HB 1378

Department of Legislative Services

Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1378 (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 12 individuals sentenced to 12 total counts of this offense in fiscal 2019. The Judiciary advises that, in fiscal 2019, there were 288 violations for this offense in District Court, with no convictions, and 345 violations in the circuit courts, with 18 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 2021; 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 $3,700 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 337 of 2019 received an unfavorable report from the House Judiciary Committee. HB 649 of 2018 received a hearing in the House Judiciary Committee, but no further action was taken on the bill.

Designated Cross File: None.

Information Source(s): 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 Legislative Services

Fiscal Note History: First Reader - March 5, 2020
mm/aad

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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.

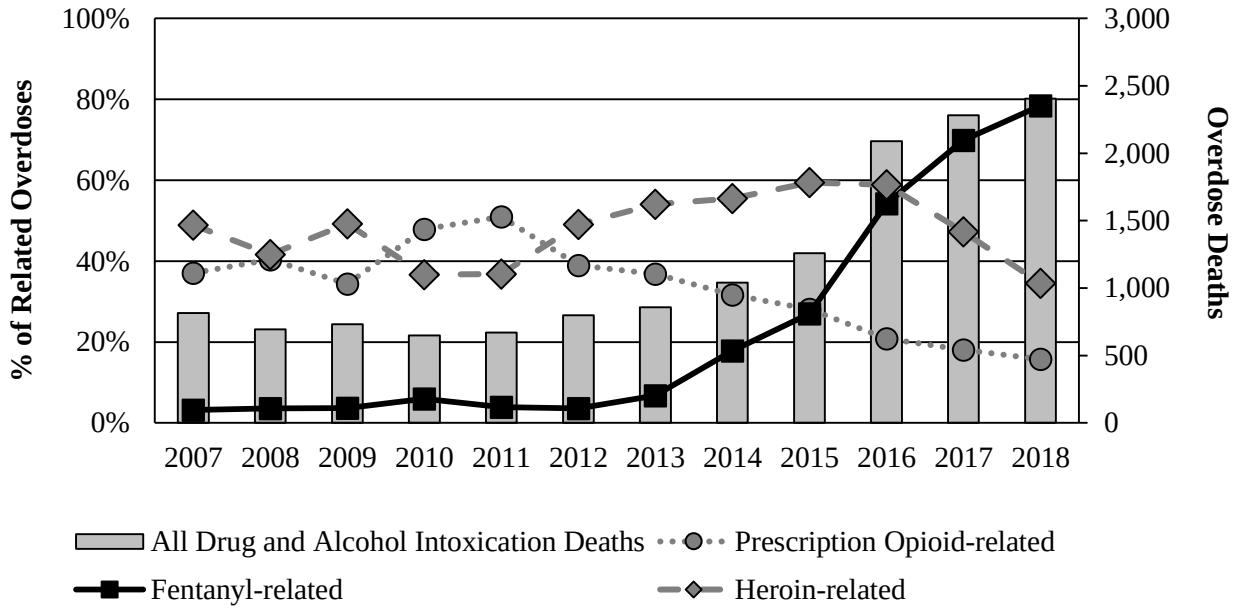
Source: Department of Legislative Services

Appendix 2 – Opioid Crisis

Opioid Overdose Deaths

Maryland ranks among the top five states for the highest rates of opioid-related overdose deaths. In 2018, the State experienced the deadliest year on record for overdose deaths, due almost exclusively to the continued presence of fentanyl. **Exhibit 1** shows the total overdose deaths in the State since 2007 and the prevalence of prescription opioids, fentanyl, and heroin in contributing to overdose deaths.

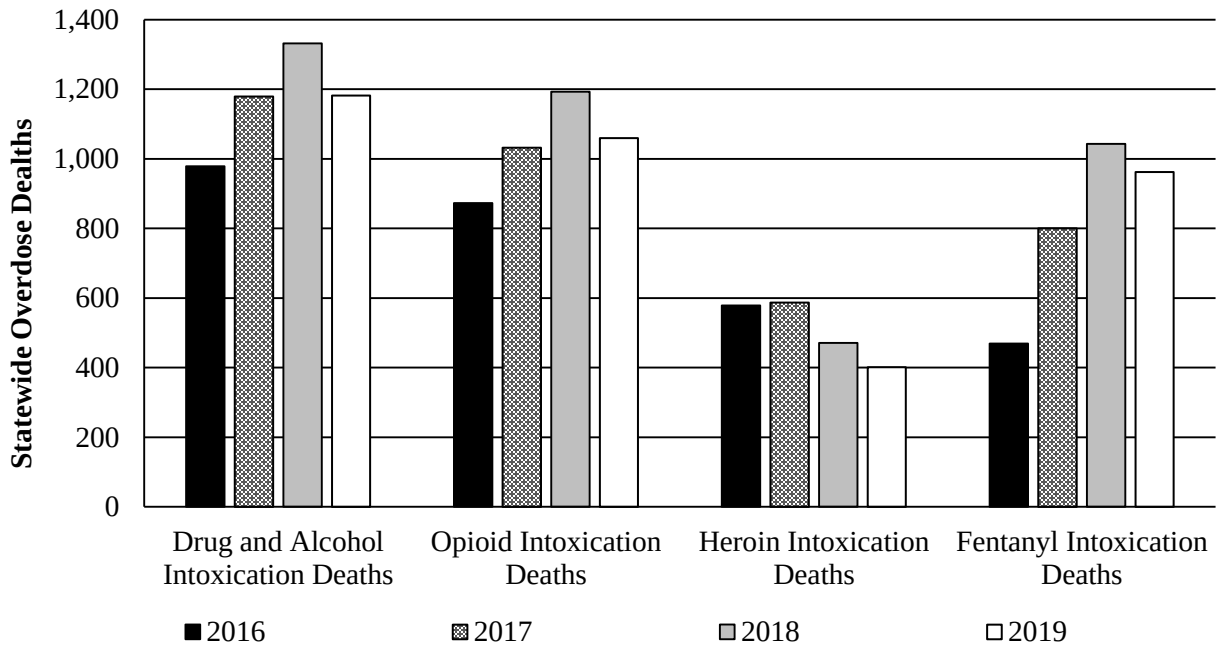
Exhibit 1
Overdose Deaths and Substance Prevalence
Calendar 2007-2018



Source: Maryland Department of Health

Preliminary data for 2019 suggests that 2018 may have been the peak of the opioid epidemic. Data published by the Opioid Operational Command Center indicates that the total number of overdose deaths in Maryland for the first six months of 2019 was lower than the number of deaths at the same point in 2018. **Exhibit 2** shows the total overdose deaths, overdoses involving opioids, and deaths involving heroin and fentanyl for the first six months of the last four years.

Exhibit 2
Overdose Deaths, First Six Months
Calendar 2016-2019



Source: Maryland Department of Health

Although the data for the first six months of 2019 shows a decrease in fentanyl-related overdose deaths relative to 2018, fentanyl-related deaths are still well above 2017 levels. Furthermore, overdose deaths for heroin and fentanyl are not mutually exclusive, as law enforcement often finds fentanyl mixed into heroin. Nearly 30% of all overdose deaths in the State in 2018 involved both heroin and fentanyl.

Maryland Actions to Address the Opioid Crisis

Legislative Response: The General Assembly has passed numerous acts to address the State's opioid crisis, including prevention, treatment, overdose response, and prescribing guidelines.

- Chapters 571 and 572 of 2017, the Heroin and Opioid Prevention Effort and Treatment Act, require the Governor's proposed budget for fiscal 2019 through 2021 to include specified rate adjustments for community behavioral health providers; require development of a plan to increase provision of treatment; expand

access to naloxone; require the Maryland Department of Health (MDH) to distribute evidence-based information about opioid use disorders to health care facilities and providers that provide treatment; and prohibit health insurance carriers from applying a prior authorization requirement for certain substance use disorder treatment drugs.

- Chapters 573 and 574 of 2017, the Heroin and Opioid Education and Community Action Act (Start Talking Maryland Act), expand drug education in public schools to include heroin and opioid addiction prevention; require local boards of education to establish a policy requiring each public school to store naloxone and other overdose-reversing medication to be used in an emergency; and require institutions of higher education that receive State funding to establish a policy that addresses heroin and opioid addiction and prevention.

- Chapter 570 of 2017 requires a health care provider 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, with specified exceptions.

- 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 whom 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.

- Chapter 532 of 2019 established programs for opioid use disorder screening, evaluation, and treatment (specifically medication-assisted treatment) in local correctional facilities and in the Baltimore Pretrial Complex. The programs must conduct a screening of the mental health and substance use status of each inmate as well as offer at least one formulation of each U.S. Food and Drug Administration

approved full opioid agonist, partial opioid agonist, and long-acting opioid antagonist used for the treatment of opioid use disorders. Phase-in of the programs begins January 1, 2020.

- Chapter 537 of 2019 established the Opioid Restitution Fund, a special fund that will retain any revenues received by the State relating to specified opioid judgments or settlements. The fund may be used only for specified opioid-related programs and services.

Legal Actions Related to the Opioid Crisis: Nationwide, lawsuits have been filed against pharmaceutical manufacturers, pharmacies, and individual providers for fueling the opioid crisis, either for aggressively marketing opioids and downplaying the known addictive qualities of the drugs, or for failing to detect and report suspicious orders. In December 2017, the U.S. Judicial Panel on Multidistrict Litigation ordered the consolidation of the nearly 200 pending opioid-related cases into multidistrict litigation in the U.S. District Court for the Northern District of Ohio. Over 2,500 jurisdictions are part of the litigation, including 32 Maryland jurisdictions (16 counties and 16 cities). In September 2019, Purdue Pharma, one of the original defendants named in the lawsuit, filed for bankruptcy. Purdue Pharma has proposed a settlement worth $3 billion plus future revenues from OxyContin sales. Attorney General Brian E. Frosh issued a statement rejecting Purdue Pharma's proposed settlement. In May 2019, the Attorney General filed charges against Purdue Pharma, the Sackler family (owners of Purdue Pharma), Rhodes Pharmaceuticals (an entity with ties to Purdue Pharma and the Sackler family), and related entities. The State's charges allege that Purdue Pharma and the Sackler family conducted an orchestrated marketing scheme designed to mislead Maryland health care providers, patients, insurers, officials, and others about the benefits of opioids while downplaying their risks. Any payments made to the State as a result of opioid litiagation will be placed in the Opioid Restitution Fund.

Funding to Address the Opioid Crisis

The fiscal 2020 budget has nearly $710 million targeted toward addressing the opioid crisis in Maryland. Nearly $700 million is budgeted in MDH, the vast majority of which is for substance use disorder treatment in Medicaid ($622.5 million). Also included in MDH's fiscal 2020 budget is the second and final year of $33 million in federal funds for the State Opioid Response Grant. The budget also contains $3 million for the Behavioral Health Crisis Response Grant Program as mandated by the General Assembly, which will increase to $4 million in fiscal 2021. Additional fiscal 2020 funding includes $3 million in Department of Public Safety and Correctional Services support for medication-assisted treatment in State correctional facilities and $725,000 between the Governor's Office of Crime Prevention, Youth, and Victim Services and the Department of State Police for various enforcement and treatment efforts.