(3) 532-544.

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

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

fentanyl is present in the sample.

What is more, tools that test only for the presence of a single substance (like fentanyl) necessarily do not provide information about other substances (like xylazine or nitazenes). Given the increasing risk of overdose posed by *combinations* of drugs, an ideal drug-checking system would test for multiple substances.

Fortunately, more advanced drug-checking tools such as Fourier-transform infrared spectroscopy (FTIR) and gas chromatography mass spectroscopy (GC-MS) are available. These tools—generally known as “quantitative drug checking”—can identify multiple substances in a drug sample. They can also determine the relative concentration of those substances.

Deployment of these tools promises to save lives. By giving people more information about the dangers that might be posed by drugs, advanced drug-checking services can prevent a person from unwittingly taking a substance they may otherwise have believed was safe. Effective deployment of FTIR and/or GC-MS drug-checking can also alert public-health and law-enforcement personnel as to emerging trends regarding the drug supply in a community. For example: advanced drug-checking technology can provide early alerts that drug samples in a given community are starting to be contaminated with nitazenes, xylazine, or other compounds.

Recently—with the support of the Michigan State Police, the Michigan Department of Health and Human Services, and the Washtenaw County Health Department—a group known as Liberation Empathy Advocacy for the Future (LEAF) has launched a quantitative drug-checking service in Ypsilanti. The first quantitative drug-checking service in Washtenaw County, the LEAF program builds upon the experience of other Michigan communities that have effectively deployed these services. Specifically, the LEAF program is sub-granted through the Red Project in Grand Rapids. The Red Project operates quantitative drug-checking services through a Michigan State Police-funded grant, with the support of the Kent County Health Department.

The Red Project reports the results not only to the person who provided the sample, but also to community and partner agencies. The project operates cooperatively with the Grand Rapids Police Department pursuant to a memorandum of agreement.

To date, there have been no reported negative externalities stemming from the Grand Rapids drug-checking program. And the benefits have been pronounced. The program has tested hundreds of samples of drugs, and provided both law-enforcement and health partners with emerging data about the drug supply in the Grand Rapids area.

Of course—and as the Grand Rapids experience demonstrates—quantitative drug-checking programs can work only if people feel comfortable bringing a sample for testing. If people fear that providing samples for testing could subject them to criminal consequences, they will be extraordinarily unlikely to provide such samples for testing. That could lead to more overdoses, more deaths, and delayed (or incomplete) information about the community’s drug supply. Similarly, it is important to provide a safe-harbor for workers who are facilitating the drug-testing program. Workers must feel confident that their work for the program will not lead to criminal charges (for, e.g., possession of the drugs that they are testing).

Fortunately, the quantity of drugs needed for an FTIR or GC-MS sample is very small: testing can be performed on samples no larger than half a grain of rice (or, in weight measure, 1/100<sup>th</sup> of a gram). Possession of such “trace amounts” of drugs are generally not indicative of more serious criminal activity.

Accordingly, to facilitate safe and effective quantitative drug-testing in Washtenaw County, the Prosecutor’s Office will decline to prosecute possession of (1) trace amounts of drugs that were (2) provided for quantitative drug-checking. Consistent with the statutory standard for “good Samaritans” seeking overdose attention, the Prosecutor’s Office also will not prosecute possession of a controlled substance “in an amount sufficient only for personal use” if the evidence that a person possessed a controlled substance was obtained as a result of participation in a quantitative drug-checking program.<sup>25</sup>

As of the date of this Policy, the State-funded LEAF program in Ypsilanti is the only quantitative drug-checking program operating in Washtenaw County. Accordingly, for the time being, this Policy currently applies only to that program. APAs will be made aware if and when any additional legitimate quantitative drug-checking programs begin to provide services in Washtenaw County.

## II. Policy Directive

**1. Possession of Trace Amounts of Drugs for Quantitative Drug Checking Purposes:** The Washtenaw County Prosecutor’s Office will not file any criminal charges for the possession of trace amounts of drugs that were possessed by:

- (1) an individual seeking to obtain quantitative drug checking; or
- (2) a person involved with facilitating quantitative drug checking (for example, a worker who possessed a sample of drugs for the purposes of testing that sample).

For purposes of this policy, “trace amounts” means 1/100<sup>th</sup> of a gram, or approximately the size of half a grain of rice.

Every case is different, and there is no comprehensive set of circumstances which indicate that a person possessed a controlled substance for quantitative drug-checking purposes. In determining whether an individual was seeking to avail themselves of quantitative drug-checking, Assistant Prosecuting Attorneys (APAs) should consider the totality of circumstances. Among other factors, APAs should consider:

- (1) a person’s statements;
- (2) any receipts or other documentation from a drug-checking service; and
- (3) the physical location at which an individual was alleged to have possessed the controlled substance (i.e., whether they were at or near a drug-checking site).

## **2. APA Discretion – Amounts Slightly Exceeding “Trace Amounts” As Defined By This**

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<sup>25</sup> MCL 333.7403(3).

**Policy:** It is possible that a person will possess slightly more than a “trace amount” of a controlled substance as defined by this Policy, and still legitimately be seeking quantitative drug testing. Consistent with the spirit of this Policy, APAs should use their discretion and decline to prosecute cases involving possession of a small amount of drugs where the evidence indicates the person possessed those drugs for quantitative drug-checking purposes.

Workers at a quantitative drug-checking program should be given particular leeway, as they may possess multiple samples at one time in order to complete their work. Absent truly exceptional circumstances (for example, an indication that a worker was collecting samples of drugs to sell them on the street), it would not be consistent with this Policy to charge a worker at a quantitative drug-checking program for doing their job.

APAs must obtain approval from the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney before authorizing any such charges against workers.

**3. Possession of a Controlled Substance For Personal Use – Evidence Obtained As A Result of Participation in Quantitative Drug-Checking:** In addition, the Washtenaw County Prosecutor’s Office will not file criminal charges for (1) possession of a controlled substance “in an amount sufficient only for personal use” if (2) the evidence that a person possessed a controlled substance was obtained as a result of participation in a quantitative drug-checking program.

This provision effectively adopts the statutory standard set out under Michigan’s “good Samaritan” law, which precludes possession prosecutions if a person sought medical attention to prevent an overdose. See MCL 333.7403(3).<sup>26</sup>

By way of example, if a person is (1) observed bringing a sample of drugs in for quantitative drug-checking, and, (2) *as a result of that observation*, is subsequently stopped by police on suspicion of possessing a controlled substance, the Prosecutor’s Office will not file charges for simple possession.

An “amount sufficient only for personal use” is necessarily a fact-specific inquiry, and will depend on the substance involved. In determining whether an amount was sufficient only for personal use, APAs should look to the totality of circumstances. Because this provision is meant to adopt the standard in Michigan’s Good Samaritan law, APAs should also look to any guidance under that law as to what amounts are considered “sufficient only for personal use.”

**4. Independent Evidence of Possession Sufficient for Personal Use:** This Policy does not purport to provide blanket immunity from possession charges for anyone who participates in a quantitative drug-checking program.

If (1) charges are sought by law-enforcement for possession of a controlled substance “sufficient

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<sup>26</sup> The two situations, it bears emphasis, are largely parallel. A person who is immune from prosecution under Michigan’s Good Samaritan law is seeking to prevent fatal consequences from an overdose *that has already occurred*. Correlatively, a person who is seeking quantitative drug-checking will generally be seeking to prevent a fatal overdose from *occurring in the first place*.

only for personal use,” and (2) there is sufficient evidence to authorize that charge that *does not* stem from participation in a quantitative drug-checking program, APAs should authorize that charge, assuming charges are in the interest of justice. That is true even if the would-be defendant separately participated in a quantitative drug-checking program.

As always, of course, APAs should consider referral to a diversion or deflection program (such as LEADD, pre-plea diversion, or sobriety court) when charges pertain to drug possession.

**5. Relationship to Other Charging Policies:** This Office maintains other charging policies relating to the use, possession, or small-scale distribution of certain substances. Those policies take precedence over this Policy.

For example, this Office generally does not charge the unauthorized use or possession of buprenorphine. *See* Policy 2021-07. If charges are sought for the unauthorized possession of buprenorphine, and our Office’s Buprenorphine Policy would mandate the denial of that charge, APAs should deny that charge notwithstanding the parameters of this Policy.

**6. 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. This Policy should not be interpreted to impact charging decisions related to any offense beyond possession of a controlled substance.

**7. 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.

**8. 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.



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