

Department of Legislative Services  
Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 687  
Judiciary

(The Speaker, *et al.*) (By Request - Administration)

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**Criminal Law - Distribution of Opioids Resulting in Death**

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This emergency Administration bill creates a crime for the direct or indirect distribution of an “opioid” or an “opioid analogue,” the use of which causes the death of another. A violation is a felony with a maximum penalty of 30 years imprisonment. A sentence imposed under the bill must be separate from and consecutive to a sentence for any crime based on the act establishing the violation. It is a defense that the defendant was an active user of an opioid or opioid analogue at the time of the distribution causing the death of the decedent. The bill also establishes complete immunity from prosecution for a person if evidence for prosecution of the crime is solely obtained as a result of the person’s seeking, assisting, or providing medical assistance.

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**Fiscal Summary**

**State Effect:** Potential significant increase in general fund expenditures beginning in FY 2017 due to the bill’s penalty provisions. Impact may occur in the near term and may be delayed to future years depending on how sentences are imposed. Enforcement can be handled with existing resources. No effect on revenues.

**Local Effect:** Enforcement can be handled with existing resources. No effect on revenues.

**Small Business Effect:** The Administration has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment.

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**Analysis**

**Bill Summary:** Under the bill, the sharing of an opioid or opioid analogue without remuneration or the exchange of goods or services is not considered “distribution.”

“Opioid” means specified controlled dangerous substances (CDS) listed in Schedule I or II under State law.

“Opioid analogue” means a substance that (1) has a chemical structure similar to an opioid and (2) has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect of an opioid on the central nervous system. The definition does not include (1) a CDS; (2) a substance for which there is an approved new drug application; or (3) a substance approved for investigational use under the federal Food, Drug, and Cosmetic Act.

**Current Law:** While the possession, distribution, and manufacturing of opioids may be subject to criminal prosecution, as specified, causing the death of another by distribution of opioids or opioid analogues is not a specific crime under State law.

CDS are listed on one of five schedules (Schedules I through V) set forth in statute depending on their potential for abuse and acceptance for medical use. Under the federal Controlled Substances Act, for a drug or substance to be classified as Schedule I, the following findings must be made: (1) the substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in the United States; and (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision.

Heroin is an opium derivative and is listed as a Schedule I CDS. Schedule II opioids include codeine, oxycodone, and fentanyl.

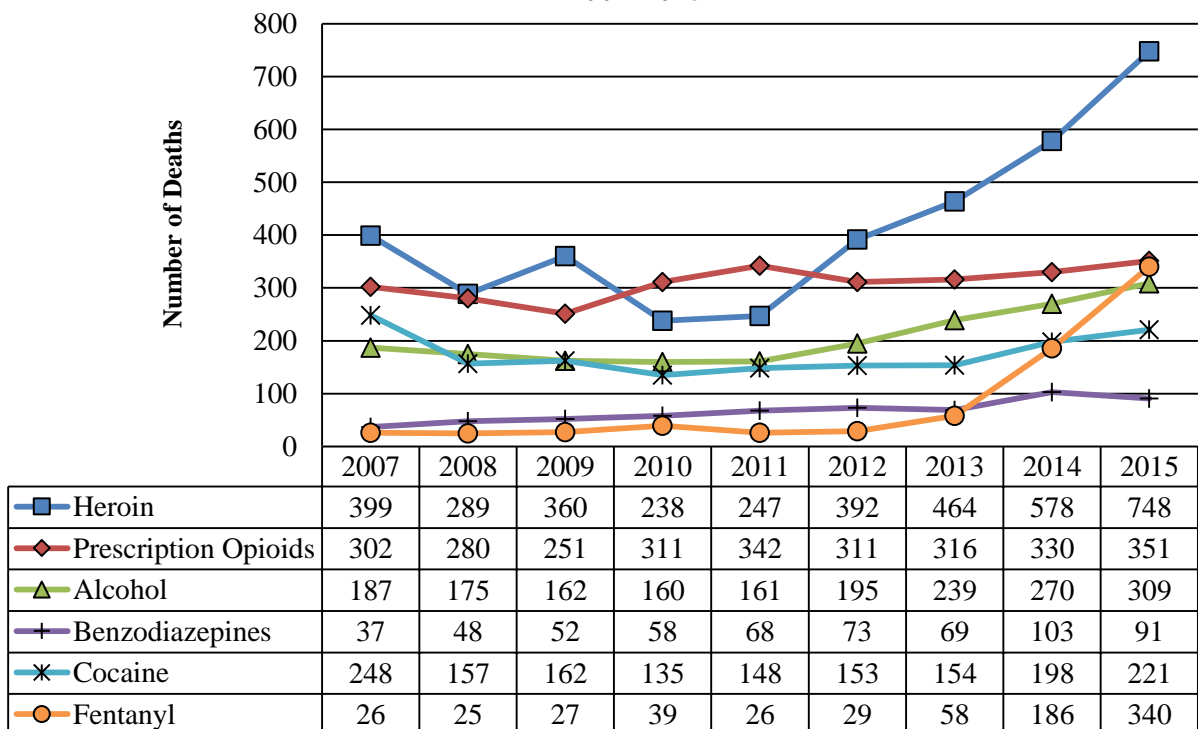
For information on crimes involving the *distribution* of CDS, please refer to the **Appendix – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses**.

Chapter 401 of 2014, the “Good Samaritan Law,” established that a person who, in good faith, seeks, provides, or assists with the provision of medical assistance for a person experiencing a medical emergency after ingesting or using alcohol or drugs is immune from criminal prosecution for specified violations if the evidence for the criminal prosecution was obtained solely as a result of the person’s seeking, providing, or assisting with the provision of medical assistance. Additionally, a person who experiences a medical emergency after ingesting or using alcohol or drugs is immune from criminal prosecution for certain violations if the evidence for the criminal prosecution was obtained solely as a result of another person’s seeking medical assistance. The law also establishes that the act of seeking, providing, or assisting with the provision of medical assistance for another

person may be used as a mitigating factor in a criminal prosecution. The violations covered by Chapter 401 include possession, but not distribution, of a CDS.

**Background:** According to a 2016 report of the Department of Health and Mental Hygiene (DHMH), *Drug and Alcohol-Related Intoxication Deaths in Maryland*, drug- and alcohol-related intoxication deaths in Maryland increased for the fifth year in a row, totaling 1,259 deaths in 2015 – a 21% increase since 2014 and an all-time high. Of all intoxication deaths, 1,089 deaths (86%) were opioid-related, including deaths related to heroin, prescription opioids, and nonpharmaceutical fentanyl. Opioid-related deaths increased by 23% between 2014 and 2015 and have more than doubled since 2010. Heroin- and fentanyl-related deaths have risen particularly sharply. The number of heroin-related deaths increased by 29% between 2014 and 2015 and has more than tripled between 2010 and 2015. The number of fentanyl-related deaths increased by 83% between 2014 and 2015 and has increased nearly twelvefold since 2012. **Exhibit 1** shows trends in drug- and alcohol-related intoxication deaths in Maryland from 2007 through 2015.

**Exhibit 1**  
**Total Number of Drug- and Alcohol-related Intoxication Deaths**  
**By Selected Substances in Maryland**  
**2007-2015**



Source: Department of Health and Mental Hygiene

Preliminary data from DHMH indicates that the number of intoxication deaths increased at an even steeper rate in 2016, with 1,468 deaths from January through September 2016 compared to 904 deaths during the same period in 2015 (a 62% increase). Additionally, for January through September 2016, the number of heroin-related deaths increased 72% and the number of fentanyl-related deaths increased nearly fourfold compared to the same period in 2015.

**State Expenditures:** This analysis assumes that relevant provisions of Chapter 515 of 2016 (also known as the Justice Reinvestment Act) take effect October 1, 2017. Chapter 515 reduces the maximum incarceration penalties for specified underlying crimes that establish a violation under the bill.

General fund expenditures may increase significantly beginning in fiscal 2017, due to the emergency designation of the bill, as a result of the bill's incarceration penalty due to a potentially significant additional number of people being committed to State correctional facilities. General fund expenditures also increase, potentially significantly, beyond the five years addressed in this analysis, due to a potentially significant number of people being committed to State correctional facilities for longer periods of time. The increase in expenditures is dependent on the sentence imposed for the underlying crime that establishes the violation under the bill. The bill requires that the sentence imposed for the crime created by the bill be separate from and consecutive to the sentence for the underlying crime. Sentences that could be imposed for an underlying drug-related crime range from 2 to 40 years imprisonment (under current law) or from 5 to 40 years imprisonment (under Chapter 515).

Also, others who are not sentenced for an underlying crime, including those who distribute an opioid analogue that is not already explicitly prohibited under existing law and that results in a person's death, could be prosecuted for violating the provisions of the new crime created by the bill and receive a sentence. As a result, the bill may have an immediate fiscal impact and a delayed fiscal impact, depending on when the separate and consecutive sentence required by the bill is imposed.

This analysis is based on the following information and assumptions:

- In 2015, DHMH advises that there were 1,089 opioid-related deaths.
- In 2016, between January and September, there were 918 heroin-related deaths, 738 fentanyl-related deaths, and 154 prescription opioid-related deaths that were not in combination with heroin and/or fentanyl.
- Opioid-related deaths increased by 23% between 2014 and 2015.

- Presumably, for most, if not all of these deaths, there is a person guilty of distributing opioids and he or she could be sentenced under the bill's penalty provisions.
- Given the significant increase in the number of opioid-related deaths, and the fact that the bill establishes a new crime for which there is no close comparison in terms of impact, it is not possible to accurately estimate the number of convictions nor the length of time served under the bill's penalty provisions. Additionally, the bill establishes an affirmative defense for a defendant who actively used opioids or opioid analogues at the time of the distribution and further establishes that the sharing of an opioid or opioid analogue without remuneration or the exchange of goods or services is not "distribution" for purposes of the bill's proposed crime, which may limit the number of individuals convicted under the bill. However, due to the high number of opioid-related deaths in Maryland in 2015 and from January through September of 2016, a potentially significant number of individuals may still be subject to the bill's penalty provision, thus increasing general fund incarceration expenditures by a potentially significant amount.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,600 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new State inmate (including variable health care costs) is about \$800 per month. Excluding all health care, the average variable costs total \$210 per month.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** SB 539 (The President, *et al.*) (By Request - Administration) - Judicial Proceedings.

**Information Source(s):** Baltimore City; Kent, Montgomery, and Worcester counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of State Police; Department of Legislative Services

**Fiscal Note History:** First Reader - February 26, 2017  
md/kdm

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## **Appendix – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses**

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Under Title 5, Subtitle 6 of the Criminal Law Article, a person may not:

- distribute, dispense, or possess with the intent to distribute a controlled dangerous substance (CDS);
- manufacture a CDS or manufacture, distribute, or possess a machine, equipment, or device that is adapted to produce a CDS with the intent to use it to produce, sell, or dispense a CDS;
- create, distribute, or possess with the intent to distribute a counterfeit substance;
- manufacture, distribute, or possess equipment designed to render a counterfeit substance;
- keep a common nuisance (any place resorted to for the purpose of illegally administering CDS or where such substances or controlled paraphernalia are illegally manufactured, distributed, dispensed, stored, or concealed); or
- pass, issue, make, or possess a false, counterfeit, or altered prescription for a CDS with the intent to distribute the CDS.

**Exhibit 1** shows the applicable sentences for these crimes under current law, and under Chapter 515 of 2016 (also known as the “Justice Reinvestment Act”), which repealed mandatory minimum penalties applicable to a repeat drug offender (or conspirator) convicted of distribution of CDS and related offenses and established new maximum penalties. The changes take effect October 1, 2017.

**Exhibit 1**  
**Penalties for Distribution of Controlled Dangerous Substances and Related Offenses**

Offense	Current Penalty <sup>1</sup>	New Penalty <sup>2</sup>
<b>CDS (Other than Schedule I or II Narcotic Drugs and Other Specified CDS)</b>		
First-time Offender	Maximum penalty of 5 years imprisonment and/or \$15,000 fine	Maximum penalty of 5 years imprisonment and/or \$15,000 fine
Repeat Offender	2-year mandatory minimum sentence. Maximum penalty of 5 years imprisonment and/or \$15,000 fine	Maximum penalty of 5 years imprisonment and/or \$15,000 fine
<b>CDS (Schedule I or II Narcotic Drug &amp; Specified Drugs)</b>		
First-time Offender	Maximum penalty of 20 years imprisonment and/or \$25,000 fine	Maximum penalty of 20 years imprisonment and/or \$15,000 fine
Second-time Offender	10-year mandatory minimum sentence (20 years maximum imprisonment) and a fine of up to \$100,000	Maximum penalty of 20 years imprisonment and/or \$15,000 fine
Third-time Offender	25-year mandatory minimum sentence and a fine of up to \$100,000	Maximum penalty of 25 years imprisonment and/or a \$25,000 fine (parole eligibility at 50% of sentence)
Fourth-time Offender	40-year mandatory minimum sentence and a fine of up to \$100,000	Maximum penalty of 40 years imprisonment and/or a \$25,000 fine (parole eligibility at 50% of sentence)

CDS: controlled dangerous substance

<sup>1</sup>Repeat offenders are subject to twice the term of imprisonment and/or fines that are otherwise authorized. All mandatory minimum sentences listed in the exhibit are nonsuspendable and nonparolable. Pursuant to Chapter 490 of 2015, a court may depart from the listed mandatory minimum sentences under specified circumstances.

<sup>2</sup>Under Chapter 515 of 2016, effective October 1, 2017, the authorization to double penalties for repeat offenders is made applicable only when the person has also been previously convicted of a crime of violence. Additionally, a person serving a term of confinement that includes a mandatory minimum sentence, imposed on or before September 30, 2017, for specified crimes generally involving the manufacture, sale, and distribution of CDS may apply to the court for a modification or reduction of the mandatory minimum sentence, regardless of whether the defendant filed a timely motion for reconsideration or if a motion for reconsideration was denied by the court (the court is authorized to depart from the specified mandatory minimum sentences).

Source: Department of Legislative Services



**ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES**

**TITLE OF BILL: Criminal Law - Distribution of Opioids Resulting in Death**

**BILL NUMBER: SB539/HB687**

**PREPARED BY: GLO**  
**(Dept./Agency/GLO)**

**PART A. ECONOMIC IMPACT RATING**

This agency estimates that the proposed bill:

  X   WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND  
SMALL BUSINESSES

**OR**

       WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND  
SMALL BUSINESSES

**PART B. ECONOMIC IMPACT ANALYSIS**