Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 337 (Delegate Reilly, *et al.*)
Judiciary

Criminal Law - Opioids - Distribution Causing Death of Minor

This bill creates a crime for the direct or indirect distribution of an opioid or opioid analogue, the use of which causes the death of a minor. 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. Under the bill, distribution includes the sharing of an opioid or opioid analogue by an adult. The bill 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. It is also a defense that the defendant was an active user of an opioid or opioid analogue at the time the distribution occurred.

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.

Analysis

Current Law: Unless specifically exempted, or listed on another schedule, specified opium derivatives, including their salts, isomers, and salts of isomers, whenever their existence is possible within the specific chemical designation, are deemed Schedule I controlled dangerous substances (CDS).

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.

While the possession, distribution, and manufacturing of an opioid or opioid analogue may be subject to criminal prosecution, as specified, causing the death of *a minor* by distribution of an opioid or opioid analogue is not a specific crime under State law.

For information on crimes involving the distribution of CDS, please refer to **Appendix 1 – 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 must be 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 must be 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: 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, effective May 25, 2017, 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. Additionally, the bill may have an immediate fiscal impact and a delayed fiscal impact, depending on when the separate and consecutive sentence by the bill is imposed. 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.

Additional Information

Prior Introductions: HB 649 of 2018 received a hearing in the House Judiciary Committee, but no further action was taken on the bill.

Cross File: None.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Maryland Department of Health; 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; Department of Legislative Services

Fiscal Note History: First Reader - February 8, 2019
mag/kdm

Analysis by: Amber R. Gundlach

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

Appendix 1 – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses

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.

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

Offense	Current Penalty[1,2]
CDS (Other than Schedule I or II Narcotic Drugs and Other Specified CDS)[3]	
First-time Offender	Maximum penalty of 5 years imprisonment and/or $15,000 fine
Repeat Offender	Maximum penalty of 5 years imprisonment and/or $15,000 fine
CDS (Schedule I or II Narcotic Drug and Specified Drugs)[4]	
First-time Offender	Maximum penalty of 20 years imprisonment and/or $15,000 fine
Second-time Offender	Maximum penalty of 20 years imprisonment and/or $15,000 fine
Third-time Offender	Maximum penalty of 25 years imprisonment and/or a $25,000 fine (parole eligibility at 50% of sentence)
Fourth-time Offender	Maximum penalty of 40 years imprisonment and/or a $25,000 fine (parole eligibility at 50% of sentence)

CDS: controlled dangerous substance

[1]Repeat offenders are subject to twice the term of imprisonment and/or fines that are otherwise authorized. Under Chapter 515 of 2016, effective October 1, 2017, this authorization is made applicable only when the person has also been previously convicted of a crime of violence.
[2]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.
[3]*e.g.,* marijuana
[4]*e.g.,* cocaine and heroin

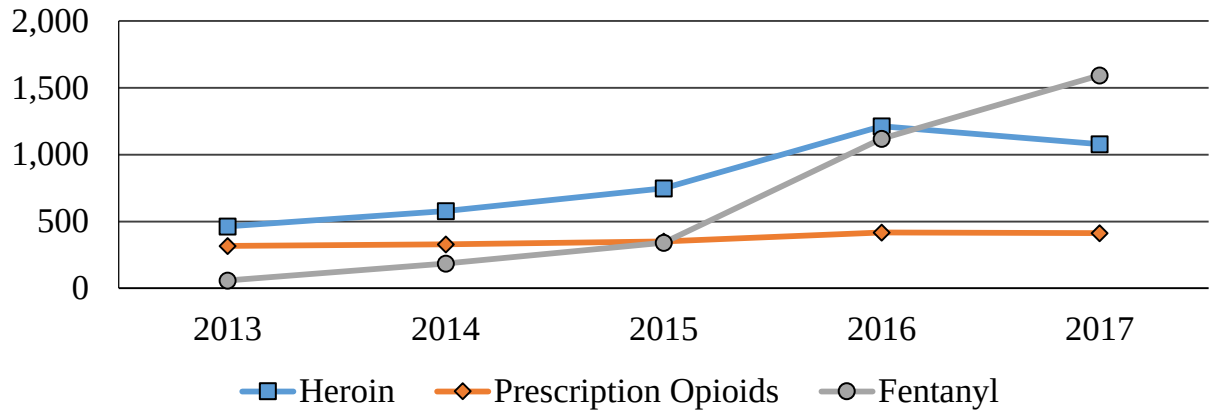
Source: Department of Legislative Services

Appendix 2 – Opioid Crisis

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.

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



Source: Maryland Department of Health

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.