

STATEMENT OF  
**Eric E. Sterling, J.D.<sup>1</sup>**  
SUBMITTED TO  
THE MARYLAND HOUSE OF DELEGATES  
JUDICIARY COMMITTEE  
HON. LUKE CLIPPINGER, CHAIR  
HON. J. SANDY BARTLETT, VICE CHAIR  
FEBRUARY 12, 2025

**IN OPPOSITION TO**  
**HB1398 – Criminal Law –**  
**Distribution of Heroin or Fentanyl Causing Serious Bodily Injury or Death**

Chair Clippinger, Vice Chair Bartlett, Distinguished Delegates, I oppose HB1398, as introduced, and urge you to give it an unfavorable report.

Introduction: In 1986, I wrote the Federal law that punishes drug dealers if death results from the drug they distributed. That summer, as the deadly crack epidemic was starting, a well-intentioned goal of those bills was to protect urban communities and especially young Black men (like the athletes who died, Len Bias and Don Rogers) by giving the U.S. Justice Department a new, “urgently-needed tool” – mandatory minimum sentences. As we have seen, the consequences have been devastating to Black families and communities. And the methamphetamine mandatory minimums have been disproportionately applied to the Hispanic population. The goals of increasing racial justice to which most of us are unalterably committed are often not fulfilled by laws that are enacted, especially when they create new offenses with long sentences. Wouldn’t it compound their tragedies if a law named for Victoria, Scottie, Ashleigh and Yader resulted in further injustice and loss of life?

1. **To save lives is the proper goal** of drug legislation during a drug overdose epidemic. A likely unintended consequence (but **not unforeseen**) is that this legislation will increase fatalities. Those who use drugs will interpret this law as, “if you are present when someone **dies or suffers serious bodily injury** from a drug overdose, you may get a twenty-year prison sentence. Calling 9-1-1 to rescue an overdosed person could mean spending much of my life in prison.” The salutary nuances of the “sharing” exclusion from the distribution definition are meaningless to people who use drugs. They, perhaps better than legislators, understand those nuances are going to be largely discounted by narcotics investigators and prosecutors.
2. Long sentences become very expensive. With limited resources, spending must be targeted on life-saving strategies, not empty promises of “accountability.” The Fiscal Note is not “eye-popping” because it assumes only 8 sentences per year and unrealistically low-balls an

additional year of incarceration as \$3,744 per year (“average variable costs”) (by excluding all health care and overhead costs).

3. HB1398 fails to analyze and distinguish the appropriate culpability for the circumstances of deaths.
  - a. Appropriate targets – dealers who add fentanyl to the drug supply or who know it has fentanyl. These criminals are unlikely to be deterred or punished by this bill.
  - b. Likely targets – the lowest level distributors and the associates of the deceased.
4. Huge unwarranted racial disparity in prosecutions and sentences have been the rule regarding drug enforcement at the federal level and here in Maryland and are likely in the application of this new statute.
5. This bill is an empty promise to provide allegedly missing accountability.
  - a. The prohibited conduct — “distribute” — is the same conduct already prohibited in Maryland law. **How could a person be proven to have “distributed” in violation of this new statute but not the current statutes?** (e.g., Md. Crim Law § 5-602. Distributing, possessing with intent to distribute; § 5-608.1. Penalties — Distribution of fentanyl and fentanyl mixtures; § 5-612. Manufacture, distribution of specified amounts; § 5-613. Drug kingpin (who conspires to distribute)). That is illogical.
  - b. Only a handful of the thousands of “distributors” of these drugs that led to a death or serious bodily injury are going to be sentenced under this new statute. Nearly universally, the families aggrieved by these tragedies will have no satisfaction under this bill – otherwise it will be frightfully expensive.

My experience with a law like HB1398.

**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, I was in my 7<sup>th</sup> year as the Assistant Counsel to the Subcommittee on Crime of the U.S. House of Representatives Judiciary Committee responsible for federal drug laws and enforcement. After the shock and outrage at the cocaine-induced death of Maryland basketball star Len Bias on June 19, 1986, Congress passed a law I wrote providing for harsh punishments for distribution of drugs, including when it results in a death. **It provides a mandatory 20-year sentence, up to life imprisonment for distribution “if death or serious bodily injury results from the use of such substance,”** enacted in Subtitle A of Title I of the “Anti-Drug Abuse Act of 1986” (P.L.99-570, Oct. 27, 1986, 21 U.S.C. 841(b)(1)). The law provided mandatory minimum prison terms for quantities of **heroin**, cocaine, crack, PCP, LSD, marijuana, **and fentanyl**. That law is infamous for its mandatory minimum sentences for small quantities of crack cocaine, the ratio of 1-to-100 by weight between crack and powder cocaine that triggered the minimums, and the resulting very long sentences and **extraordinary racial disparity in punishment under those provisions**. (I wrote a provision of the “Fair Sentencing Act of 2010” that reduced the ratio between crack and powder cocaine to 1-to-18 (P.L. 111-220)). These racial disparities were noted by President Biden on January 17, 2025 when he commuted the sentences of thousands of men and women serving those unjustly long sentences

<https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2025/01/17/statement-from-president-joe-bidenhas-on-additional-clemency-actions/> (accessed Feb. 13, 2025).

In the 1980s, these mandatory minimum sentencing bills were enthusiastically endorsed by leading liberal Democrats in both houses of Congress and members of the Congressional Black Caucus (CBC) as protecting the Black community from the scourge of crack cocaine, etc. Within a few years, majorities of the CBC were co-sponsors of amendments to change the crack cocaine provisions, which were fruitlessly offered in many Congresses.

Since 1986, some states have adopted similar “drug-induced homicide” laws. I have often 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.

What should be the goal of our legislation to deal with overdoses?

Saving lives should be the primary goal in writing drug laws; **bills that risk increasing the number of deaths should not be enacted.**

In the 38 years since the Anti-Drug Abuse Act, the national number of fatal drug overdoses has grown from about 4200 in 1986 to more than 107,000 in 2023 -- growing almost 25-times during the life of those federal penalties. One can fairly say that the federal penalty authorizing specially long sentences for distributing often-lethal drugs like cocaine, heroin and fentanyl has been an ineffective tool for saving lives.

**The most effective ways to reduce the numbers of fatal overdoses 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.**

The Maryland Overdose Data Portal re EMS Naloxone Administration shows that there is an underutilization of administration of Naloxone to Hispanic Marylanders by emergency response teams – putting Hispanic Marylanders at greater risk of dying. For CY 2024, of the 5723 reported administrations, approximately 200 were administered to persons identified as Hispanic. <https://health.maryland.gov/dataoffice/Pages/mdh-dashboards.aspx> Understanding and fixing this underutilization will save lives.

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 intensified 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 HB1398:

I want to commend the sponsors of HB1398 and SB604 for two important salutary features of the bill.

First, the HB1398 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 2014 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). HB1398 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, HB1398 limits the definition of the term “distribute” to eliminate prosecution for merely sharing of CDS among persons using drugs. This is an attempt to recognize the reality that persons obtaining, ingesting and distributing drugs are often one and the same and not the kinds of 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 *implicitly entirely* “without remuneration of the exchange of goods and services.” The reality is that sharing is not always purely gratuitous, and frequently involves 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, as drafted this exclusion will severely limit its applicability and lead to unjust prosecutions and sentences. An amendment such as “without *substantial remuneration*” and dropping exchange of goods and services would be an important recognition of the reality of the economics of the often desperate, often destitute lives of people who are using heroin and fentanyl.

#### HB1398 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 – HB1398 is unlikely to save the lives of the men and women it is intended to protect.

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. My objections to HB1398 are neither academic nor theoretical. I have attended International Overdose Awareness Day memorials in Rockville and met similar families.

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

A huge question for the Department of Legislative Services in compiling the Fiscal Note for this bill is to estimate how many years of incarceration would result from its enforcement. In 2023, they noted that there were 1,624 unintentional overdose deaths involving heroin and fentanyl. The drugs in every one of those deaths was “distributed” by some number of persons.

How many distributors will be identified, prosecuted, convicted and sentenced? The Department of Legislative Services estimated that 5% of those convicted of distribution of narcotics is a reasonable estimate of the total number that might be sentenced under this bill. It noted that in FY 2023 there were 160 convictions for narcotics distribution (a subset of the convictions under § 5-602). But there were 5,305 “violations” of narcotics distribution offenses filed in Circuit Courts in FY 2023, including 396 alleging violation of § 5-608.1 (Penalties — Distribution of fentanyl and fentanyl mixtures) and 20 convictions omitted from the calculation. Is a mere 8 offenders per year a realistic number for estimating the cost?

Would the availability of this statute change the behavior of investigators or the decision-making of State’s Attorneys?

The Fiscal Note of February 11, 2025, for HB1398 reports the total cost per incarcerated person in Maryland as \$5,339 per month, or \$64,068 annually. Eight prisoners per year at \$64,068 is \$512,544. This quickly becomes a significant expenditure. **At the end of 5 years, the cumulative cost for just 8 persons would be \$7,688,160. At the end of 10 years, the cumulative cost would be \$28,189,920.**

As a consecutive sentence, the costs would not start until some number of years in future at the expiration of other sentences. If you expect this bill to actually result in these kinds of sentences – for just 8 persons per year, some future General Assembly will have to start passing very significant appropriations to cover the costs that this bill creates.

The proposed punishment exceeds the culpability of most of the likely 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.

The bill is silent on the state of mind or criminal intent of those to be charged. In these cases there is no specific intent to take the life of the victim, as with murder (“deliberate, premeditated, and willful”).

In Maryland law, other deaths – undoubtedly tragic – involving acts of criminal 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 perceive a *substantial and unjustifiable risk that a fatal result will occur* sounds very much like the situation with lower-level distributors of fentanyl who don’t have actual knowledge that there is fentanyl. It can fairly said that they are “criminally negligent” in distributing the drugs.

Arguably an offense more comparable to that of low-level distributor of heroin or fentanyl who causes the death of one who uses the heroin or fentanyl is the killing of another by operating a vehicle in a *grossly negligent manner*. For such killing, the maximum imprisonment is only up to 10 years (1st offense) Md. Crim Law. sec. 2-209.

Or consider a case involving use of 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.

Furthermore, in assessing the culpability of the offender relative to the deceased, it is worth remembering that every time a person ingests a dose of an illegally sourced opioid, considering the high risk that it contains fentanyl, that person is engaged in an act of enormous recklessness that most people who are not addicted, not desperate or not intoxicated would not engage in.

#### Prosecution of traffickers truly culpable

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 could be so sentenced under existing law to long sentences. But such persons are rarely identified and prosecuted in Maryland – the Fiscal Note identified a total of only 20 convictions in FY 2023 for Maryland’s heightened fentanyl offense, Md. Crim Law § 5-608.1. In cases that call for extra long punishment, any State’s Attorney could refer the case to the U.S. Attorney who would eagerly prosecute them and obtain a mandatory minimum sentence in federal prison of 20 years -- at no cost to the Maryland taxpayers.

The 20-year maximum set forth in HB1398 – for the low-level distributors likely to be charged – seems excessive compared to the penalties for killing someone in those other circumstances.

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 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. HB1398, 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) (including a narcotic drug like heroin or fentanyl) carries a 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, in addition, 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 (“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”, i.e., a “drug kingpin”) are further subject to a mandatory minimum of 20 years imprisonment up to 40 years. This list of all the current penalties that are applicable demonstrates that the additional penalty created by HB1398 is superfluous. And thus, with all these long penalties already in place, the likelihood is miniscule that HB1398, 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, close friends or drug sharing acquaintances, or persons prevailed upon by the deceased who was desperate to obtain narcotics in the state of being “dopesick.” 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.

Likelihood of unjust prosecution due to randomness and infrequency

Sadly, as the Fiscal Note suggests in the hypothesis that only 8 cases might be brought annually under HB1398, one of the prominent features 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.

For what fraction of those fatalities would the Committee expect that the enhanced penalties authorized by HB1398 would be imposed? For the 1624 families in 2023 who wanted 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 HB1398 or even investigated or prosecuted?

#### 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).**

And similar to historic data regarding prosecutions for homicide seeking the death penalty, the data suggests that the fact that the person who died was white was the primary determinant whether a prosecution for drug-induced homicide is brought. In the data compiled from media sources by The Action Lab at Northeastern University, no instance was identified in which the deceased was a person of color. <https://www.healthinjustice.org/drug-induced-homicide>

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.