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POSITION ON PROPOSED LEGISLATION

BILL: HB1398 Criminal Law - Distribution of Heroin or Fentanyl Causing Serious Bodily Injury or Death (Victoria, Scottie, Ashleigh, and Yader's Law)

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 2/12/2025

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 1398. Rather than rely on data and best practices to address the overdose crisis, House Bill 1398 relies on a punitive response that has proven ineffective in the past and dangerously creates the likelihood of more overdoses and other harm.

The opioid epidemic has led to a shocking and tragic number of overdoses. While overdose fatalities in Maryland decreased dramatically this past year – from 2,500 in 2023 to 1,553 in 2024¹ -- this crisis continues to devastate families and communities, with Baltimore holding the tragic distinction of being the nation's deadliest city.² Especially troubling are the racial disparities; while Black individuals report using and selling drugs at similar rates to white people, they experience overdoses and drug-related prosecutions at much higher rates. For example, between 2017 and 2023, fatal overdoses in Maryland increased by 65% among Black people while decreasing by 25% among

¹ Maryland Department of Health, Overdose Dashboard, <https://health.maryland.gov/dataoffice/Pages/mdh-dashboards.aspx#Overdose>.

² Alissa Zhu, Jessica Gallagher and Meredith Cohn, *They entered treatment. Drugs, overdoses and deaths followed.* The Baltimore Banner, 12/20/2024, <https://www.thebaltimorebanner.com/community/public-health/baltimore-opioid-drug-treatment-investigation-AOTRDIBQAJGHEFCLJ3NW2J5JN4/>.

white people.³ In 2019, Black people made up 12% of the US population but accounted for 27% of adult drug arrests.⁴

OPD does not support any punitive response to the public health issues related to substance abuse and overdose, but not only does this bill seek to expand the criminalization of substance use, it is also unnecessary and duplicative of existing law. The incarceration and accountability sought by this bill is already available under current law. People who provide drugs can already be prosecuted and convicted of involuntary and grossly negligent manslaughter.⁵ In the leading case, *State v. Thomas*, the Supreme Court recognized the inherent dangerousness of selling heroin justified a manslaughter conviction based on the sale of four bags of heroin to someone who ultimately died of an overdose.⁶ Moreover, there already is a law providing an enhanced consecutive sentence for distribution of fentanyl or heroin. Criminal Law § 5-608.1 specifically provides for up to 10 additional years' incarceration for distributing heroin or fentanyl, and requires that sentence to be consecutive to the distribution charge. House Bill 1398 seeks to add another charge with the requirement of another consecutive sentence to all other counts, *removing judicial discretion* in a wide range of circumstances that are not appropriate for a blanket term.

While existing charges cover this very crime, adding another charge will impact litigation, in ways that are counterproductive and ultimately harmful to the families that this bill purports to support. A felony conviction with a mandatory consecutive sentence of up to 20 additional years incarceration significantly reduces the prospect of a plea bargain. By incentivizing trials, the time before there is any resolution or closure will extend, and family members will be required to testify.

This approach is particularly inappropriate given that prosecutions under this provision will inevitably focus predominantly on other individuals who use substances. Although the sponsors of this bill claim to seek to exempt from prosecution the sharing of drugs, the actual language will not do so. "Remuneration or exchange of goods" (HB 1398, page 2 line 2) can include a wide range of behaviors that are common among drug users. People with substance use disorders often barter or

³ Maryland Department of Health, Overdose Dashboard, <https://health.maryland.gov/dataoffice/Pages/mdh-dashboards.aspx#Overdose>.

⁴ Pew Charitable Trusts, Issue Brief: Drug Arrests Stayed High Even as Imprisonment Fell From 2009 to 2019 (2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019>.

⁵ See, e.g., *State v. Thomas*, 464 Md. 133, 211 A.3d 274 (2019); *McCauley v. State*, 245 Md. App. 562 (2020); *Tolen v. State*, 242 Md. App. 288 (2019).

⁶ 464 Md. 133 (2019).

sell drugs to support their addiction and/or to help people they know stay out of withdrawal.⁸ Analyses of existing drug-induced homicide statutes around the country have found that the majority of resulting prosecutions do not charge high-level distributors, but focus on the last person to touch the drugs – friends and family members who are the lowest person on the distribution chain, who may share drugs with no intention to sell.⁹ Examples from a review of these laws are:

- In New Jersey, 25 of 32 cases involved charging friends of the decedent who did not sell drugs in a significant way;
- In Wisconsin, 90% of cases charged friends, relatives, or a low-level dealer who was likely to be selling to support their own use.; and
- In six Illinois counties, the person most likely to be charged was the last person who was with the decedent.¹⁰

House Bill 1398 will also sweep in anyone who has used with someone who had a fatal overdose. The bill applies to anyone in the distribution or delivery chain, regardless of their role. (Page 2, lines 19-24.) An individual who delivers drugs at someone else's order is at equal risk, regardless of whether they even knew what the drug contents were. Prosecution under this bill would also not require that the drugs even be related to the cause of death (page 2, lines 8-11), creating a homicide crime for a wider range of fatalities than even this bill intends to address.

In addition to being ineffective at reducing drug use or distribution, laws like House Bill 1398 **deter life-saving actions** by targeting the very people who are in the best position to summon help when an overdose occurs. They undermine Good Samaritan Laws, which protect individuals from arrest and prosecution of certain crimes when seeking medical attention for someone experiencing a medical emergency, such as an overdose. Studies have shown that the most cited

⁸ Susan G. Sherman, et al., *Drug Users' Involvement in the Drug Economy: Implications for Harm Reduction and HIV Prevention Programs*, 79 J. Urban Health 266 (2002), <https://doi.org/10.1093/jurban/79.2.266> (among participants who had used heroin, cocaine, or crack cocaine in the last 6 months, 44% were involved in the drug economy, and those who reported daily use of drugs were even more likely to be involved in the drug economy); Kora DeBeck, et al., *Income Generating Activities of People who Inject Drugs*, 91 Drug Alcohol Depend. 50 (2007), [10.1016/j.drugalcdep.2007.05.003](https://doi.org/10.1016/j.drugalcdep.2007.05.003) (53% of participants, who were people who injected drugs, were engaged in prohibited economies, such as drug selling or sex work; 47% said they would no longer engage in those economies if they didn't need money for drugs).

⁹ Health in Justice Lab, *Drug Induced Homicide*, <https://www.healthinjustice.org/drug-induced-homicide> (last accessed Feb. 7, 2025); Rosa Goldensohn, *They Shared Drugs. Someone Died. Does that Make them Killers?*, N.Y. Times (May 25, 2018); Lindsay LaSalle, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane* 42 (2017), https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdf.

¹⁰ LaSalle, *supra* note 7.

reason people do not call for help during an overdose is fear of the police and arrest.¹¹ House Bill 1398 will make people even more reluctant to call 911 and secure life-saving response services for people they use with, based on the fear, and reality, that they will be charged with a felony.

Punitive responses to the public health issues related to overdose do not work. As the number of drug-related prosecutions and resulting incarceration dramatically increased from the “War on Drugs,” so did the rate of fatal overdose. States with higher drug imprisonment rates do not exhibit lower rates of drug use or overdose.¹² In fact, by decreasing supply through prosecution and sentencing without addressing the demand of addiction with treatment services, these laws make society more dangerous. Studies show that the increased criminalization of substance misuse and sales increases violent and property crime and diverts limited resources away from addressing these offenses.¹³

Moreover, the reliance on incarceration will increase rather than reduce fatal overdoses. Multiple studies confirm that drug overdose is the leading cause of death after release from incarceration.¹⁴ In fact, the risk of a fatal overdose is more than 12 times higher within two weeks of release from jail or prison than at other times.¹⁵ A study from North Carolina showed a 40-fold increase in the odds of an opioid overdose in the first two weeks after release.¹⁶

A criminal legal system approach to this public health crisis of fatal overdoses will be costly, dangerous, and divert substantial resources from more effective measures. OPD estimates that

¹¹ Stephen Koester et al., *Why are some people who have received overdose education and naloxone reticent to call Emergency Medical Services in the event of overdose?*, 48 Int J Drug Policy 115 (2017), [10.1016/j.drugpo.2017.06.008](https://doi.org/10.1016/j.drugpo.2017.06.008).

¹² Pew Charitable Trusts, Issue Brief: More Imprisonment Does Not Reduce State Drug Problems (2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>

¹³ Jared Grossi, The Relationship between the War on Drugs and Crime (May 3, 2020), <https://ssrn.com/abstract=3591798>.

¹⁴ Elizabeth L.C. Merrall, et al., Meta-analysis of drug-related deaths soon after release from prison. 105 *Addiction* 1545 (2010), <https://doi.org/10.1111/j.1360-0443.2010.02990.x>; Ingrid A. Binswanger, et al., *Release from Prison — A High Risk of Death for Former Inmates*, 356 N. Engl. J. Med. 157 (2007), <https://www.nejm.org/doi/full/10.1056/NEJMsa064115>.

¹⁵ New data: Solitary confinement increases risk of premature death after release, online at: https://www.prisonpolicy.org/blog/2020/10/13/solitary_mortality_risk/; ACLU, *Overjailed and Untreated* (201), available online at https://www.aclu.org/wp-content/uploads/legal-documents/20210625-mat-prison_1.pdf; <https://www.sciencedirect.com/science/article/abs/pii/S2949875923000218?via%3Dihub>.

¹⁶ Shabbar I. Ranapurwala, et al., *Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015*, 108 Am. J. Pub. Health 1207 (2018), <https://doi.org/10.2105/AJPH.2018.304514>.

defense costs alone will equal more than one million dollars per year.¹⁷ State's Attorneys and law enforcement should focus on enforcement of fraud, abuse and discrimination in health settings, documented issues in Baltimore,¹⁸ rather than using its limited resources on homicide charges for low-level dealers and shared users who are most likely to be connected to the drugs ingested in an overdose, but have no intent to sell.

More broadly, focusing effort and funding on services that are demonstrated to reduce drug use and overdose, such as evidence-based prevention programs, treatment services in the community and during incarceration, and harm reduction efforts like Naloxone distribution, are more effective approaches to the overdose crisis. Through grant-funded projects, OPD has incorporated peer recovery services in its representation in select jurisdictions, which has served more than 500 public defender clients with a drug addiction, connecting them to treatment programs, social service resources, and financial assistance while providing ongoing support, advocacy and education on harm reduction and recovery pathways. These clients report better wellbeing and have lower recidivism and overdose rates. State funds that would be required for the prosecution, defense, and incarceration under House Bill 1398 would be better spent on supporting and expanding these types of programs.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on House Bill 1398.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.

¹⁷ This estimate presumes that, if passed, this charge would be applied to one person in 70% of fatal overdoses for fentanyl or heroin. The law provides for multiple people to be prosecuted along the distribution chain, and theoretically could be applied in every overdose. We further assumed that 90% of people charged would also be accused of other offenses, and the increased effort would average 3 hours per case to account for the increases in factual elements to litigate, likelihood of trial due to sentencing exposure, and increased legal arguments. The remaining 10% of estimated cases in which other charges do not apply would require the effort of a high felony, which the national workload standards for public defense estimates as 99 hours per case. The additional time needed for both existing and additional cases total 15,259 hours, which is equivalent to 7 additional attorneys. The Maryland workload standards call for one secretary or clerk for every three attorneys and one social worker for every 8 attorneys. Thus, the fiscal impact for OPD would total the costs for 7 felony public defenders, three secretaries, and one social worker.

¹⁸ Alissa Zhu, Jessica Gallagher & Meredith Cohn, *They entered treatment. Drugs, overdoses and deaths followed.* The Baltimore Banner, December 20, 2024, <https://www.thebaltimorebanner.com/community/public-health/baltimore-opioid-drug-treatment-investigation-AOTRDIBQAJGHEFCLJ3NW2J5JN4/>.

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