LAW ENFORCEMENT ACTION PARTNERSHIP

ADVANCING JUSTICE AND PUBLIC SAFETY SOLUTIONS

Date: February 12, 2025

Re: SB 604

Position: OPPOSE

STATEMENT OF
MAJOR STANFORD "NEILL" FRANKLIN, [i]
Maryland State Police (Ret.)
ON BEHALF OF THE
LAW ENFORCEMENT ACTION PARTNERSHIP [ii]

SUBMITTED TO
THE MARYLAND SENATE
COMMITTEE ON JUDICIAL PROCEEDINGS
HON. WILLIAM C. SMITH, JR., CHAIR
HON. JEFF WALDSTREICHER, VICE CHAIR

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

Chair Smith, Vice Chair Waldstreicher, Distinguished Senators, on behalf of the Law Enforcement Action Partnership (LEAP), we oppose SB604 and urge you to give it an unfavorable report because it will:

- Be ineffective in saving lives;
- Would undermine Maryland's "Good Samaritan" legislation passed in 2014;
- Be phenomenally expensive (DLS estimates predict $4.9 million per year in 2035 and growing);
- Be ineffective in deterring the distribution of fentanyl and heroin;
- Lead to unjust punishment for persons suffering from serious substance use disorders and low-level drug distributors; and
- Disproportionately adversely impact racial minorities as applied.

LEAP greatly appreciates your intention and leadership, Vice Chair Waldstreicher, in introducing this bill that attempts to reduce the enormous number of fentanyl and heroin overdoses. Unfortunately, the mechanism will be ineffective because it simply would punish even more harshly than current law those who distribute those drugs. Every law enforcement officer and prosecutor appreciate legislation that is inspired by the desire to save lives. All of us at LEAP, having made criminal justice our life's work, have worked with survivors and victims of horrendous crimes, and we appreciate, far more than is commonly understood, the grievous losses they have endured, and understand that they are never adequately addressed by the justice system.

I am sure that you all agree that no matter how appealing and well-intentioned a legislative concept may be, it must be tested against the likelihood that it will be effective, that it will not be counterproductive, and that it advances the cause of justice.

SB604 has clearly been drafted with an attempt to minimize the potential of discouraging persons present at an overdose from calling 9-1-1 for emergency medical response because of a justifiable fear of prosecution for distribution. But the immunity from prosecution of those acting in good faith in subsection (g) is such a narrowly drawn exception that it will not be relied upon to summon help and will be ineffective at saving lives. As drafted, it is an invitation to further investigate and eventually prosecute "the person seeking, providing, or assisting with the provision of medical assistance," that is the person who is most likely – in the moment – to know the circumstances and location of the overdose victim to speed the emergency medical response to potentially save the victim's life. If that person must determine – was I getting food, shelter, reimbursement, sex, etc. from the person who is overdosing? – in order to conclude, I can call 9-1-1 and not get in trouble. That is not a setup for a rapid, life-saving response.

SB604 also attempts to exclude from its harsh penalties those who are using drugs with the person who died from an overdose, that is "sharing of heroin or fentanyl. . . without remuneration or the exchange of goods or services." In these sharing situations, a person who obtains and shares the drugs is reimbursed for the expense, either with money, shelter, transportation, food, or sex. Drug use among the user population is very much transactional. As drafted these features are too narrow and inadequate to achieve their just and life-saving objectives. I also believe it will undermine the current Good Samaritan provision in a sense that people involved in the sharing process, as hesitant as they are now, would certainly be more hesitant to summon help under SB604 if passed. One must consider how the new law is perceived by the people the law is targeting, not by those who draft and support it.

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 for the next 20 years for a total of $9,811,200. **Every year that eight prisoners were sentenced, this bill would be creating an eventual expense of $9,811,200 in 2024 dollars.** If enacted, after 10 years, **in 2035 alone, imprisonment under this bill would cost $4,905,600** (in 2024 dollars). However, the cumulative cost over ten years of incarcerating just 8 persons convicted of this new offense by the end of 2035 would have been $26,960,800.

Sadly, many of our law enforcement colleagues, in their passion to combat criminals, continue to rely on disproven concepts of drug trafficking and the behavior of men and women with serious opioid use disorders. One such concept is that low-level offenders, starting with people who use drugs, can be pressured with the threat of long sentences each in turn to inform on their supplier leading "up the chain" to successful investigation and prosecution of the most culpable high-level suppliers of drugs. In practice, this rarely occurs. Consequently, our courts and our prisons have large numbers of the lowest-level distributors who can be sentenced to 15 or 20 years, the kinds of long sentences that legislators envisioned for the most culpable offenders.

Let me also clarify a key feature about the drug traffic that this legislation does not and cannot address. The nation's supply of illegal opioids is contaminated by fentanyl long before it gets to Maryland. Almost no distributor of illegal opioids based or operating in Maryland neighborhoods adds fentanyl to the drugs they are distributing or knows or controls the purity of the product they are distributing. In this sense, the offense in this bill lacks a fundamental feature of criminal law, the criminal intent. Implicitly, the typical defendant prosecuted under the bill may have been reckless regarding the probability that the product they distributed included fentanyl. Certainly, of course, there will be defendants who knew or who had reason to believe that they were distributing fentanyl. But there is no such explicit state of mind referenced in this bill.

Traditionally, acts of recklessness lack the intentionality that are characteristic of the greatest levels of culpability warranting long additional 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)). If one kills another by operating a vehicle in a grossly negligent manner, you are subject to imprisonment of up to 10 years (1st offense) (Md. Crim Law. sec. 2-209). If you kill someone while driving a vehicle impaired by CDS, you can be imprisoned by up to 5 years. The 20 years here, for most of the persons who are likely to be charged, seems excessive compared to the penalties for killing someone in those other circumstances.

Regarding any assertion that this new offense will in any way deter the distribution of heroin or fentanyl: Every person who shares or distributes such drugs right now *knows* that they face a long sentence if they are caught. The addition of a new potential sentence enhancement, such as SB604, will not change their behavior – it will not deter those who are willing to risk the sentences that are already authorized in Maryland law (as well as those in Federal law). Both low-level and high-level distributors of opioids are already subject to long Maryland sentences. First, a simple distribution violation of Maryland Criminal Law § 5-602, "Distributing, possessing with intent to distribute, or dispensing controlled dangerous substance," if a narcotic like heroin or fentanyl, now carries a prison sentence of up to 20 years for a first offense (Md. Crim. L. § 5-608 (a)). If second offense after a serious first offense, a prison sentence of up to 25 years (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)). Then there is currently already 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 accumulated by any number of transactions that occur in a 90-day period) (Md. Crim. L. § 5-612).

And the higher-level distributors (grandly characterized as drug kingpins: "an organizer, supervisor, financier, or manager who acts as a co-conspirator 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 that SB604, if enacted, will deter anyone from selling fentanyl or heroin is close to zero.

The much greater likelihood 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. I can recall two such Maryland cases in 2017 where I was designated as an expert witness for the defense. In both cases, the accused were friends of the deceased, and they were charged with murder. These were not the high-level distributors.

While SB604 relies on misconceptions of the malicious drug dealer, knowingly pushing fentanyl-tainted drugs on customers in hopes of getting them hooked, this is very rarely the case. Instead, many of those prosecuted for drug overdose deaths are themselves users and could have just as easily been the victim. The deceased, meanwhile, are typically individuals who have long struggled with opioid use disorder, and who in some cases may have deliberately sought out drugs containing fentanyl.

Additionally, as noted in the 2023 Maryland State Commission on Criminal Sentencing Policy report, "An Assessment of Racial Differences in Maryland Guidelines-Eligible Sentencing Events," [iii] Blacks are arrested, prosecuted and sentenced at significantly higher rates than White individuals for similar drug offenses. As such, there is no reason to believe that the results of SB604 will be any different.

We must also consider the effects of the COVID-19 outbreak of 2020 where addiction and overdose death rates soared in just about every category in the United States and Canada. The increases are most likely attributed to changes in the illegal drug supply, increased use of substances to cope with stress, and less access to support services for people who use drugs. Post COVID-19, over the past couple of years, Canada has dramatically increased support services for people who use drugs, resulting in a significant downward trend of overdose deaths, without becoming overly aggressive with punitive drug laws.

We at LEAP strongly suggest learning from the successes in Canada by increasing the availability of drug user and mental health support services, establishing a meaningful number of overdose prevention sites, and continually working to remove the stigma associated with drug use. Environments conducive to alienating drug users from society, pushing them farther into the shadows of dangerous use habits, must be eliminated. We must continue working toward creating environments of connection for those who use drugs.

Hopefully, this committee agrees that low-level drug offenders, most of whom have serious substance use disorders, do not deserve a two-decade term of imprisonment. The most prominent feature of these prosecutions

will be their relative infrequency and randomness. It is not justice to randomly punish a handful of offenders out of a great mass of similarly situated persons.

I think we can all agree that in the overwhelming majority of these cases, the deceased has been using these drugs for some time or sought them out. The likelihood that the defendant prosecuted under a bill like SB604 is the allegorical drug "pusher" luring unsuspecting young people to try the lethal drug for the first time in order to "hook" them as customers is extremely small.

For these reasons, we ask that you oppose SB 604 and instead support policies aimed toward prevention, treatment, and public safety.

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[i] Major Neill Franklin (Ret.) is a distinguished figure in law enforcement, boasting a remarkable 34-year career that includes notable positions within both the Maryland State Police and the Baltimore Police Department. Franklin's extensive service began with the Maryland State Police, where he dedicated 23 years of his life to public safety. His exceptional performance led him to be selected in 2000 by the Commissioner of the Baltimore Police Department to reconstruct and lead the Education and Training Section in Baltimore.

Throughout his tenure with the Maryland State Police, Franklin made significant contributions, notably serving as the commander of the Education and Training Division and the Bureau of Drug and Criminal Enforcement. He was instrumental in the creation and oversight of the first Domestic Violence Investigative Units for the Maryland State Police, showcasing his commitment to progressive policing practices.

Franklin's perspective on the War on Drugs was profoundly shaped by the community impacts he witnessed during his career. Influenced by former Baltimore Mayor Kurt Schmoke, who famously criticized the drug war's violent repercussions, Franklin became a staunch advocate for reform. This commitment was further fueled by the heartbreaking loss of his close friend, Maryland State Police Corporal Ed Toatley, who was killed during an undercover drug operation. This tragedy solidified his resolve to challenge and change ineffective drug policies.

In 2010, Franklin transitioned from active duty to leadership as the Executive Director of the Law Enforcement Action Partnership, a role he held for a decade until his retirement in 2020. Under his guidance, the organization worked towards reshaping public safety strategies and advocating for reformative approaches to drug policy.

Franklin's expertise in policing has also been recognized in judicial settings, where he has served as an expert witness in both Maryland Circuit and federal district courts. His commitment to community engagement and reform extends beyond his professional duties; he has held positions on various boards, including the Youth & Police Initiative, the Alliance for Safety and Justice, the National Organization of Retired State Troopers, the Faith Based Community Council on Law Enforcement and Intelligence, and TurnAround Inc. among others.

Through his extensive service and advocacy, Major Neill Franklin has made a lasting impact on law enforcement practices and community safety initiatives, demonstrating a profound commitment to justice and reform.

[ii] The Law Enforcement Action Partnership (LEA) is a nonprofit group of police, prosecutors, judges, and other criminal justice professionals who speak from firsthand experience. Our mission is to make communities safer by focusing law enforcement resources on the greatest threats to public safety and working toward healing police-community relations.

[iii] 2023 Maryland State Commission on Criminal Sentencing Policy report, "An Assessment of Racial Differences in Maryland Guidelines-Eligible Sentencing Events"