

**Testimony in Support of House Bill 720**

Criminal Law- Drug Paraphernalia for Administration- Decriminalization  
*Before the Judiciary Committee: February 18, 2020*

House Bill 720 decriminalizes the possession and use of drug paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance. It also repeals the prohibition against the delivery, manufacturing, or possessing with the intent to deliver or sell under certain circumstances.

This bill complements the State's efforts to reduce the impact of substance abuse in our communities. In 2017, Governor Hogan declared a State of Emergency in response to the opioid crisis in Maryland and across the country.<sup>1</sup> The devastating consequences of the opioid epidemic include substance abuse and overdose as well as an increased risk in the transmission of infectious diseases such as HIV, hepatitis C, and hepatitis B.<sup>2</sup> As a public health measure, House Bill 720 will help prioritize health and safety over punishment and begin to reduce the stigma associated with problematic drug use. It will improve lives, save taxpayer dollars, and reduce the burden on law enforcement resources.

**Current Drug Paraphernalia Laws Are Confusing and Fueling Crisis**

Although drug use itself is not criminalized, Maryland law effectively criminalizes drug use through bans on the possession of controlled dangerous substances<sup>3</sup> and prohibitions on possession of drug paraphernalia.<sup>4</sup> Currently in Maryland, the possession of drug paraphernalia is a misdemeanor. The maximum penalties upon conviction depend on whether the person is a repeat offender. For a first violation, the punishment is a fine not to exceed \$500<sup>5</sup>. For subsequent violations, the punishment includes jail time not exceeding 2 years or a fine not exceeding \$2,000, sometimes both.<sup>6</sup>

House Bill 720 will decrease the current confusion surrounding the differences in Maryland's drug paraphernalia laws. This confusion stems from the fact that not all drug paraphernalia is illegal. The Maryland General Assembly created exceptions that decriminalized drug paraphernalia involving the use or possession of marijuana,<sup>7</sup> instruments used to test or analyze controlled substances for fentanyl,<sup>8</sup> and possession of controlled paraphernalia by a participant in a syringe exchange program.<sup>9</sup>

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<sup>1</sup> *Overdose Prevention in Maryland*, MARYLAND DEPARTMENT OF HEALTH BEHAVIORAL HEALTH ADMINISTRATION (last visited Feb. 28, 2019) [https://bha.health.maryland.gov/overdose\\_prevention/Pages/Index.aspx](https://bha.health.maryland.gov/overdose_prevention/Pages/Index.aspx).

<sup>2</sup> National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, *Managing HIV and Hepatitis C Outbreaks Among People Who Inject Drugs*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 2018)

<sup>3</sup> MD. CODE ANN., CRIM LAW § 5-601 (2018).

<sup>4</sup> MD. CODE ANN., CRIM LAW § 5-619 (2018).

<sup>5</sup> MD 5-619(d)(2)(i)

<sup>6</sup> Id. at (iii)

<sup>7</sup> MD. CODE ANN., CRIM LAW § 5-619(c)(1) (2018), 2015 Md. Laws Ch. 351 (S.B. 456).

<sup>8</sup> MD. CODE ANN., CRIM LAW § 5-619(c)(2) (2018), 2018 Md. Laws Ch. 145 (S.B. 1137) (removing "test" and "analyze" from the law's language).

<sup>9</sup> MD. CODE ANN., HEALTH § 24-908(b) (2016), 2016 Md. Laws Ch. 348 (S.B. 97).

While these exceptions provide a good foundation for the fight against the opioid epidemic, House Bill 720 is needed to address inconsistencies in the current law. Only the syringe exchange programs and participants meeting the requirements under Title 24 of the Maryland Code are protected by the exemptions. Participants registered in these programs are safe from prosecution for possessing syringes. This exemption does not apply to individuals who obtain a clean needle elsewhere. Currently only four counties have qualifying programs able to distribute syringes. This is far from a number adequate to serve the state. When the supplies are illegal, even registered program participants fear harassment and arrest. Decriminalizing drug paraphernalia would decrease the fear of prosecution for organizations and participants. Both recipients and providers of services should feel completely protected. Doing so would minimize risky behavior and unsafe use practices.

Moreover, the nuances in the current law make it difficult for law enforcement officers to properly enforce them. This decreases the efficacy of harm reduction programs due to fear of harassment, and it subjects the laws to abuse. For example, how could an officer possibly distinguish between an “illicit” needle and one used for a diabetic to inject insulin? Not only does the current law create confusion for officers and individuals, but the lack of clarity also allows police to be selective in their enforcement, which may disproportionately harm minority populations.

### **Current Drug Paraphernalia Laws Create a Disparate Impact on Minorities**

Drug use rates are comparable amongst Black and White Americans, while use amongst Hispanic or Latino Americans is slightly less.<sup>10</sup> However, a different picture is revealed when lifetime drug use is examined. The National Survey on Drug Use and Health reveals that 54.5% of White Americans identified as having used illicit drugs compared to 45.9% of African Americans and 37.7% of Hispanic or Latino Americans.<sup>11</sup>

The racial composition of the U.S. prison population provides a glimpse into the impact of inequitable criminal law enforcement policies. The Bureau of Justice Statistics (BJS) tracks the race of prisoners who have been sentenced to at least one year in prison which accounts for 97%.<sup>12</sup> Of this subsection of prisoners, 30.3% are White, 33% are Black, and 23.4% are Hispanic.<sup>13</sup> This must be juxtaposed to the racial breakdown of the U.S Population, which is 60.4% White, 13.4% Black, and 18.3% Hispanic or Latino.<sup>14</sup>

The imprisonment rate statistics highlight this inequity further. The imprisonment rate for Black men is 2,336 per 100,000 people, for Hispanic men it is 1,054 per 100,000, and for

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<sup>10</sup> National Survey on Drug Use and Health 2018, Substance Abuse and Mental Health Services Administration, Table 1.23B (2019)

<sup>11</sup> National Survey on Drug Use and Health 2018, Substance Abuse and Mental Health Services Administration, Table 1.22B (2019)

<sup>12</sup> Prisoners in 2017, Bureau of Justice Statistics, U.S. Department of Justice, NCJ 252156, 5-6 (April 2019) available at <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> QuickFacts, United States, United States Census Bureau, available at <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

White men it is 397 per 100,000.<sup>15</sup> In other words, Black men are imprisoned at a rate almost six times that of White men and Hispanic men are imprisoned at a rate of 2.7 times that of their White counterparts.<sup>16</sup> The numbers are even worse for Black men ages 18 to 19, who are 12 times more likely to be imprisoned than their White counterparts.<sup>17</sup>

To examine the imprisonment statistics specific to drug possession or use is a challenge. BJS tracks imprisonment for drug offenses but does not delineate the specific drug involved in the crime.<sup>18</sup> BJS also categorizes prisoners by their most serious offense.<sup>19</sup> This practice has the potential to underrepresent the number of people in prison with a drug conviction because they will be tracked for their most serious convicted offense, e.g., homicide. However, even with these limitations, the data provides important insight. Nearly half of all federal prisoners (47.3%) were serving time for a drug offense.<sup>20</sup> Of the 78,800 prisoners with a drug offense as their most serious crime, 22% were White (17,300), 37% were Black (29,000), and 39% were Hispanic (31,000).<sup>21</sup> These numbers continue demonstrate the disproportionate imprisonment rates.

The racial breakdown of incarceration rates for drug crimes, at both the federal and state level, raises concerns given the racial composition of the country as a whole.<sup>22</sup> This concern is compounded when considered in the context of drug use statistics that show that more Whites use illegal drugs in the course of their lifetime than Blacks or Hispanics.<sup>23</sup> When Black Americans represent 13.4% of the population but 37% of federal prisoners and 30.4% of state prisoners nationwide convicted of drug crimes, it is clear that the law is not being equitably enforced.

### **Decriminalizing Drug Paraphernalia Would Reduce the Burden on Courts and Law Enforcement**

Currently, the consequences associated with paraphernalia possession depend on whether the individual has been convicted before. After a first offense, the charge can carry criminal penalties that require court hearings to be set automatically. Since the majority of individuals charged with possession are repeat offenders, House Bill 720 could have a positive fiscal impact on the courts, prosecutors, and public defenders. By removing the penalties associated with paraphernalia possession, their workloads could be lessened.

In Maryland between 2013 and 2019, the total number of charges for possession of paraphernalia was 95,418.<sup>24</sup> The total number of recorded cases filed containing a charge of

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<sup>15</sup> Prisoners in 2017, Bureau of Justice Statistics, U.S. Department of Justice, NCJ 252156, 17 (April 2019) *available at* <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 15.

<sup>18</sup> *See id.* at 22, Table 13 (revealing that BJS tracks drug crimes but not the drugs involved in these crimes).

<sup>19</sup> *See id.* (tracking prisoners by their most serious offense).

<sup>20</sup> *Id.* at 24.

<sup>21</sup> *Id.*

<sup>22</sup> QuickFacts, United States, United States Census Bureau (providing statistics on the race of U.S. population) *available at* <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

<sup>23</sup> *See Part III(A)*(providing a discussion of illicit drug use and marijuana use across racial categories).

<sup>24</sup> Possession of Paraphernalia Statistics

possession of paraphernalia was 86,204.<sup>25</sup> The total number of cases filed with a single charge of possession of paraphernalia in those same years was 23,090.<sup>26</sup> These numbers demonstrate the heavy burden the courts endure handling these types of cases. Criminal charges, which carry the potential of jail time, require the defendant be arraigned by a judge, and often require additional hearings to resolve the charges. Over 40% of these charges are ultimately dropped. Out of the 95,418 charges, 39,800 were nolle prosequi.<sup>27</sup> Decriminalizing the possession of drug paraphernalia would reduce the number of cases in which the court is required to appoint an attorney. Accordingly, it would also reduce the strain on the Public Defender.

### **Other States Have Decriminalized Paraphernalia**

Maryland would not be the first to decriminalize drug paraphernalia. This epidemic is nationwide and other states have taken legislative action. Last April, New Mexico Governor Michelle Lujan Grisham signed legislation<sup>28</sup> that decriminalized the possession of small quantities of marijuana and repealed criminal sanctions associated with possession of drug paraphernalia. Alaska, Rhode Island and West Virginia are all states that have no prohibition on the possession of drug paraphernalia. Additionally, while Wyoming prohibits delivery or possession with intent to deliver, they do not prohibit the simple possession of drug paraphernalia.

### **Conclusion**

The current legal framework in Maryland surrounding drug use is confusing, improperly enforced, and creates unnecessary risk to those affected by the opioid epidemic. States have begun to shift away from using criminal punishment as a means to combat this crisis. Instead, by decriminalizing paraphernalia, the focus turns to harm reduction practices. Maryland should do the same. House Bill 720 is a necessary step in Maryland's fight. It will help prioritize health and safety over punishment and begin to reduce the stigma associated with problematic drug use. This will enable people to access resources and get the help they need.

*This testimony is submitted on behalf of the Public Health Law Clinic at the University of Maryland Carey School of Law and not by the School of Law or the University of Maryland system.*

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<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> NMS 30-31-25.1(C) (2019).