

Department of Legislative Services  
Maryland General Assembly  
2019 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 570 (Senator Bailey, *et al.*)  
Judicial Proceedings

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Distribution of Fentanyl Resulting in Death

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This bill establishes a crime for the distribution of fentanyl, any structural variation of fentanyl, or any analogue of fentanyl, the use of which is a contributing cause to the death of another. A violation constitutes felony second-degree murder, with a maximum penalty of 40 years imprisonment. The bill also establishes immunity from criminal prosecution for an individual who lawfully prescribes or administers fentanyl to an individual.

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Fiscal Summary

**State Effect:** Minimal increase in general fund incarceration expenditures due to the bill's penalty provision. No effect on revenues.

**Local Effect:** None.

**Small Business Effect:** None.

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Analysis

**Current Law:**

*Murder in the Second Degree*

Second-degree murder is murder that is not first-degree murder. First-degree murder is (1) a deliberate, premeditated, and willful killing; (2) committed by lying in wait; (3) committed by poison; or (4) committed in the perpetration of or an attempt to perpetrate other specified crimes. A person who commits second-degree murder is guilty of a felony and on conviction is subject to imprisonment not exceeding 40 years.

## *Crimes of Violence*

A conviction for murder, among other specified crimes, is considered a crime of violence under the Criminal Law Article, which subjects a person to more stringent penalties for second, third, and fourth convictions for crimes of violence.

The Public Safety Article also designates second-degree murder, among other specified crimes, as a crime of violence. Therefore, a person who has been convicted of second-degree murder is prohibited from possessing a regulated firearm, a rifle, a shotgun, or ammunition.

## *Distribution of a Controlled Dangerous Substance and Possession with Intent to Distribute a Controlled Dangerous Substance*

Unless the substance is listed in another schedule or specifically exempted, opium and opiate, and a salt, compound, derivative, or preparation of opium or opiate is a substance listed as a Schedule II controlled dangerous substance (CDS). Additionally, other specified opiates are listed in Schedule II, including fentanyl.

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 II, the following findings must be made: (1) the drug or other substance has a high potential for abuse; (2) the drug or other substance has a currently accepted medical use in treatment in the United States, or a currently accepted medical use with severe restrictions; and (3) abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

For information on crimes involving the distribution of CDS, please refer to **Appendix 1 – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses.**

**Background:** For information on the State’s opioid crisis, please refer to **Appendix 2 – Opioid Crisis.**

**State Expenditures:** General fund expenditures increase minimally as a result of the bill’s incarceration penalty due to more people being committed to State correctional facilities for longer periods of time.

Maximum incarceration penalties for distribution of CDS range from 5 to 40 years (as shown in Appendix 1). Additionally, Chapter 569 of 2017 prohibits a person from knowingly distributing or possessing with the intent to distribute (1) a mixture of CDS that

contains heroin and a detectable amount of fentanyl or any analogue of fentanyl or (2) fentanyl or any analogue of fentanyl. In addition to any other penalty imposed, a person is subject to imprisonment for up to 10 years. A sentence imposed for a violation of this prohibition must be served consecutively to any other sentence imposed. The Maryland State Commission on Criminal Sentencing Policy advises that it has received information for one individual convicted for this offense in the circuit courts in fiscal 2018. The Judiciary advises that, in fiscal 2018, there were 118 violations for this offense in District Court, with no convictions, and 283 violations in the circuit courts, with three convictions.

This analysis assumes that there is some overlap between the number of individuals subject to penalties under Chapter 569 of 2017 and under the bill, and that a minimal number of individuals are not sentenced for an underlying crime and are instead only sentenced for violating the provisions of the bill. Thus, general fund expenditures increase minimally beginning in fiscal 2020; expenditures further increase beyond the five years addressed in this analysis due to more people being committed to State correctional facilities for longer periods of time.

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 \$3,800 per month. Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

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## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Montgomery and Prince George's counties; Maryland Association of Counties; cities of Bowie and Takoma Park; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of Human Services; Office of the Governor; President's Commission on Combating Drug Addiction and the Opioid Crisis; U.S. Code; Department of Legislative Services

**Fiscal Note History:** First Reader - February 21, 2019  
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## Appendix 1– 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.

Chapter 515 of 2016 (also known as the “Justice Reinvestment Act”) 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 took effect October 1, 2017.

## Appendix 2– Opioid Crisis

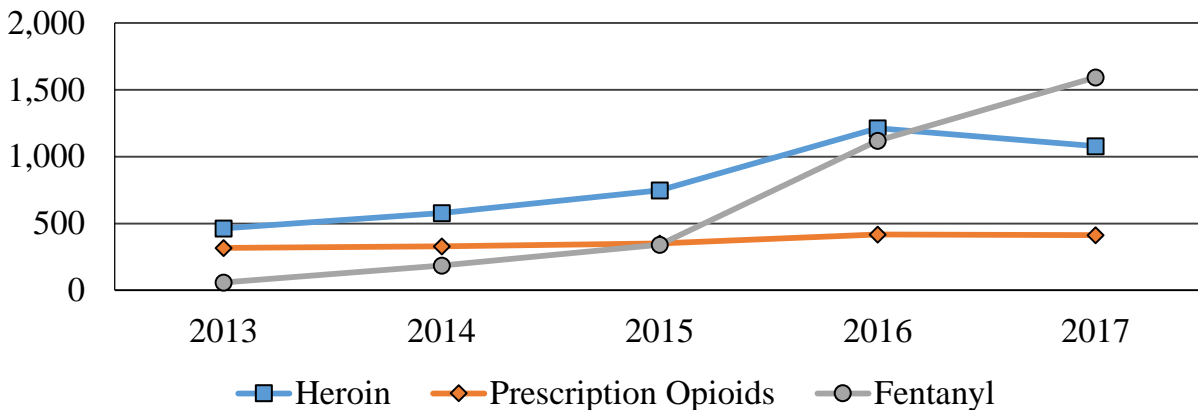
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### *Opioid Overdose Deaths*

While heroin and prescription opioid deaths have begun to taper off, fentanyl deaths have continued to rise at a high rate. As seen in **Exhibit 1**, between 2016 and 2017, prescription opioid-related deaths in Maryland decreased negligibly by 1% (from 418 to 413) while heroin-related deaths decreased by 11% (from 1,212 to 1,078). However, fentanyl-related deaths increased by 42% (from 1,119 to 1,594). Between January and June 2018, there were 1,038 deaths related to fentanyl, a 30% increase over the same time period for 2017.

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**Exhibit 1**  
**Total Number of Drug-related Intoxication Deaths**  
**By Selected Substances in Maryland**  
**2013-2017**



Source: Maryland Department of Health

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### *Federal Actions to Address the Opioid Crisis*

In 2016, the Comprehensive Addiction and Recovery Act authorized over \$181 million annually, and the 21st Century Cures Act (CURES Act) authorized up to \$970 million to be distributed through the State Targeted Response to the Opioid Crisis Grants. The grants are to be used by states to increase access to treatment and reduce unmet treatment needs and opioid-related overdose deaths. In 2017, Maryland received a two-year, \$20 million grant for the prevention and treatment of opioid abuse. In March 2017, President Donald J. Trump signed an executive order establishing the President’s Commission on Combating Drug Addiction and the Opioid Crisis. The commission issued

a final report in November 2017, with 56 recommendations, including a recommendation for federal block grant funding for state activities relating to opioids and substance use disorders.

In 2018, the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act was passed. The legislation expands existing programs and creates new programs to prevent substance use disorders and overdoses, including reauthorization of the Office of National Drug Control Policy, new Centers for Disease Control and Prevention grants for states and localities to improve prescription drug monitoring programs, and funding to encourage research into nonaddictive painkillers. Additionally, the legislation partially lifts the restriction that blocks states from spending federal Medicaid dollars on residential addiction treatment centers by allowing payments for residential services for up to 30 days while also allowing Medicare to cover medication-assisted treatment (MAT) in certain settings for the treatment of substance use disorder.

### *Maryland Actions to Address the Opioid Crisis*

The General Assembly passed several comprehensive acts during the 2017 session to address the State's opioid crisis, which addressed prevention, treatment, overdose response, and prescribing guidelines.

Chapters 571 and 572 of 2017, the Heroin and Opioid Prevention Effort and Treatment Act, among other things, require (1) the Behavioral Health Administration to establish crisis treatment centers that provide individuals in a substance use disorder crisis with access to clinical staff; (2) the Maryland Department of Health (MDH) to establish and operate a toll-free health crisis hotline; (3) certain health care facilities and systems to make available to patients the services of health care providers who are trained and authorized under federal law to prescribe opioid addiction treatment medications, including buprenorphine; (4) each hospital to have a protocol for discharging a patient who was treated for an overdose or identified as having a substance use disorder; (5) the Governor's proposed budget for fiscal 2019 through 2021 to include specified rate adjustments for community behavioral health providers; (6) the Department of Public Safety and Correctional Services and MDH to develop a plan to increase the provision of substance use disorder treatment, including MAT, in prisons and jails; (7) authorization of the provision of naloxone through a standing order and guidelines to co-prescribe naloxone to high-risk individuals; and (8) the expansion of private insurance coverage for opioid use disorders by prohibiting certain carriers from requiring preauthorization for a prescription drug used for treatment of an opioid use disorder that contains methadone, buprenorphine, or naltrexone.

Chapters 573 and 574 of 2017, the Heroin and Opioid Education and Community Action Act (Start Talking Maryland Act), require (1) the State Board of Education to expand an existing program in public schools to encompass drug addiction and prevention education that includes instruction related to heroin and opioid addiction and prevention and information relating to the lethal effect of fentanyl; (2) each local board of education to establish a policy requiring each public school to obtain and store naloxone and other overdose-reversing medication to be used in an emergency situation; (3) each local board of education or local health department to hire a sufficient number of community action officials or develop and implement a program that provides community relations and education functions that coordinate forums and conduct public relations efforts; and (4) specified institutions of higher education in Maryland to establish a policy that addresses heroin and opioid addiction and prevention, including awareness training for incoming students, obtaining and storing naloxone, and campus police training.

Chapter 570 of 2017 requires a health care provider, on treatment for pain and based on the provider's clinical judgment, to prescribe the lowest effective dose of an opioid and a quantity that is no greater than that needed for the expected duration of pain severe enough to require an opioid that is a controlled dangerous substance (CDS). The quantity limitations do not apply to opioids prescribed to treat a substance-related disorder; pain associated with a cancer diagnosis; pain experienced while the patient is receiving end-of-life, hospice, or palliative care services; or chronic pain.

In January 2017, Governor Lawrence J. Hogan issued an executive order establishing an Opioid Operational Command Center (OOCC) to facilitate collaboration between State and local public health, human services, education, and public safety entities to combat the heroin and opioid crisis. OOCC will (1) develop operational strategies to continue implementing the recommendations of the Governor's Heroin and Opioid Emergency Task Force; (2) collect, analyze, and facilitate data sharing relevant to the heroin and opioid epidemic; (3) develop a memorandum of understanding among State and local agencies regarding sharing and collection of health and public safety information and data relating to the epidemic; (4) assist and support local agencies in the creation of opioid intervention teams; and (5) coordinate the training of and provide resources for State and local agencies addressing the threat to the public health, security, and economic well-being of the State.

In March 2017, Maryland became the first state to declare a state of emergency for the opioid crisis, activating the Governor's emergency management authority and enabling increased and more rapid coordination between the State and local jurisdictions. In conjunction with the declaration, Governor Hogan included a supplemental budget appropriation of \$10 million, part of a \$50 million, five-year commitment.

In July 2017, \$22 million was appropriated for fiscal 2018, including \$10 million in CURES Act funding, to be used for prevention, treatment, and enforcement activities. Prevention efforts include distribution of opioid intervention teams for each jurisdiction, a



public awareness campaign, funding to train community teams on overdose response and linking to treatment, a pilot program to create school-based teams for early identification of the problems related to substance use disorders, and distribution of opioid information to health care facilities and providers that offer treatment. Enforcement initiatives include funding to disrupt drug trafficking organizations for the heroin coordinator program and to increase MDH's regulatory oversight of CDS. Treatment funding will be used to expand treatment beds and implement a tracking system to identify available beds; improve access to naloxone; establish a 24-hour crisis center in Baltimore City; expand use of peer recovery support specialists; expand Screening, Brief Intervention, and Referral to Treatment to hospitals and parole, probation, and correctional facilities; increase access to MAT; expand law enforcement diversion programs; and improve the State's crisis hotline.

In 2018, the General Assembly expanded upon the comprehensive legislation of the prior year. Chapter 149 of 2018 authorizes an emergency medical services provider or law enforcement officer to report an actual or suspected overdose to an appropriate information technology platform. Chapter 211 of 2018 requires MDH to identify a method for establishing a tip line for a person to report a licensed prescriber who the person suspects is overprescribing certain medications. Chapters 215 and 216 of 2018 require a health care provider to advise a patient of the benefits and risks associated with a prescribed opioid or co-prescribed benzodiazepine. Chapters 439 and 440 of 2018 require a general hospice care program to establish a written policy for the collection and disposal of unused prescription medication and require a program employee to collect and dispose of a patient's unused medication on the death of the patient or the termination of a prescription.