

STATEMENT OF  
**Eric E. Sterling, J.D.**<sup>1</sup>  
SUBMITTED TO  
THE MARYLAND SENATE  
COMMITTEE ON JUDICIAL PROCEEDINGS  
HON. WILLIAM C. SMITH, JR., CHAIR  
HON. JEFF WALDSTREICHER, VICE CHAIR  
FEBRUARY 12, 2025

**IN OPPOSITION TO**  
**SB604 – Criminal Law –**  
**Distribution of Heroin or Fentanyl Causing Serious Bodily Injury or Death**

Chair Smith, Vice Chair Waldstreicher, Distinguished Senators, I oppose SB604, as introduced, and urge you to give it an unfavorable report.

**I wrote a very similar bill for the U.S. Congress in circumstances similar to the ones we are facing today** – a growing epidemic of deaths associated with increased distribution of a new form of illegal drug. In the summer of 1986, after the shock and outrage at the cocaine induced death of Maryland basketball star Len Bias, I wrote the law providing for harsh punishment for distribution of drugs that result in a death. I was the Assistant Counsel to the U.S. House of Representatives Judiciary Committee’s Subcommittee on Crime responsible for developing the “Narcotics Penalties and Enforcement Act of 1986” (H.R. 5394, 99<sup>th</sup> Cong. (Sec. 107 provided a special term of imprisonment for offenses resulting in death or serious bodily injury). H.R. 5394 was enacted as Subtitle A of Title I of the “Anti-Drug Abuse Act of 1986” (P.L.99-570, Oct. 27, 1986), with amendments). That law is most famous, or infamous, for its mandatory minimum sentences for crack cocaine and powder cocaine, the ratio of 1 to 100 by weight to trigger the minimums, and the resulting very long sentences and extraordinary racial disparity in punishment under those provisions. The law provided these mandatory minimums for quantities of heroin, cocaine, crack, PCP, LSD, marijuana, and little noticed at the time, fentanyl. **That law also included a mandatory 20-year sentence, up to life imprisonment for distribution “if death or serious bodily injury results from the use of such substance.”**

After 38 years, with the number of fatal drug overdoses growing almost ten-fold, one can fairly say that it has been an ineffective tool for saving lives.

I think the General Assembly can accomplish the bill’s purposes more effectively with other strategies. If you do report a bill law to punish persons who distribute heroin and fentanyl which results in death, then I encourage you to draft it with more explicit statements regarding the necessary state of mind to convict, and to choose a punishment that is consistent with Maryland law and more appropriate than a maximum of 20 years, as I outline below.

Before I go further, as a resident of District 18, I want to commend Vice Chair Waldstreicher, the sponsor, and my Senator, for his unflagging sensitivity to the concerns of his constituents. In District 18 we are proud that Senator Waldstreicher has been one the leaders in the General Assembly for making our justice system more just, especially in the area of racial justice. Senator Waldstreicher’s essential leadership to expand the ability of Marylanders to expunge old and minor criminal records is just one example of his commitment..

The problem:

The number of opioid overdoses we are experiencing is shocking. In Montgomery County, there were 138 fatal overdoses reported for 2023 (74 are reported for 2024 for Montgomery County on the Maryland Department of Health dashboard (Jan. 10, 2025), concentrated in Rockville and Silver Spring)(most likely preliminary data and an undercount). In 2010, when I was appointed to the Montgomery County Alcohol and Other Drug Addiction Advisory Council (AODAAC), my recollection is that the number of fatal overdoses county-wide was closer to 30.

**The most effective ways to reduce the numbers of fatal overdoses in the short term are public health approaches to expand treatment capacity; improve accessibility to treatment; reduce the stigma around addiction, treatment, and recovery; increase the support for people in recovery, especially with strong peer recovery programs; and increase harm reduction outreach in appropriate communities to expand the availability of naloxone.**

Consistent with the public health approach, in 2024, the Montgomery County Behavioral Health and Crisis Services team, noticing an increase in overdoses among Hispanic and African-American males in parts of the county undertook an emergency outreach effort in the Aspen Hill/Glenmont/Wheaton corridor to reach youth using fentanyl, and to their families. In February 2024, the Montgomery County Council appropriated \$3.1 million in Opioid Abatement funds for treatment, harm reduction, prevention, community engagement and management.

Positive Features of SB604:

I want to commend Senator Waldstreicher for two important salutary features of the bill.

First, the SB604 would expand significantly the coverage of the 2014 “Good Samaritan” law which is intended to increase the number of calls for emergency medical services at the time of an opioid overdose. Since the possession of heroin and fentanyl is illegal, the use of the drugs is typically secretive and done either alone or with others who are also illegally possessing and using the drugs. The Good Samaritan law was limited only to provide immunity to those charged with possession or administration of controlled dangerous substances (CDS) (Md. Crim. Proc. Sec. 1-210, Seeking medical assistance for another who ingested or used alcohol or drugs). SB604 would expand the Good Samaritan law’s application to immunity from prosecution for an offense involving distribution. This is an important expansion. Following this approach to increase the number of calls for emergency services for opioid overdoses, the text of subsection

(g) of SB 604 should be made an amendment to Criminal Law section 5-602 (Distributing, possessing with intent to distribute, or dispensing controlled dangerous substance) as a new subsection. (The General Assembly should commission a study of how the Good Samaritan law is perceived by persons who are using drugs to assess its effectiveness in increasing calls to 9-1-1 and ways it can further be improved.)

Second, SB604 limits the definition of the term “distribute” to eliminate the sharing of CDS between persons using drugs. This is an attempt to recognize the reality that persons ingesting drugs are often peers and sharing and are not the distributors of drugs the General Assembly is seeking to punish more severely than those who use. This important exclusion, to be effective, needs to revise the exclusion that the sharing is “without remuneration of the exchange of goods and services.” The reality is that sharing is not always purely gratuitous, and may frequently involve providing rides, food, shelter, reimbursement, or services such as cooking, cleaning, laundry, storage of goods, or sex. With such exchange of goods or services being common, this exclusion will severely limit its applicability and lead to unjust prosecutions and sentences.

#### SB604 is unlikely to deter or save lives

Nevertheless, while these are important efforts to mitigate the harshness of the sentences, with its proposed maximum of an additional consecutive sentence of up to 20 years – SB604 is unlikely to save the lives of the men and women it is intended to protect.

For over 38 years, there has been a Federal enhanced penalty for death or serious bodily injury that results from distribution of a controlled substances of a minimum of 20 years up to life imprisonment which applies to ANY quantity of any Schedule I or II substance – including heroin and fentanyl -- that is distributed (21 U.S.C.841(b)(1)(C)). These penalties have been Federal law since Oct. 1986. As we can see, the threat of long prison sentences have had negligible effect on the increase in the distribution of fentanyl or on the number of tragedies associated with use of opioids.

Since 1986, some states have adopted similar “drug-induced homicide” laws. I have occasionally been contacted by attorneys and journalists working on such cases. As reported to me, overwhelmingly, these penalties, and in some states even the threat of the capital punishment, are applied to the friends, associates or family of the deceased or to the lowest level distributors operating at a local or neighborhood level.

I appreciate the grief and anger that families have when a loved one dies from a drug overdose. My family believes that my youngest first cousin, Clifford Sterling, died from a heroin overdose after he relapsed many years ago. The shame and stigma around such deaths often leads families to an unwillingness to acknowledge the cause of death – that has been the case in my family. My objections to SB604 are neither academic nor theoretical. I have attended International Overdose Awareness Day memorials in Rockville and met similar families.

In reality, the 20-year prison term that this bill proposes as “justice” for these tragedies would be an empty promise. There are too many cases. Few, if any, persons will be identified or prosecuted as the source or distributor of the heroin or fentanyl. According to the latest data from the [dashboard](https://health.maryland.gov/dataoffice/Pages/mdh-dashboards.aspx) of the Maryland Department of Health (<https://health.maryland.gov/dataoffice/Pages/mdh-dashboards.aspx>), statewide in **CY 2024 there were 1189 were fentanyl-related fatal** overdoses out of a total of 1553. For what fraction of those fatalities would the Committee expect that the enhanced penalties authorized by SB604 would be imposed? For the 1189 families who want some measure of justice for the tragic death of their loved one, how many should expect that those who organized or masterminded the production, importation, and wholesale distribution of the drugs that killed their loved ones are going to be sentenced under SB604 or even investigated or prosecuted?

This bill, if implemented as intended, will be phenomenally expensive.

The Fiscal Note of March 3, 2024, for SB1075 (2024), last session’s version of this bill, reported the then-current average total cost per incarcerated person in Maryland as \$5,110 per month, or \$61,320 annually. Using FY 2023 prosecution data and estimating that 5% of those convicted of distributing narcotics would be sentenced under SB604, the Department of Legislative Services estimated eight individuals annually would be sentenced to the maximum consecutive 20-year penalty. Eight prisoners per year at \$61,320 each is \$490,560. That sum does not appear to be very large, except that it would repeat and grow every year for the next 20 years for a total of \$9,811,200 for the sentencing of one cohort of 8 defendants per year. If enacted, after 10 years, **in 2035 alone, imprisonment of 8 prisoners per year under this bill would cost \$4,905,600** (in 2024 dollars). However, the **cumulative cost over ten years (2025-2035) of incarcerating just 8 persons convicted of this new offense by the end of 2035 would be \$26,980,800 in 2024 dollars.**

The proposed punishment exceeds the culpability of most of the defendants

The proposed punishment for being the “perpetrator” of these tragic deaths is severely out of line compared to the penalties for those responsible for other tragic losses of life with similar levels of knowledge, intent and culpability.

In Maryland law, other deaths – undoubtedly tragic – involving acts of negligence or recklessness carry much lower penalties than a 20-year sentence consecutive to other long sentences.

In Manslaughter by Vehicle — Criminal Negligence, the killing of another by operating a vehicle or vessel in a criminally negligent manner is subject to up to 3 years imprisonment. Criminally negligent means with respect to a result or circumstance that the person should be aware, but fails to perceive, that the person’s conduct creates a substantial and unjustifiable risk that such result will occur and the failure to perceive constitutes a gross deviation from the standard or care that would be exercised by a reasonable person. (Md. Crim Law sec. 2-210(c).

That failure to fail to perceive a *substantial and unjustifiable risk that the [fatal] result* will occur sounds very much like the situation with lower-level distributors of fentanyl –they don't *know* that there is fentanyl, and they are criminally negligent – perhaps grossly negligent – in distributing the drugs.

A more serious version of this offense -- when one kills another by operating a vehicle in a *grossly negligent manner*, the maximum imprisonment is only up to 10 years (1st offense) Md. Crim Law. sec. 2-209.

In a case involving drugs: if someone kills another person while driving a vehicle impaired by CDS, they can be imprisoned by up to 5 years. Md. Crim. Law sec. 2-506. The 20 year maximum set forth in SB604 -- for most of the persons who are likely to be charged -- seems excessive compared to the penalties for killing someone in those other circumstances.

What is the conduct of the likely defendants?

A key feature about the drug traffic that this legislation does not and cannot address is the introduction of fentanyl into the drug supply. The nation's supply of illegal opioids is contaminated by fentanyl long before it gets to Maryland – it is almost always introduced in Mexico. I am not aware of any cases in which a person in the State of Maryland added fentanyl into the drugs they were distributing. If so, those might be the persons worthy of such long sentences and would be so sentenced under existing law. But such persons are unlikely to be identified and prosecuted in Maryland. Indeed, if such defendants could be identified, the State's Attorney could refer them to the U.S. Attorney to prosecute and obtain a mandatory minimum sentence in federal prison of 20 years at no cost to the Maryland taxpayers.

Most distributors of illegal opioids based in or operating in local neighborhoods do not control the purity of the product they are distributing, do not test for the presence of fentanyl, and may lack knowledge of the presence of fentanyl. SB604 does not provide a fundamental feature of the criminal law, a statement of criminal intent or state of mind regarding the conduct and circumstances. The typical drug seller is reckless regarding the likelihood that they may be distributing fentanyl-laced opioids. Recklessness, like negligence, is a lower level of criminal state of mind than intentional or knowing. (Of course, there are drug dealers who know or have reason to believe that they are distributing fentanyl – they are not singled out in SB604).

This bill is unlikely to deter any conduct (other than calling 9-1-1 to save a life)

Any assertion that this new 20-year offense will in any way deter the distribution of heroin or fentanyl is fanciful: every person who shares or distributes such drugs right now *knows* that they face a long sentence if they are caught.

Both low-level and high-level distributors of opioids are already subject to long Federal and Maryland sentences. SB604, will not change their behavior. First, a simple distribution (Md. Criminal Law § 5-602, Distributing, possessing with intent to distribute, or dispensing controlled

dangerous substance) of a narcotic like heroin or fentanyl, already carries prison sentence of up to 20 years for a first offense (Md. Crim. L. § 5-608 (a)). If a second offense after a serious first offense, a prison sentence of up to 25 years can be imposed (Md. Crim. L. § 5-608 (c)).

If fentanyl or its analogues are distributed in a first offense, current law provides for an additional consecutive sentence of 10 years (Md. Crim. L. § 5-608.1 (b)). And Maryland has a mandatory minimum sentence of 5 years imprisonment for the distribution of 5 pure grams or more of fentanyl or a mixture weighing more than 28 grams that contains *a detectable amount* of fentanyl (and these amounts can be cumulated by any number of transactions that occur in a 90 day period) (Md. Crim. L. § 5-612).

Higher-level distributors (drug kingpins: “an organizer, supervisor, financier, or manager who acts as a coconspirator in a conspiracy to manufacture, distribute, dispense, transport in, or bring into the State a controlled dangerous substance”) are further subject to a mandatory minimum of 20 years imprisonment up to 40 years. Very simply, the likelihood is miniscule that SB604, if enacted with its 20-year additional sentence, will deter anyone from selling fentanyl or heroin.

#### Likelihood of unjust prosecution of associates of the deceased

What is likely is that those who will be prosecuted under this new section are persons who were using drugs or sharing their drugs or who sold the small quantity of drugs that triggered the fatal overdose. These are going to be the family members of the deceased, perhaps close friends or drug sharing acquaintances, or persons prevailed upon by the deceased who is desperate to use. These are not the high-level distributors. Many of those who are sentenced for this kind of offense could have been, in fact, the person who died. I think we all agree in 2025 that low-level drug offenders, most of whom have serious substance use disorders, do not deserve a two-decade term of imprisonment.

#### Likelihood of unjust prosecution due to randomness and infrequency

Sadly, as the 2024 Fiscal Note suggests in the hypothesis that only 8 cases might be brought annually under SB604, the most prominent feature of these prosecutions will be their relative infrequency and randomness. Infrequent, random prosecution with harsh punishment out of thousands of similar offenders is more of an injustice than justice.

#### Exacerbating unwarranted racially disparate sentencing

Finally, there is the danger of continuing and exacerbating the racial disproportionality in the investigation, arrest, prosecution, sentencing and imprisonment in drug cases. In Maryland, this has been well established, and was documented by the 2023 report of the Maryland State Commission on Criminal Sentencing Policy, “An Assessment of Racial Differences in Maryland Guidelines-Eligible Sentencing Events.” **According to the report, 77.6 percent of the persons sentenced for felony narcotics offenses were Black, and 19.7% were White** (figure 9, p. 26). **For drug offenses that carry a mandatory minimum sentence, Black defendants were 89.5% and White defendants were 7.9%** (figure 20, p. 38).

For all these reasons, I urge an unfavorable report.

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<sup>1</sup> Eric E. Sterling was Executive Director of the Criminal Justice Policy Foundation (1989-2020). He has lived in Maryland 32 years and the 18<sup>th</sup> legislative district over 27 years. From 1979 to 1989 he was Assistant Counsel, U.S. House of Representatives Committee on the Judiciary responsible for drug abuse matters among many other issues. From 2013 to 2017, on the appointment of Gov. Martin O'Malley, he served on the Maryland Medical Cannabis Commission and chaired its Policy Committee. In Montgomery County, he served for 10 years on the Alcohol and Other Drug Abuse Advisory Council including three years as chair. From 2022 to 2024, he was Chair the Montgomery County Advisory Commission on Policing. He received a B.A. from Haverford College in 1973, and a J.D. from Villanova University Law School in 1976.