

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1245
Judiciary

(Delegate Tomlinson, *et al.*)

Criminal Law - Distribution of Heroin or Fentanyl Causing Serious Bodily
Injury or Death (Victoria and Scottie's Law)

This bill prohibits the distribution (without the lawful authority to do so) of heroin or fentanyl, or a chemical analogue of heroin or fentanyl, the use of which results in the death or serious bodily injury of another. A violator is guilty of a felony and on conviction is subject to imprisonment for up to 20 years. A sentence imposed for such a violation must be consecutive to and not concurrent with another sentence imposed under any other provision of law. A prosecution under the bill may be brought in the county where the violation occurred or the county where the death or serious bodily injury occurred.

Fiscal Summary

State Effect: Potential significant increase in cumulative general fund expenditures for the Department of Public Safety and Correctional Services (DPSCS) in the out-years, as discussed below. Revenues are not materially affected.

Local Effect: The bill is not anticipated to materially affect local finances or operations.

Small Business Effect: None.

Analysis

Bill Summary: A person may not “distribute” heroin or fentanyl, or a chemical analogue of either of those substances, without the lawful authority to do so, the use of which results in the death or serious bodily injury of another. “Distribute” does not include the sharing of heroin or fentanyl, or an analogue of either of those substances, without remuneration or the exchange of goods or services.

The prohibition applies regardless of whether:

- the death or serious bodily injury occurred as a result of using the substance by itself or combined with any compound, mixture, diluent, or other substance;
- the substance is mixed or combined with any compound, mixture, diluent, or other substance after the prohibited distribution; or
- the distribution of the substance is made directly to the person who dies or suffers serious bodily injury.

If possession of the substance is transferred more than once prior to the occurrence of the death or serious bodily injury, each person who distributed or delivered the substance is considered to have violated the bill's prohibition.

A person who, in good faith, seeks, provides, or assists with the provision of medical assistance for a person experiencing a medical emergency after using heroin or fentanyl, or an analogue of one of those substances, is immune from criminal prosecution under the bill if evidence for the criminal prosecution was obtained solely as a result of the provision of medical assistance.

Current Law: Controlled dangerous substances (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.

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 CDS. Heroin is an opium derivative and is listed as a Schedule I CDS. Fentanyl is a Schedule II opioid. Both substances are narcotics.

Section 5-602 of the Criminal Law Article prohibits a person from distributing, dispensing, or possessing with the intent to distribute or dispense a CDS. Section 5-608.1 of the Criminal Law Article prohibits a person from knowingly violating § 5-602 with (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. A violator is guilty of a felony and is subject to imprisonment for up to 10 years in addition to any other penalty imposed for a violation of § 5-602. A sentence imposed for a violation of this prohibition must be served consecutively to any other sentence imposed.

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

- distribute, dispense, or possess with the intent to distribute a 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.

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

<u>Offense</u>	<u>Current Penalty^{1, 2}</u>
CDS (Other Than Schedule I or II Narcotic Drugs and Other Specified CDS)	
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)³	
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 For example, cocaine and heroin.

Source: Department of Legislative Services

State Expenditures: Cumulative general fund incarceration expenditures may increase significantly in the out-years due to the bill’s penalty provision. Under current law, individuals sentenced for possession with intent to distribute or distribution of a narcotic (including fentanyl and heroin) are subject to a maximum sentence of 20 years imprisonment and/or a \$15,000 fine for a first offense, and individuals sentenced for distribution offenses involving a mixture of heroin and fentanyl or fentanyl alone are also exposed to an increased penalty of up to 10 years imprisonment that must be consecutive to any other sentence. **Exhibit 2** displays the violations and convictions for these relevant offenses in fiscal 2023.

It is unclear how the increased penalty under § 5-608.1 of the Criminal Law Article and the increased penalty established under the bill will interact for sentencing purposes. Regardless, under the bill, if the unlawful distribution of heroin, fentanyl, or a chemical analogue of either of those substances results in the death or serious bodily injury of another, these individuals would also be subject to an increased penalty of up to 20 years imprisonment that must be consecutive to any other sentence.

Exhibit 2
Violations and Convictions Related to the Distribution of Narcotics
Fiscal 2023

	District Court		Circuit Court	
	<u>Violations</u>	<u>Convictions</u>	<u>Violations</u>	<u>Convictions</u>
<i>§ 5-602 – Possession with the Intent to Distribute and Distribution of a Narcotic</i>	3,935	1	4,223	1,337
<i>§ 5-602 – Distribution of a Narcotic</i>	576	0	698	164
<i>§ 5-608.1 – Possession with Intent to Distribute and Distribution of a Fentanyl Mixture</i>	421	0	285	24

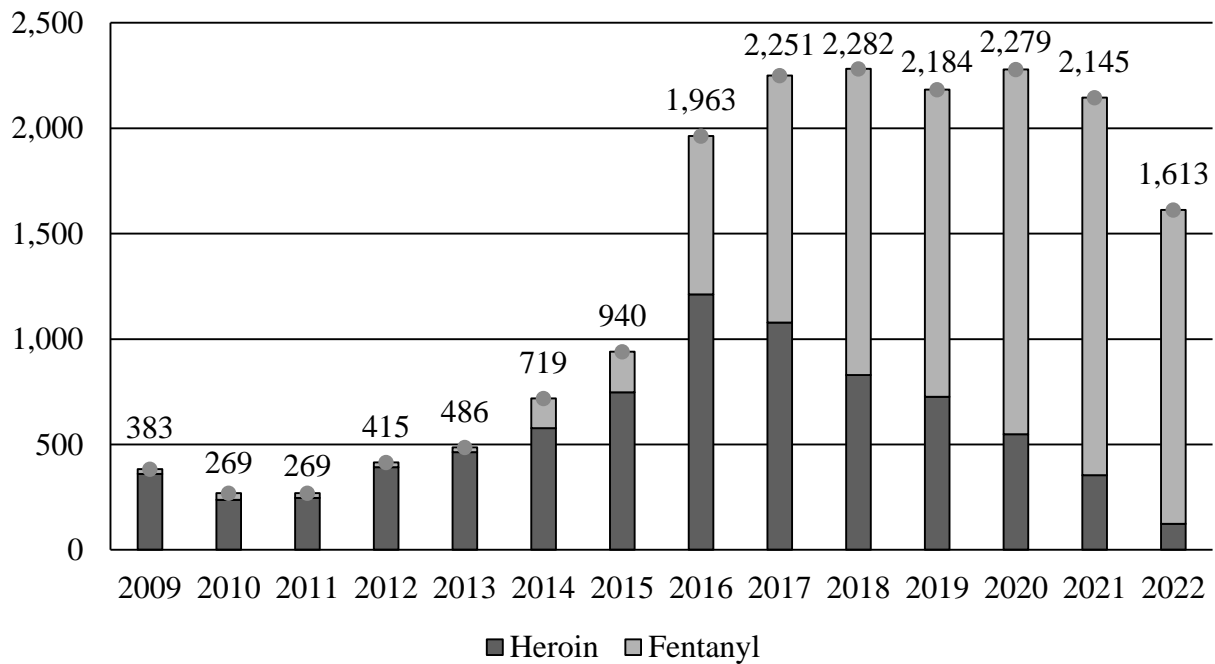
Source: Judiciary (Administrative Office of the Courts); Department of Legislative Services

DPSCS advises that during fiscal 2023 the Division of Correction received 608 individuals and the Division of Parole and Probation supervised 2,022 individuals with one or more offenses for distributing, possessing with the intent distribute, or dispensing a CDS under § 5-602 of the Criminal Law Article. However, it is unknown (1) how many of these

individuals were convicted of offenses involving heroin or fentanyl or (2) if any of these individuals distributed heroin or fentanyl that resulted in the death or serious bodily injury of another.

The Opioid Operational Command Center’s [preliminary annual report](#) for 2022 on Unintentional Drug- and Alcohol-related Intoxication Deaths in Maryland indicates the number of deaths resulting by calendar year for specific substances. **Exhibit 3** displays the data related to unintentional overdoses involving heroin and fentanyl.

Exhibit 3
Unintentional Overdose Deaths Involving Heroin and Fentanyl
Calendar 2009-2022*



* 2022 data is preliminary as of October 2023.

Source: Opioid Operational Command Center; Department of Legislative Services

Thus, cumulative general fund expenditures may increase significantly as a result of the bill’s incarceration penalty due to 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 incarcerated individual, including overhead, is estimated at \$5,110 per month. Excluding overhead, the average cost of housing a new State incarcerated individual (including health care costs) is about \$1,244 per month. Excluding all health care (which is a fixed cost under the current contract), the average variable costs total \$336 per month.

For illustrative purposes only, if the increased penalty applies to just 5% of the convictions for distributing a narcotic under § 5-602 in fiscal 2023 (approximately eight individuals) and each of those individuals is sentenced to the maximum consecutive 20-year penalty, the bill may add as much as 160 years of incarceration. Assuming the variable costs for incarcerated individuals of \$336 per month excluding health care, State costs could increase by \$645,120 for each annual cohort of defendants sentenced under the bill's increased penalty. Any impact from these additional incarcerations will likely be realized in the out-years, as individuals conclude incarceration penalties available under existing statute and begin additional incarceration time under the bill.

Office of the Public Defender

The Office of the Public Defender (OPD) advises that the bill creates additional charges for OPD clients who already have felony cases and that the additional charges will increase the level of effort required in existing OPD cases. However, given the seriousness of the charges these defendants face under existing statute, the Department of Legislative Services advises that the increase in workloads for OPD *solely* resulting from the bill and the corresponding need for additional staff cannot be reliably estimated at this time and can only be determined with actual experience under the bill. Should actual workloads increase to the point that existing resources prove insufficient, OPD may request additional resources through the annual budget process.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: SB 1075 (Senator Ready, *et al.*) - Judicial Proceedings.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Opioid Operational Command Center; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of Legislative Services

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