[J-12A-2026 and J-12B-2026]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CHARLES CLAYTON CASSELL III, Appellant	:	No. 22 MAP 2025 : Appeal from the Order of the Superior Court at No. 993 MDA 2023 dated September 24, 2024, Affirming the Judgment of Sentence of the York County Court of Common Pleas, Criminal Division, at No. CP-67-CR-0000378-2022 dated May 1, 2023. : ARGUED: March 12, 2026
COMMONWEALTH OF PENNSYLVANIA, Appellee v. JERROD AARON SCOTT, Appellant	:	No. 23 MAP 2025 : Appeal from the Order of the Superior Court at No. 1247 MDA 2023, dated October 1, 2024, Affirming the Judgment of Sentence of the York County Court of Common Pleas, Criminal Division, at No. CP-67-CR-0000858-2021 dated June 1, 2023. : ARGUED: March 12, 2026

OPINION

JUSTICE McCAFFERY **DECIDED: October 13, 2026**

The crimes of drug delivery resulting in death (DDRD)[1] and possession with intent to deliver controlled substances (PWID)[2] both require proof that the defendant "delivered," or intended to deliver, drugs to another. In these discretionary appeals, we consider whether the fact that the defendant and the decedent jointly acquired and used the drugs together is a defense to the element of "delivery." As will be discussed, we conclude that the General Assembly's broad definition of "delivery" in the Controlled Substance, Drug Device, and Cosmetic Act (the Drug Act)[3] does not permit such a defense because the Drug Act does not differentiate between drug dealers and co-users for purposes of delivery of illegal narcotics. Accordingly, in both cases, we affirm the judgments of sentence.

I. FACTS & PROCEDURAL HISTORY THROUGH SENTENCING

A. *Commonwealth v. Cassell*, 22 MAP 2025

On October 22, 2020, Angelique Smith left a drug rehabilitation facility in Lancaster, Pennsylvania. She had no money or cell phone. Around midday, Smith met Jena Parrish at a local convenience store. Parrish, who did not know Smith before this encounter, described Smith as "really anxious" and "pacing back and forth like she needed something." N.T., 3/20-22/2023, at 255. Smith told Parrish that she "wanted to go back to York" and was "looking to get high[.]" *Id.* at 262, 265. She asked Parrish to get her "dope" but Parrish declined. *Id.* Parrish, who lived near the store, allowed Smith to stay on her front porch and use her cell phone periodically throughout the night and next morning.

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[1] 18 Pa.C.S. § 2506.

[2] 35 P.S. § 780-113(a)(30).

[3] 35 P.S. §§ 780-101-780-144.

Parrish's cell phone logs revealed Smith texted and called Appellant, Charles Clayton Cassell, III, multiple times that evening and into the next morning. Cassell, who was 30 years older than Smith, described himself as "more than just a boyfriend[;]" he was her "protector." Commonwealth Exhibit 34 (Cassell Police Interview, 10/26/2020) at 7, 14. In the text messages, Smith told Cassell she did not have any money and needed someone to pick her up so she could meet up with him in York. He texted that he would "have a guy get" her and asked, "do u want to use[?]" Commonwealth Exhibit 24(a) (Cellebrite Extraction Report) at 3. Smith responded, "Yes [I] want to use[.]" *Id.* Mid-morning on October 23rd, Cassell arranged for an Uber driver to transport Smith to a supermarket parking lot in York, where Cassell was waiting for her in his car.

Cassell's cell phone records revealed he had "multiple conversations" with other individuals — one of whom was Chase Smith[4] — in an "attempt to get drugs." N.T., 3/20-22/2023, at 184. At 1:16 p.m., Cassell sent the following text message to Chase: "Where can I meet you, I have $40. And I'm sick[.]" Commonwealth Exhibit 24(b) at 2. Chase responded, "My house sorry man[.]" *Id.* Cassell texted that he was "on [his] way[.]" *Id.*

The location data from Cassell's cell phone revealed he then drove in a "direct route" toward Chase's house. N.T., 3/20-22/2023, at 245. Chase did not testify at trial, but he was charged with, and ultimately pled guilty to, the sale of drugs to Cassell. *See id.* at 187. From there, Cassell parked his car behind an apartment building, and he and Smith "got high" for the first time that day, sharing a bag of what they believed to be heroin.[5] Cassell Police Interview at 9, 36. About two and one-half hours later, Cassell and Smith "shot … up" again near a park. *Id.* at 14-15, 37. Cassell told police that Smith

[4] It appears that Chase Smith was not related to Angelique Smith. For ease of reference, we will refer to him as "Chase."

[5] Post-mortem testing of Smith's blood revealed only fentanyl.

"used more than [he] did [b]ecause [he] always let her … take as much as she wants." *Id.* at 14.

Although initially Smith was happy and screaming, she soon took a turn — her "head went down" and her lips started turning blue. Cassell Police Interview at 15-16. Cassell stopped the car, pulled Smith out, and attempted to resuscitate her. When Smith appeared to be breathing on her own, Cassell returned her to the car and drove to a nearby parking lot. He explained he did not call for help because Smith had outstanding warrants and told him she would kill herself if she had to go back to jail. Soon thereafter, "everything shut down" and Smith stopped breathing. *Id.* at 17. Although Cassell tried to give her CPR again, he was unsuccessful. When he saw "bile coming out of her mouth and … nose[, he] realized … that she drowned." *Id.* at 18. Although he claimed he was distraught, Cassell still did not call for help or drive Smith to a nearby hospital. Instead, he ingested the remaining drugs and drove around until he discarded the paraphernalia. He finally called 911 about an hour later.

Cassell was subsequently charged with third-degree murder, DDRD, criminal use of a communication facility, tampering with evidence, recklessly endangering another person, and PWID.[6] The third-degree murder charge was based on his purported delivery of the drugs to Smith, which led to her death, as well as the fact that he prevented her from receiving medical assistance when he knew she was in need of care. *See* Criminal Information, 2/10/2022, at 1 (unpaginated).

Cassell proceeded to a jury trial. Before the court charged the jurors, Cassell requested an instruction on joint acquisition and use of narcotics similar to a charge approved by the United States Court of Appeals for the Third Circuit in *U.S. v. Semler*,

[6] *See* 18 Pa.C.S. §§ 2502(c), 2506(a), 7512(a), 4910(1), and 2705, and 35 P.S. § 780-113(a)(30), respectively.

858 Fed App'x 533 (3d Cir. 2021) (unreported). *See* N.T., 3/20-22/2023, at 271-272. The trial court refused the request, concluding that *Semler* was based on federal law. *See id.* at 272. The jury convicted Cassell of all charges, and on May 1, 2023, the trial court imposed an aggregate sentence of 23½ to 47 years' imprisonment.

B. *Commonwealth v. Scott*, 23 MAP 2025

During the week leading up to June 28, 2019, Melissa Wandell and her friend, Zack Savage, planned to purchase heroin from Wandell's dealer, "Ro Ro." N.T., 3/27-30/2023, at 120-127. Savage provided the funds, and Wandell intended to trade some of her prescription medications for drugs. *See id.* On Friday, June 28th, Savage arrived at Wandell's apartment in Dillsburg, Pennsylvania at approximately 11:00 a.m. Wandell called Ro Ro several times but was unable to reach her. Eventually, an individual who identified himself as Ro Ro's son "J" answered the phone. *Id.* at 129. "J" later was identified as Appellant Jerrod Aaron Scott. Scott told Wandell he could help her get drugs if she picked him up at Hershey Medical Center. *See id.* at 129-130.

Savage gave the money for the drugs to Wandell and drove the two of them to Hershey to pick up Scott. Scott got in the backseat of Savage's car and directed him to drive to a convenience store in Harrisburg. When they arrived, Scott went into the store and came out with another individual. They both got in the backseat of Savage's car. Wandell then handed the money to Scott, who, in turn, handed it to the dealer in exchange for fentanyl. Scott then directed Savage to drive him to several other locations, including: another dealer to purchase crack cocaine, a Rite Aid to fill his prescription for Suboxone,[7] and a third dealer to trade the Suboxone for heroin. *See* N.T., 3/27-30/2023, at 133-136. The heroin, however, turned out to be more fentanyl.

[7] Suboxone is a prescription medication that helps those addicted to opioids manage cravings and reduce withdrawal symptoms. *See* American Addiction Centers, https://americanaddictioncenters.org/suboxone (last accessed Jun. 25, 2026).

Scott next led Savage to a park where the three of them could "get high[.]" N.T., 3/27-30/2023, at 136. By this time, it was close to 7:00 p.m. Once they arrived, Scott, Wandell, and Savage walked to a secluded location. Wandell carried the drugs and paraphernalia for her and Savage. Scott, who carried his own drugs, got high first, followed by Wandell. Scott soon began to overdose, and Savage had to find his way back to the car to retrieve Narcan,[8] which Scott had in a backpack he left in the car. Once Savage returned, he and Wandell revived Scott.

At that point, Savage was angry because he purchased the drugs and had not yet gotten high. He proceeded to snort "roughly … two bags worth of the fentanyl." N.T., 3/27-30/2023, at 140. Savage soon began to stumble and slur his words before passing out. Wandell and Scott had to carry him back to the car. Scott, who was angry because he believed Savage stole some of his drugs, dropped Savage, and Savage's head "slammed on the pavement." *Id.* at 143.

Eventually, Scott and Wandell got Savage to the car and propped him up in the backseat. Wandell drove to a nearby minimart, looking for water to revive Savage; however, the store was closed. Wandell then drove Scott to another location so he could "get a hit of crack" before they proceeded to her apartment in Dillsburg. N.T., 3/27-30/2023, at 147. Once they arrived, Wandell checked on Savage again. However, she left him in the backseat when she and Scott went into her apartment to continue to get high. Wandell went back outside to check on Savage, who was passed out but still alive, three or four more times before falling asleep around 2:30 a.m. *See id.* at 150-151.

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[8] Narcan, a brand name for Naloxone, "is a medicine that rapidly reverses an opioid overdose." National Institute on Drug Abuse, https://nida.nih.gov/publications/drugfacts/naloxone (last accessed Jun. 26, 2026). It can be purchased over-the-counter at a pharmacy. *See id.*

The next morning, Wandell checked on Savage again and "thought [she] felt a pulse." N.T., 3/27-30/2023, at 153. She then left for an appointment at a methadone clinic before returning about 45 minutes later. Wandell's mother[9] told her Savage "didn't look right." *Id.* When Wandell could not feel a pulse, her mother called 911. Although paramedics attempted to revive Savage, he was pronounced dead.

Scott was charged with third-degree murder, DDRD, access device fraud, theft, receiving stolen property, tampering with evidence, and PWID.[10] The theft-related charges were based on allegations that, while Savage was unconscious, Scott stole Savage's credit card and attempted to use it.

Scott proceeded to a jury trial. During the charging conference, Scott's counsel (like Cassell's counsel) requested a *Semler* instruction concerning "joint possession," because "the facts of the case support that three addicts went out to get drugs to use together." N.T., 3/27-30/2023, at 406-407. After reviewing the case law cited by both defense counsel and the Commonwealth, the trial court declined to give the requested instruction. *See id.* at 466 ("I don't have any appellate Pennsylvania case law to rely on to say that … I should give some special instruction that if they were all doing drugs together, there couldn't be a delivery."). The jury convicted Scott of DDRD, PWID, access device fraud, theft, and receiving stolen property, and acquitted him of third-degree murder and tampering with evidence. On June 1, 2023, the trial court sentenced Scott to an aggregate term of 9 to 18 years' imprisonment, following by one year of probation.

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[9] Wandell lived with her mother.

[10] *See* 18 Pa.C.S. §§ 2502(c), 2506(a), 4106(a)(1)(ii), 3921(a), 3925(a), and 4910(1), and 35 P.S. § 780-113(a)(30), respectively.

II. POST-SENTENCE MOTIONS & APPEALS

Both Cassell and Scott (collectively Appellants) filed timely, nearly identical, post-sentence motions based upon their proposed defenses of joint acquisition, possession, and use of the controlled substances.[11] They both argued the evidence was insufficient to support their convictions of DDRD and PWID because they jointly acquired, possessed, and used the drugs with the decedents that ultimately led to the decedents' deaths.[12] *See* Cassell's Post-Sentence Motion, 5/11/2023; Scott's Post-Sentence Motion, 6/6/2023. For support, Appellants cited a then-recent, unpublished Superior Court decision, *Commonwealth v. Brown*, 297 A.3d 755 (Pa. Super. 2023) (unpub. memo.), which concluded that "there could be no conveyance of possession [of narcotics] between two parties 'where possession was jointly acquired at the outset by both a defendant and another user/possessor **who were equal participants in the purchase**." Cassell's Post-Sentence Motion, at 3 (emphasis in original); Scott's Post-Sentence Motion, at 3 (emphasis in original). Thus, Appellants argued that their joint acquisition and use of the drugs with the decedents defeated any claim that they **delivered** drugs to the decedents, a requisite element of both DDRD and PWID. Relying again on *Brown* and the Third

[11] Although Cassell and Scott were represented by different attorneys, both attorneys were employed by the York County Office of Conflict Counsel.

[12] Cassell made this same argument in support of vacating his conviction of third-degree murder. *See* Cassell's Post-Sentence Motion, 5/11/2023, at 7. Notably, however, when charging the jury on the offense of third-degree murder, the trial court instructed that "[m]alice can be inferred from the failure of the defendant to seek medical care for a victim." N.T., 3/20-22/2023, at 321. The court **never** told the jury that it could find Cassell guilty of third-degree murder simply because he allegedly delivered drugs to Smith that led to her death. Thus, Cassell's purported delivery of drugs to Smith might not have been a factor in the jury's guilty verdict on the charge of third-degree murder — instead, the jury may have concluded that Cassell acted with malice when he drove around for several hours while Smith was experiencing an overdose, and failed to seek aid for her. Regardless, because we ultimately conclude joint acquisition and use of drugs is not a defense to the element of delivery, we need not address Cassell's third-degree murder conviction further.

Circuit's decision in *Semler*, Appellants asserted, alternatively, that the trial court should have granted their requests for a jury instruction on joint acquisition and use. *See* Cassell's Post-Sentence Motion, at 8-9; Scott's Post-Sentence Motion, at 8-9. In both cases, the trial court judge denied the post-sentence motions.

Present counsel, Anthony J. Tambourino, Esq., entered his appearance for Appellants and filed timely direct appeals. In both appeals, counsel argued: (1) the evidence for DDRD and PWID (and in Cassell's case, third-degree murder) was insufficient because the Commonwealth failed to prove the defendant delivered the drugs which led to the decedent's death; and (2) the trial court erred by failing to provide a jury instruction on joint acquisition and use of controlled substances. *See Commonwealth v. Cassell*, 328 A.3d 516 (Pa. Super. 2024) (unpub. memo. at *3); *Commonwealth v. Scott*, 325 A.3d 844, 849 (Pa. Super. 2024). In both cases, the same panel of the Superior Court unanimously affirmed the judgments of sentence.[13] *See Cassell*, 328 A.3d at *8; *Scott*, 325 A.3d at 854.

Addressing the sufficiency claim first, the Superior Court observed that a conviction of DDRD requires proof that the defendant intentionally delivered controlled substances in violation of the Drug Act, and someone died as a result of using those substances. *See Scott*, 325 A.3d at 850 (*citing* 18 Pa.C.S. § 2506(a)). Nevertheless, the Commonwealth is not required to prove the defendant "intended to cause the death of another" — rather, it must prove the defendant intentionally delivered the drugs and had "a reckless disregard of death from the use of the contraband." *Id.* (citation and internal quotation marks omitted). The Court opined that the inherent dangerousness of consuming

[13] Notably, the Superior Court issued an unpublished decision in *Cassell* and a published opinion in *Scott*. With the exception of reference to the individual facts in each case, the Superior Court opinions are virtually identical. They were both authored by Judge Beck and joined by Judge Dubow and President Judge Emeritus Stevens. Therefore, we will refer to the published opinion in *Scott*, unless discussing the specific facts in *Cassell*.

fentanyl, which carries a high possibility of death, satisfies the required element of recklessness. *See id.* (*citing Commonwealth v. Storey*, 167 A.3d 750, 758 (Pa. Super. 2017) (defendant's sale of heroin to a third party who then gave the heroin to the decedent was sufficient to establish recklessness for DDRD conviction)).

The Court observed, however, that Appellants specifically challenged the **delivery** element of their convictions. Relying on *Brown* and *Semler*, they argued that because they "mutually planned to acquire … and use the drugs together" with the decedents, neither Appellant delivered the drugs to the decedent within the meaning of the DDRD and PWID statutes. *Scott*, 325 A.3d at 850-851. Scott focused on the fact that each "addict" — he, Wandell, and Savage — "had equity in the efforts to obtain drugs: Savage contributed funds and his vehicle, Wandell contributed her contact with Scott's mother, … and Scott contributed his knowledge of where to get drugs in furtherance of their plan." *Id.* at 851 (citation and some internal quotation marks omitted). Scott characterized himself as "a personal joint user, not a drug dealer." *Id.* (citation omitted). Similarly, Cassell described his relationship with Smith as personal and non-commercial — according to him, they were "two addicts … who mutually planned to acquire and use the drugs together." *Cassell*, 328 A.3d at *5 (citation omitted).

The Superior Court refuted Appellants' focus on joint acquisition and use by turning to the definition of "deliver" and "delivery" in the Drug Act. *Scott*, 325 A.3d at 851. It noted the Act defines the terms as "the actual, constructive, or attempted **transfer** from one person to another … whether or not there is an agency relationship." *Id.* (emphasis added) (*citing* 35 P.S. § 780-102). The Superior Court observed that this Court has defined "transfer" pursuant to its plain meaning — that is, a person "transfers" drugs when they "physically convey drugs to another person" whether or not money or something of

value is exchanged. *Id.* at 851-852 (*citing Commonwealth v. Murphy*, 844 A.2d 1288 (Pa. 2004); *Commonwealth v. Metzger*, 372 A.2d 20 (Pa. Super. 1977)).

Although the Court acknowledged that Appellants' argument had "some commonsense appeal[,]" it ultimately concluded the facts in each case were sufficient to support the convictions, particularly considering this Court's broad interpretation of the term "delivery."[14] *Cassell*, 328 A.3d at *6; *Scott*, 325 A.3d at 852. With respect to Scott, the Commonwealth proved that Scott obtained the drugs from his dealer, using Savage's money. *See Scott*, 325 A.3d at 852. He then conveyed the drugs to Wandell, Savage's agent. The Superior Court explained that even if there was a plan to obtain and use drugs together, that plan was between Savage and Wandell, **not** Savage and Scott. In fact, there was no evidence Savage ever intended to use drugs with Scott. *See id.*

With respect to Cassell, the Court focused on Cassell's control of the situation — he described himself as Smith's protector, he asked if she wanted to use drugs, he paid for her transportation, he called the drug dealer and provided the funds for the drugs, and he "let Smith take as much as she wanted before using himself." *Cassell*, 328 A.3d at *6 (citation and some punctuation omitted). To the extent Cassell argued that he and Smith had joint "constructive possession" of the drugs, the Court concluded that "Smith may have had access to the drugs, but she did not have **control** over them." *Id.* (emphasis added).

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[14] The Superior Court explicitly rejected Appellants' reliance on *Brown* and *Semler*. The Court noted *Brown* was a "split non-precedential decision" which affirmed the dismissal of the charges because the Commonwealth failed to preserve its issue for review. *Scott*, 325 A.3d at 850 n.4. As for the unpublished Third Circuit decision in *Semler*, the Superior Court explained that decision interpreted the term "distribute" in the federal drug statute. *Scott*, 325 A.3d at 851 n.5. Moreover, like *Brown*, *Semler* was not unanimous — Judge Porter issued a "lengthy concurring and dissenting opinion," which "critiqued the majority … for failing to abide by the plain language of the statue in favor of its own policy analysis." *Id.* (*citing Semler*, 858 Fed. App'x at 543-545 (Porter, J., concurring in part and dissenting in part)).

Next, the Superior Court rejected Appellants' claim that the trial court erred by denying their requests for a jury instruction on joint acquisition and use. *See Scott*, 325 A.3d at 853. The Court noted that the trial courts' instruction on delivery was an accurate reflection of the law, and the facts in each case did not support a "joint acquisition/use charge." *Id.* at 853-854; *see also Cassell*, 328 A.3d at *7. Accordingly, the Superior Court declined to interfere with the trial court's discretion to deny the requested instruction.

After rejecting the sufficiency and jury instruction claims, the Superior Court affirmed the judgments of sentence. *See Cassell*, 328 A.3d at *8; *Scott*, 325 A.3d at 854.

III. ISSUE

Appellants petitioned this Court for allowance of appeal. In granting allocatur review, we directed the Prothonotary to consolidate the cases and list them together. We also rephrased the issue as follows:

> When two or more persons jointly and constructively acquire and use drugs, is that a defense to the element of "delivery" for charges of possession with intent to deliver, drug delivery resulting in death, and third-degree murder (where delivery of drugs was a stated element of the Information)? If so, is the defense (1) sufficient for an acquittal of those charges, or (2), in the alternative, is the defense sufficient to obtain a "constructive possession" style of jury instruction?

Commonwealth v. Cassell / *Commonwealth v. Scott*, 336 A.3d 937, 937-938 (Pa. 2025).

IV. DISCUSSION

Before the Superior Court, Appellants framed the issue as a challenge to both the sufficiency of the evidence supporting their convictions of DDRD, PWID, and in Cassell's case, third-degree murder, and the trial courts' refusal to instruct their respective juries on the potential defense of joint acquisition and use of controlled substances. *See Cassell*, 328 A.3d at *3; *Scott*, 325 A.3d at 849. However, as evident in our *per curiam*

order granting allocatur review, the primary — and perhaps, preliminary — question is much broader: Is the joint acquisition and possession of controlled substances between co-users **a defense** to the element of delivery necessary to prove the crimes charged? In other words, is the Commonwealth required to disprove the defendant jointly acquired possession of the controlled substances with the decedent for their personal use?

A. DDRD and PWID

Our analysis begins with the relevant statutory provisions, which we interpret through the lens of the Statutory Construction Act. *See* 1 Pa.C.S. §§ 1501-1991. Because statutory interpretation presents a question of law, "our standard of review is *de novo*, and our scope of review plenary." *Commonwealth v. Lehman*, 311 A.3d 1034, 1044 (Pa. 2024) (citation omitted).

As Section 1921(a) commands, our predominant goal is to "ascertain and effectuate the intention of the General Assembly[,]" which is generally best expressed through the plain language of the statute. *Lehman*, 311 A.3d at 1044 (*citing* 1 Pa.C.S. § 1921(a)-(b); *Miller v. County of Centre*, 173 A.3d 1162, 1168 (Pa. 2017)). When the statutory language is clear and unambiguous, we may not disregard it "under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). It is only when the language is ambiguous that we utilize the statutory construction factors in Section 1921(c) to determine the General Assembly's intent. *See* 1 Pa.C.S. § 1921(c). Moreover, because the statutes here are penal provisions, we must construe them strictly, and, if there is an ambiguity, we view the provisions "in the light most favorable to the accused." *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001) (citations omitted).

The crimes of DDRD and PWID are inextricably bound. PWID is codified in Section 780-113(a)(30) of the Drug Act, and prohibits "the manufacture, **delivery**, or possession with intent to manufacture or deliver, a controlled substance by a person not registered

under [the] act[.]" 35 P.S. § 780-113(a)(30) (emphasis added). The Act defines "deliver" or "delivery" as "the actual, constructive, or attempted **transfer** from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship." 35 P.S. § 780-102 (emphasis added). Merriam Webster Dictionary defines "transfer" as "to convey from one person, place, or situation to another" and "to cause to pass from one to another[.]" Merriam-Webster ("TRANSFER"), https://merriam-webster.com/dictionary/transfer (last accessed Jun. 25, 2026). Alternatively, transfer is defined as "to make over the possession or control of[.]" *Id.*

Under our case law, the delivery of controlled substances may be accomplished in several different ways. "A defendant actually transfers drugs whenever he physically conveys drugs to another person[.]" *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004) (citation and footnote omitted). In addition, "a defendant constructively transfers drugs when he directs another person to convey drugs under his control to a third person or entity." *Id.* (citation omitted). In fact, a defendant need not even have an agency relationship with the seller. Rather, an individual, acting on a buyer's behalf, who physically conveys drugs to a buyer may be liable as "a principal for delivering drugs[.]" *Id.* at 1234 n.9 (citation omitted). As this Court found in *Murphy*, a defendant may also be guilty of PWID if he is an accomplice to the drug dealer, despite the fact that he never physically possesses or handles the drugs. In that case, the defendant aided "the principal drug deliverer, in transferring drugs to the" buyer when he screened the buyer to determine if the buyer was a police officer and confirmed to the dealer that the buyer was "okay to sell drugs to." *Murphy*, 844 A.2d at 1237.

A conviction of DDRD requires proof that the defendant "intentionally administer[ed], dispense[d], deliver[ed, gave], prescribe[d, sold] or distribute[d] any controlled substance or counterfeit controlled substance **in violation of** [**S**]**ection**

13(a)(14) or (30) of [**the Drug Act**,[15]] and another person die[d] as a result of using the substance." 18 Pa.C.S. § 2506(a) (emphasis added).[16] Thus, "a violation of one of the specifically referenced provisions of the Drug Act is an element of the crime of DDRD." *Commonwealth v. Peck*, 242 A.3d 1274, 1281 (Pa. 2020). PWID is one of those referenced provisions.

Accordingly, to obtain a conviction for DDRD, the Commonwealth must prove the defendant violated the Drug Act by actually or constructively transferring controlled substances to another person[17] and the decedent died as a result of using those controlled substances. The crime does not require proof that the defendant physically handed the controlled substances to the decedent, or that he intended to cause the decedent's death. While the Commonwealth must prove the defendant intentionally delivered the drugs to another, the *mens rea* required for the resulting death is recklessness, that is, the decedent's death must have been "a natural or foreseeable

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[15] *See* 35 P.S. § 780-113(a)(14), (30).

[16] DDRD is graded as a first-degree felony but provides for a term of imprisonment up to 40 years. *See* 18 Pa.C.S. § 2506(b)(1). This is twice the maximum sentence permitted for most first-degree felony convictions. *See* 18 Pa.C.S. § 1103(1). Presumably, the enhanced penalty is a holdover from the provision's enactment in 1989, when the offense was designated as third-degree murder and carried a mandatory minimum sentence of five years' imprisonment. *See* Act of Dec. 22, 1989, P.L. 773, No. 109, imd. effective ("A person commits **murder of the third degree** who administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance … in violation of [the Drug Act], and another person dies as a result of using the substance.") (emphasis added). However, a 2011 amendment to the Crimes Code reclassified the offense as a first-degree felony, removed the mandatory minimum sentence, and added the maximum penalty of 40 years' imprisonment, the same maximum penalty for third-degree murder. *See* Act of July 7, 2011, P.L. 220, No. 40, § 1, effective in 60 days; *see also* 18 Pa.C.S. § 1102(d).

[17] This delivery must constitute a violation of the Drug Act. *See Commonwealth v. Peck*, 242 A.3d 1274, 1285 (Pa. 2020) (evidence was **insufficient** to convict defendant of DDRD when the death occurred in Pennsylvania, but the underlying drug delivery was in Maryland; "the Drug Act, by its express terms, is violated only by a drug delivery that occurs within Pennsylvania").

consequence of [the defendant's] conduct." *Commonwealth v. Kakhankham*, 132 A.3d 986, 995 (Pa. Super. 2015).

Despite our broad interpretation of the term "delivery" in the PWID and DDRD statutes, Appellants urge this Court to embrace a defense to the element of delivery which has been recognized by some state and federal appellate courts as a derivative of constructive possession — joint acquisition and use.[18]

B. Constructive Possession

"The purpose of the constructive possession doctrine is to **expand the scope of possession statutes** to encompass those cases where actual possession at the time of arrest cannot be shown but where the inference that there has been actual possession is strong." *Commonwealth v. Carroll*, 507 A.2d 819, 820 (Pa. 1986) (emphasis added) (*citing* Whitebread and Stevens, *To Have and To Have Not*, 58 U. VA. L. REV. 751, 755 (1972)). For years, the Commonwealth utilized this "legal fiction" to establish a defendant's possession of contraband recovered from an area where the defendant "shared access and control" with another, as opposed to exclusive access. *Commonwealth v. Murdick*, 507 A.2d 1212, 1213-1214 (Pa. 1986). "Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not." *Id.* at 1213. A defendant constructively possesses contraband if he has "the ability to exercise a conscious dominion over the illegal substance" — in other words, "the power to control the contraband and the intent to exercise that control." *Commonwealth v. Macolino*, 469 A.2d 132, 134 (Pa. 1983) (citations omitted). Our decision in *Macolino* illustrates the doctrine in use — contraband was recovered from a bedroom shared by the defendant and his wife. We opined that the jury could reasonably

[18] Cassell and Scott, both represented by Attorney Tambourino on appeal, filed nearly identical appellate briefs, with the exception of reference to the specific facts in each case. Thus, to the extent their arguments align, we will address them together.

conclude the defendant was aware of the contraband found in his bedroom, and "he exercised a conscious dominion over [it,] and … he intended to possess it." *Id.* at 136. The fact that his wife had equal access to the bedroom was of no moment because "[p]ossession of an illegal substance need not be exclusive; two or more can possess the same drug at the same time." *Id.*

We never have considered whether the judicially-created doctrine of constructive possession may be employed as a defense. That, however, is exactly what Appellants desire. According to Appellants, "the doctrine of joint constructive possession captures the reality that individuals can share drugs without effecting a 'delivery' under" Section 780-102. Cassell's Brief at 25; Scott's Brief at 29. They maintain: "While the Commonwealth more often invokes this 'legal fiction' as a sword to obtain convictions, its use as a defendant's shield is just as appropriate." Cassell's Brief at 22; Scott's Brief at 26.

C. Joint Acquisition and Use

The argument that a defendant cannot **deliver** (*i.e.*, transfer) drugs to another with whom he has joint possession of those drugs is not novel. In fact, it has been recognized in at least two federal Circuit Court decisions, and one unpublished Superior Court decision.

In *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), the Second Circuit interpreted the federal Controlled Substances Act,[19] which provides that it is "unlawful for any person knowingly or intentionally … to … distribute … a controlled substance." 21 U.S.C. § 841(a)(1). The Controlled Substance Act defines "distribute" as "to deliver" and — similar to our Drug Act — further defines "deliver or delivery" to mean "the actual, constructive, or attempted transfer of a controlled substance … whether or not there

[19] 21 U.S.C. §§ 801-904.

exists an agency relationship." 21 U.S.C. § 802(8), (11) (some internal punctuation omitted).

The *Swiderski* Court considered "whether joint purchasers and possessors of a controlled substance, who intend to share it between themselves as users, may be found guilty of the felony of possession 'with intent to distribute' … as distinguished from simple possession … which is a misdemeanor." *Swiderski*, 548 F.2d at 447. In that case, the co-defendants were husband and wife who arranged to purchase cocaine for a later sale. Both co-defendants sampled the cocaine before the purchase and commented that while the quality "was not good enough for their personal use, … they had a buyer who would take it." *Id.* at 448. After they paid for the drugs and left the apartment where the transaction took place, they were stopped by Drug Enforcement Agents, who had them under surveillance. They were both charged with possession with intent to distribute controlled substances. Despite the fact that the agents recovered drugs and a large amount of cash from the co-defendants at the time of the stop, the co-defendants denied that they purchased the drugs with the intent to later sell them. Rather, they claimed they went to the apartment to get "high" and someone slipped the cocaine in the wife's purse when they left. *Id.* During their joint trial, the jury asked the court for the definition of intent to distribute, and, in particular, whether the co-defendants could distribute the drugs to each other, or whether there must be a third party involved. Over objection, the court instructed the jury "that distribution could be satisfied solely by a transfer between" the co-defendants. *Id.* at 449. The jury found both defendants guilty of possession with intent to distribute.

The Second Circuit reversed on appeal. Emphasizing that Congress prescribed more severe penalties for the commercial distribution of narcotics than for mere personal use, the Court opined:

> [W]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse simple joint possession, without any intent to distribute the drug further. **Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution**. For purposes of the Act they must therefore be treated as possessors for personal use rather than for further distribution. Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a "continuing criminal enterprise" or in drug distribution.

Swiderski, 548 F.2d at 450 (emphasis added). Thus, the Second Circuit concluded the term "transfer" in the Controlled Substances Act "was not intended to include the exchange of physical possession between two persons who jointly acquire and hold the drug for their own use." *Id.*

More recently, two judges on the Third Circuit agreed with this line of reasoning in *Semler*. *See Semler*, *supra*. In that case, Semler was charged with, *inter alia*, distribution of heroin resulting in death under the federal Controlled Substances Act. Semler and the decedent were both addicts who met in a rehabilitation center. One night, the decedent contacted Semler asking if they could "get some" heroin. *Semler*, 858 Fed. App'x at 534. Semler replied that "she knew of somewhere close," but the decedent would have to drive them. *Id.* The decedent asked Semler if she could advance the decedent "$10 worth of heroin and provide a syringe and water bottle for injection, and Semler agreed." *Id.* (footnoted omitted). Thereafter, the decedent picked up Semler and Semler's sister, and drove them to West Philadelphia, where they purchased the heroin. They then proceeded to a Kentucky Fried Chicken restaurant, where all three injected the drugs. When the decedent began to overdose, Semler and her sister left and did not tell anyone about the decedent's condition. An employee later found the decedent unresponsive in the bathroom.

During her trial, Semler requested the court instruct the jury, *inter alia*, that "individuals who jointly and simultaneously acquire possession of a controlled substance for their shared personal use can be guilty only of simple possession." *Semler*, 858 F. App'x at 535 (footnote omitted). The court denied her request, and Semler was found guilty of, *inter alia*, distribution of heroin resulting in death,[20] the federal equivalent of DDRD.

On appeal, Semler challenged the trial court's denial of her requested instruction. The majority first considered the language of the Controlled Substances Act, and in particular, the meaning of the term "distribute," which the Act defines as "to deliver." *Semler*, 858 F. App'x at 536. The majority then observed the Controlled Substances Act defines "deliver" as "the actual constructive, or attempted transfer of a controlled substance … whether or not there exists an agency relationship." *Id.* (footnote omitted). Accordingly, the majority stated the dispositive question was the meaning of the word "transfer" — the government argued that it constituted "any physical handoff of drugs from one person to another[,]" while Semler maintained there could be no transfer when "there has been a joint acquisition or purchase of a controlled substance by a group of users to share among themselves." *Id.*

The majority decided on the latter interpretation. It emphasized the Third Circuit's Model Jury Instructions which defines "[d]istribute" for purposes of drug offenses as "to deliver or to transfer … **possession or control of a controlled substance from one person to another**."[21] *Semler*, 858 Fed. App'x at 536 (footnote omitted and emphasis in

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[20] *See* 21 U.S.C. § 841(b)(1)(C).

[21] Pennsylvania's Suggested Standard Criminal Jury Instructions for the crime of PWID do not include this additional "possession or control" language. Rather, the Suggested Standard Instructions for PWID state: "The term 'deliver' includes the [actual] [constructive] [attempted] transfer from one person to another of a controlled substance. (continued…)

original). It also relied upon the "well-established" sharp distinction that Congress drew in the Controlled Substances Act between drug traffickers and drug users. *Id.* at 538. Accordingly, finding no such indication in the Act, the majority "decline[d] to find that every physical divvying up of a small quantity of jointly purchased and shared drugs must constitute a distribution." *Id.* at 539. Based on the facts of the case before it, the majority concluded that Semler was entitled to a joint acquisition and use jury instruction like the charge approved in *Swiderski*. *See Semler*, 858 Fed. App'x at 540-541. Accordingly, the majority vacated the conviction and remanded for a new trial.

Judge Porter authored a concurring and dissenting opinion, sharply criticizing the majority's reliance on unpersuasive policy considerations when the language of the statute — specifically, the word "transfer" — is plain and unambiguous. *See Semler*, 858 Fed. App'x at 544-546 (Porter, J., concurring in part and dissenting in part). Judge Porter highlighted the facial incongruity of the majority's argument — the majority admitted that "Congress intended 'distribute' to be construed broadly" but then employed a more narrow construction. *Id.* at 545. By reading the phrase "of possession or control" into the definition of delivery, the majority added language to the statute that Congress never supplied or intended. *Id.* at 548.

As for *Swiderski*, Judge Porter characterized that decision as an "extreme outlier" to which other courts have given "little weight." *Semler*, 858 Fed. App'x at 551. He asserted the *Swiderski* Court ignored the plain meaning of the statute and focused solely on Congress's intent in enacting the statute. *See id.* Judge Porter observed "no court in the fifty years since the enactment of the Controlled Substances Act has held that physically handing someone drugs is not distribution under the Act." *Id.* at 552 (footnote

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[A delivery may take place between two persons even though one of them is acting as agent for the other.]" Pa. SSJI (Crim), § 16.13(a)(30)B (2024).

omitted). Nevertheless, even if the *Swiderski* decision was persuasive, Judge Porter concluded it was distinguishable because Semler "actively steered the drug transaction from beginning to end, and [the decedent] was not an equal participant." *Id.* at 554.

More recently, in *Brown*, Superior Court President Judge Emeritus Bender authored a memorandum decision signaling his agreement with the Third Circuit's decision in *Semler*. *See Brown*, *supra*. In *Brown*, the defendant and decedent decided to "pool[ ] their money" to purchase heroin to use together. *Brown*, 297 A.3d at *1 (citation omitted). Brown contacted a high school friend who told her he could facilitate the transaction. The decedent drove Brown to Pittsburgh to meet up with Brown's friend. Once there, Brown left with her friend to purchase the drugs while the decedent waited for her in his car. After she returned, Brown and the decedent used the heroin together in the car, and later, at the decedent's home. The next morning, Brown discovered the decedent had overdosed. *See id.* at *1-*2.

Brown was charged with, *inter alia*, PWID and DDRD. However, the trial court granted her pretrial petition for a writ of *habeas corpus* and dismissed the charges related to her purported delivery of drugs to the decedent. The Commonwealth appealed, arguing the evidence was sufficient to prove Brown delivered drugs to the decedent, which later resulted in his death. Writing for the majority, P.J.E. Bender concluded the Commonwealth waived its sole issue on appeal because it failed to comply with the trial court's order to file a Pa.R.A.P. 1925(b) statement. *See Brown*, 297 A.3d at *2.

Nevertheless, despite the clear finding of waiver, P.J.E. Bender cited significant portions of the trial court's opinion and explained — in *dicta* — why he agreed with the trial court's decision. He concluded the facts demonstrated the decedent "jointly constructively possessed the drugs **before**" Brown gave him the drugs. *Brown*, 297 A.3d at *9 (emphasis in original). P.J.E. Bender expressed that he was "persuaded by *Semler*'s

rationale … that this joint acquisition and possession of the heroin precludes a finding that [Brown] delivered the drugs to" the decedent. *Id.* at *10 (noting Brown and the decedent "jointly and simultaneously acquired possession of a small amount of heroin for their shared, personal use, which unfortunately killed" the decedent).

However, in addition to being non-binding *dicta* in an unpublished decision, P.J.E. Bender's approval of *Semler* — and its joint acquisition and use defense — is the musing of a single judge. Judge Kunselman concurred in the result in *Brown*, and Judge Colins authored a concurring and dissenting statement. Judge Colins agreed with the majority's determination that the Commonwealth waived the only issue presented on appeal. *See Brown*, 297 A.3d at *10 (Colins, J., concurring and dissenting). However, he did "not agree with the majority's analysis on the merits of the Commonwealth's appeal." *Id.* Rather, Judge Colins opined there was no evidence the decedent had constructive possession of the heroin when it was purchased outside of his presence; instead, the Commonwealth presented a *prima facie* case that Brown "delivered the drugs" to the decedent when she "physically conveyed" them to him. *Id.*

While *Semler* and *Brown* applied *Swiderski*'s joint acquisition and use defense, few other courts have fully adopted that line of reasoning. Indeed, most courts that have considered the issue have distinguished *Swiderski* on its facts, observing that *Swiderski*'s holding was "**expressly limited** to the passing of a drug between joint possessors who **simultaneously acquired possession at the outset for their own use**." *United States v. Wallace*, 532 F.3d 126, 130 (2d Cir. 2008) (internal quotation marks omitted; emphases added) (*citing Swiderski*, 548 F.2d at 450-451). *See United States v. Taylor*, 638 F.2d 18, 21 (1st Cir. 1982) (concluding *Swiderski* did not apply due to the "complex nature" of the defendant's marijuana operation); *United States v. Washington*, 41 F.3d 917, 920 & n.2 (4th Cir. 1994) (declining to determine whether *Swiderski* "is good law in this Circuit"

when facts established that although the defendant and his friends were "clearly engaged in a joint venture[,]" the defendant collected money from his friends and went himself to purchase cocaine, which he intended to distribute to them); *United States v. Speer*, 30 F.3d 605, 609 (5th Cir. 1994) (declining to "pass on the validity of the *Swiderski* doctrine" when the facts established the defendants intended to distribute some of the cocaine to another co-user who was "not at or near the scene" of the drug buy); *United States v. Clark*, 634 F.3d 874, 877 (6th Cir. 2011) (explaining that "even if [the Court] were to accept *Swiderski*," the facts established that the defendant gave the drugs he stole to others, in addition to his accomplices); *United States v. Pearson*, 391 F.3d 1072, 1075-1076 (9th Cir. 2004) (explaining that "[u]nder the law of this circuit, the sharing of drugs constitutes a distribution[;]" the *Swiderski* doctrine is applicable only when the "defendant acted as a link because both [he and his co-user] had acquired possession of the controlled substance **jointly and simultaneously** from the drug supplier") (emphasis added).

Courts that have embraced the *Swiderski* doctrine focus on the fact that the defendant and his co-user "were participants in the **same transaction**." *Weldon v. United States*, 840 F.3d 865, 867 (7th Cir. 2016) (emphasis added) (defense counsel may have rendered ineffective assistance when he induced the defendant to plead guilty by insisting the defendant had no defense to distribution charge; the defendant and two others pooled their money together to purchase drugs from defendant's dealer and one died after using the narcotics). The California Supreme Court adopted a *Swiderski*-like defense to a charge of furnishing heroin in *People v. Edwards*, 702 P.2d 555 (Ca. 1985). The Court held that a person cannot be guilty of supplying heroin to another when the individuals were "**equal partners** in the purchase and the purchase [was] made strictly for each individual's personal use." *Id.* at 114 (footnote and internal quotation marks omitted; emphasis added). Nevertheless, the California Supreme Court acknowledged that cases

involving co-purchases by "truly equal partners" are rare. *Id.* at 114 n.5. The Court explained: "Where one of the co[-]purchasers takes a more active role in instigating, financing, arranging or carrying-out the drug transaction, the 'partnership' is not an equal one and the more active 'partner' may be guilty of furnishing to the less active one." *Id.*

D. Joint Acquisition and Use as a Defense to DDRD and PWID

Bearing in mind the broad definition of "delivery" in the Drug Act, we conclude the General Assembly did not intend for the joint acquisition of narcotics for personal use between two individuals to constitute a defense to PWID or — when one of those individuals overdoses — DDRD. The one caveat to our holding is set forth clearly in the Drug Act — the distribution of a small amount of marijuana not for sale. *See* 35 P.S. § 780-113(a)(31)(iii).

As explained above, the Drug Act defines the "delivery" of controlled substances as "the actual, constructive, or attempted transfer from one person to another … whether or not there is an agency relationship." 35 P.S. § 780-102. The "actual" transfer of narcotics is easy to recognize — one person physically hands drugs to another. Importantly, however, this constitutes factual possession, not constructive possession.

A constructive transfer encompasses several scenarios. Drug dealers constructively transfer narcotics to a buyer if they direct an underling to conduct the sale, although the dealer never handles the drugs or the money. However, an individual also may constructively deliver drugs to another when they intentionally facilitate the sale — in other words, as the *Swiderski* Court stated, they serve "as a link in the chain of distribution." *Swiderski*, 548 F.2d at 450. This "link" may be providing the funds for the drugs, or the transportation to the dealer. Without these actions, the transaction cannot

occur. Thus, the General Assembly's broadly-worded definition of delivery does not require the Commonwealth to disprove joint acquisition and use.[22]

More importantly, however, the General Assembly explicitly provided a lesser penalty for the distribution of a small amount of marijuana, not for sale in Subsection (a)(31). *See* 35 P.S. § 780-113(a)(31). The delivery of a Schedule I controlled substance[23] — marijuana, heroin or fentanyl — is graded as a felony and carries a maximum sentence of 5, 10 or 15 years' imprisonment and a maximum fine of $15,000, $100,000, or $250,000, depending upon the type and weight of the controlled substance at issue.[24] *See* 35 P.S. §§ 780-113(f)(1), (1.1), (2). However, Section 780-113(a)(31) of the Drug Act designates a separate offense for "(i) the possession of a small amount of marihuana only for personal use; (ii) the possession of a small amount of marihuana with the intent to distribute it but not to sell it; **or (iii) the distribution of a small amount of marihuana but not for sale.**" 35 P.S. § 780-113(a)(31) (emphasis added). The Act defines a "small amount" of marijuana as 30 grams or less. *Id.* Unlike Subsection (a)(30), a violation of Subsection (a)(31) is graded as a misdemeanor and carries a maximum

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[22] Neither Cassell nor Scott assert joint acquisition and use is an **affirmative defense** for which the defendant would bear the burden of proof.

[23] The Drug Act defines a Schedule I controlled substance as one that has "a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision." 35 P.S. § 780-104(1). The Act designates heroin, fentanyl, and marijuana as Schedule I controlled substances. 35 P.S. § 780-104(1)(ii)(10), (23), and (iv). Despite the enactment of Pennsylvania's Medical Marijuana Act, which "legalized marijuana for medical purposes under Pennsylvania law, … marijuana otherwise remains illegal" and is still denoted as a Schedule I narcotic under the Drug Act. *Green Analytics N., LLC v. Pa. Dep't of Health*, 343 A.3d 1086, 1089 (Pa. 2025). *See* 35 P.S. §§ 10231.101-10231.2110.

[24] Notwithstanding the sentencing provision in the Drug Act, Section 7508 of the Crimes Code provides mandatory minimum sentences for drug delivery convictions. *See* 18 Pa.C.S. § 7508. However, in *Commonwealth v. DiMatteo*, 177 A.3d 182 (Pa. 2018), we declared Section 7508 unconstitutional "in light of *Alleyne*[*v. United States*, 570 U.S. 99 (2013)] and its Pennsylvania progeny." *DiMatteo*, 177 A.3d at 191.

sentence of 30 days' imprisonment and a maximum fine of $500. *See* 35 P.S. § 780-113(a)(31), (g).

The General Assembly's inclusion of Subsection (a)(31) in the Drug Act clearly conveys its intention to reduce the liability of individuals who share (or co-use) a **small amount of marijuana** with others. The fact the General Assembly limited this exception to possession of a small amount of marijuana speaks volumes. It could have crafted a lesser penalty for those who **share (or co-use)** other controlled substances, such as heroin or fentanyl, but it did not. Thus, considering the General Assembly's broad definition of delivery — both actual and constructive — as well as its reduced criminality for the sharing of a small amount of marijuana, we conclude the General Assembly did not intend for this Court to extend our judicially-created doctrine of constructive possession as a defense to the delivery element of PWID and, by extension, DDRD.[25] Moreover, the Commonwealth is not required to disprove joint acquisition and use, nor is a defendant entitled to a jury instruction on joint acquisition and use as a potential defense.

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[25] In her Concurring Opinion, Justice Donohue criticizes our reference to Section 113(a)(31)(iii) as an "exception" to the broad definition of delivery in the Drug Act. *See* Concurring Opinion at 2. She aptly highlights that the Section 113(a)(31)(iii) prohibits the "'distribution' of a small amount of marijuana but not for sale[,]" and that the Act defines "distribute" as "to deliver[.]" *Id.* at 3 (citations omitted). Therefore, the definition of "delivery"— whether pursuant to Section 113(a)(31)(iii) or Section 113(a)(30) — remains the same.

We agree. Our discussion of Section 113(a)(31)(iii) is included solely to highlight the fact that if the legislature intended to craft a defense, or lesser penalty, for the "delivery" of drugs between co-users, it would have done so explicitly. Indeed, while the Drug Act does not provide a defense to co-users of a small amount of marijuana, it does significantly reduce the penalty for those guilty of that offense. This supports our broad reading of "delivery" throughout the statute.

E. Application to Appellants

Because joint acquisition and use is not a defense to the delivery element of PWID and DDRD, we agree the trial courts properly rejected Appellants' requests for a *Semler* jury instruction. Furthermore, pursuant to the plain language of the provisions at issue, we conclude the evidence presented in both cases supports Appellants' convictions of DDRD and PWID.

With regard to Cassell, the evidence established that he constructively, if not actually, delivered the fentanyl to Smith, which resulted in her death. Smith had no money, cell phone, or transportation. Cassell not only paid for her Uber ride to meet him in York, he also coordinated and paid for the drugs that resulted in her overdose. He bought the drugs from his dealer and "let [Smith] take as much as she want[ed]." Cassell Police Interview at 14. Thus, Cassell provided the funds and transportation to acquire the drugs that Smith used — the same drugs that later caused her death. While Cassell argues the Commonwealth failed to prove to whom Chase physically handed the drugs[26] — implying that if it were Smith, Cassell could not have **delivered** the drugs to her — that fact is not controlling. As explained above, the delivery of drugs may be accomplished by the actual **or constructive transfer** from one person to another. Here, Smith could not have obtained the fentanyl at issue without Cassell. While Cassell maintains he jointly

[26] Relying on the fact that Chase did not testify at his trial, Cassell argues the Commonwealth failed "to present evidence of how the transaction occurred at Chase['s] residence[.]" Cassell's Brief at 31. In Cassell's view, therefore, there was no evidence that he actually **delivered or handed** the drugs to Smith — and particularly, no evidence he had "'sole control' of the drugs[.]" *Id.* at 32 (citation omitted). However, the facts presented at trial established that: (1) Smith had no money, no transportation, and no cell phone; (2) Cassell paid for Smith's Uber ride to York; (3) Cassell repeatedly contacted drug dealers to purchase drugs for both Smith and himself; and (4) Cassell texted Chase that he had $40 for drugs and was on his way to Chase's house. At the very least, Cassell — through his actions — facilitated the delivery of drugs to Smith. Moreover, he admitted he controlled the drugs when he told police that he "let [Smith] take as much as she want[ed]." Cassell Police Interview at 14.

purchased the drugs with Smith for their own personal use, he clearly took "a more active role in instigating, financing, arranging [and] carrying-out the drug transaction[.]" *Edwards*, 702 P.2d at 114 n.5. Accordingly, even absent evidence of a physical transfer, Cassell constructively transferred the drugs to Smith. Because we agree the Commonwealth established Cassell delivered drugs to Smith, which resulted in her death, we conclude the evidence was sufficient to support Cassell's convictions of PWID and DDRD.

The evidence against Scott is even more compelling. Scott's claim that he, Wandell, and Savage jointly acquired the drugs that resulted in Savage's death is misleading. Wandell and Savage agreed to jointly purchase drugs for their own personal use. In that relationship, both took an active role — Savage provided funds and transportation, while Wandell provided prescription medications to trade and her drug dealer contact. Scott was not part of this original plan. Rather, he acted as an intermediary between Wandell and Savage and his drug dealer — Scott obtained the drugs from his dealer and physically transferred them to Wandell, who was acting as Savage's agent. *See* N.T., 3/27-30/2023, at 132, 201. We agree with the Superior Court's determination that even assuming Wandell and Savage had "a mutual plan to obtain and use drugs together[,] the facts did not establish that such a plan existed between **Savage and Scott**." *Scott*, 325 A.3d at 852 (citation omitted; emphasis added). Thus, the evidence was sufficient to prove Scott (constructively) delivered the drugs to Savage, which resulted in his death.

V. CONCLUSION

We cannot ignore the fact that Appellants' proposed defense makes sense — some believe drug dealers should be punished more harshly than drug users.

Nevertheless, this type of policy determination is for the General Assembly, not the courts. The General Assembly's broad definition of "delivery" in the Drug Act contemplates the crime of PWID is accomplished when one individual physically or constructively transfers drugs to another, without regard to whether those drugs are acquired jointly for the individuals' personal use, with the exception of a small amount of marijuana. That is where our legislature drew the proverbial line. While the doctrine of constructive possession of narcotics may be used by the Commonwealth to establish that a defendant has "the ability to exercise a conscious dominion over" a controlled substance recovered in an area of shared access,[27] it is evident our General Assembly did not intend this judicially-created doctrine to operate as a defense to the element of delivery, when two individuals jointly acquire drugs for their own personal use. Accordingly, we affirm the judgments of sentence in both appeals.

Justices Donohue, Dougherty, Mundy and Brobson join the opinion.

Justice Wecht files a concurring opinion in which Chief Justice Todd joins.

[27] *Macolino*, 469 A.2d at 134.