



TESTIMONY IN OPPOSITION TO HOUSE BILL 1398

Criminal Law - Distribution of Heroin or Fentanyl **Causing Serious Bodily Injury or Death**

TO: Members of the House Judiciary Committee

FROM: Center for Criminal Justice Reform, University of Baltimore School of Law

DATE: February 14, 2025

The University of Baltimore School of Law's Center for Criminal Justice Reform ("Center") is dedicated to supporting community-driven efforts to improve public safety and address the harm and inequities caused by the criminal legal system. The Center strongly opposes House Bill 1398.

This bill creates a new criminal offense for distributing heroin, fentanyl, or a chemical analogue of those, "the use of which results in the death or serious bodily injury of another." The new offense is a felony which carries a sentence of up to 20 years. House Bill 1398 intrudes on judicial discretion by depriving judges of the ability to order concurrent sentences based on unique facts and circumstances for each individual case.

Several criminal laws and penalties exist in Maryland that prosecutors may use when someone dies or experiences a serious bodily injury after purchasing heroin, fentanyl, or their analogues. Under Md. Code, Crim. Law § 5-602, a person guilty of manufacturing, possessing with intent to distribute, or distributing a controlled substance is guilty of a felony and is subject to imprisonment not exceeding 20 years or a fine not exceeding \$25,000 or both. Under Md. Code, Crim. Law § 5-608.1, additional carceral penalties already exist when heroin, fentanyl, or their analogues are involved. Section 5-608.1 creates a separate criminal offense for individuals found guilty of possessing, distributing, or possessing with the intent to distribute heroin, fentanyl, or their analogues. Under § 5-608.1, individuals are subject to imprisonment up to 10 years—again to be served consecutively to any other sentence. Therefore, without House Bill 1398, an individual who sells heroin to another person may be sentenced to serve 30 years in prison under current law. House Bill 1398 would allow that individual to serve up to 50 years in prison if the person who purchased the heroin experienced a serious bodily injury or death.

The Center recognizes the devastation and gravity of the pernicious harms of substance abuse, addiction, and overdose in Maryland, particularly those relating to fentanyl and heroin. Like all states, Maryland has seen countless lives lost and families destroyed. It is because of this devastation, and not in spite of it, that the Center opposes this bill. The Center joins the proponents of HB 1398 in agreeing that we must take action to confront these compounding public health crises. However, it is overwhelmingly clear that HB 1398 is not the answer. HB

1398 will not only fail to make our communities safer, but it will profoundly and disparately exacerbate the harms of the criminal justice system and distract policymakers from needed investments in treatment and more effective responses.

The Center strongly opposes HB 1398 for four primary reasons: (1) House Bill 1398's vague and overly broad language will result in variable and extreme enforcement, (2) no research exists to indicate that laws like HB 1398 reduce opioid-related harms, including severe bodily injury and death, (3) this law will needlessly cost Maryland more money when cost-effective and empirically proven interventions exist, and (4) this law will exacerbate racial disparities in drug-related prosecutions. Appropriately, much has been said about the urgent need for a "public health" response to substance abuse, addiction, and overdose. Instead, House Bill 1398 doubles down on the failures of the War on Drugs and runs counter to evidence and lived realities of communities suffering with the burden of addiction. We cannot afford to and should not make these same mistakes again.

I. HOUSE BILL 1398 IS SUSCEPTIBLE TO BROAD AND VARIABLE INTERPRETATION, RESULTING IN DISPARATE AND EXTREME ENFORCEMENT

The vague, conflicting text of House Bill 1398 will produce variable and extreme enforcement of its provisions. First, this is especially true because House Bill 1398 does not define "serious bodily injury." Federal law and other sections of Maryland code corroborate these concerns. Under 21 U.S.C. § 802(25), "serious bodily injury" is defined as a bodily injury that involves "(a) A substantial risk of death; (b) Protracted and obvious disfigurement; or (c) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty." Here, the federal definition is instructive. Anyone who distributes controlled substances in Maryland resulting in serious bodily injury or death is already subject to enhanced federal penalties, including a 20-year mandatory term of imprisonment. Federal law confirms that the definition of "serious bodily injury" is extraordinarily broad. Despite the fact that legislation like House Bill 1398 is often referred to as a "drug-induced *homicide*" law, the reality is that HB 1398 would enhance criminal liability and penalties when one friend sold heroin to another friend who experienced a non-fatal overdose or who experienced extended kidney, liver, or respiratory failure.

Second, House Bill 1398 contains no *mens rea* requirement. A defendant need not know that the controlled substance contained fentanyl or heroin to be criminally liable under this bill. Under House Bill 1398, a high school student who had stolen what he believed to be an Adderall pill from his parents' medicine cabinet and sold that pill to his classmate could be subject to 50 years in prison if that pill actually contained heroin or fentanyl and his classmate overdosed or died as a result.

Third, despite purported protections in House Bill 1398, this legislation would inevitably be used to prosecute the friends, family, and partners of people who experience serious bodily injury or death as a result of their substance use. House Bill 1398 fundamentally misunderstands the nature of drug use, sharing, and transactions among people who use or abuse drugs, including those suffering from substance use disorder. Frequently, friends or family members who use

drugs will pool their money and have one person go buy drugs. Later on, they meet and divide the drugs. Often, the person who gives someone the drugs that lead to an overdose is not a drug dealer but rather a fellow user or addict.

Fourth and moreover, the purported “sharing exception” in the bill is undermined by the drafting of subsection (D). On the one hand, the proposed bill language provides that sharing heroin or fentanyl without remuneration or exchange of goods is exempt from prosecution. At the same time, subsection (D) states that if possession of heroin, fentanyl, or their analogues “is transferred more than once prior to the occurrence of the death or serious bodily injury, each person who distributed or *delivered* the [heroin, fentanyl, or their analogues] shall be considered to have violated this section.” (emphasis added). By including “deliver[y],” subsection (D) could result in those who shared drugs by *delivering* them in the chain of distribution without remuneration or exchange of goods being subject to two more decades of prison time.

II. NO RESEARCH EXISTS TO INDICATE THAT LEGISLATION LIKE HOUSE BILL 1398 REDUCES OPIOID-RELATED HARMS, INCLUDING SEVERE BODILY INJURY AND DEATH

The existing research suggests there is no proof that criminalization reduces opioid use or its related harms, including serious bodily injury, and death.”¹ In fact, research shows that criminalization only increases drug-related harms.² Alarmingly, a 2023 study in Colorado found that “increasingly punitive drug possession policies for fentanyl possession ... could lead to increased deaths from opioid overdose.”³ Additionally, an analysis of the impact of a conviction in an opioid-related death prosecution in Haywood, North Carolina in 2018, indicates that these laws are detrimental to public health.⁴ In another study, El Sabawi et. al. (2023) conclude, while “the number of [drug-induced homicide] charges filed increased exponentially from 2009 to 2016 [this is] in the absence of any meaningful evidence that such charges produced positive public health impacts.”⁵

Significantly, the authors of the only longitudinal quantitative study finding that such laws resulted in a statistically significant reduction in opioid-related deaths⁶ were forced to rescind the

¹ See, Alexandra Savinkina, et. al., *Mortality, Incarceration and Cost Implications of Fentanyl Felonization Laws: A Modeling Study*, 121 INT’L J. DRUG POLICY, 1, 7 (2023) (noting, criminalization has not been proven to reduce drug use or its sequelae); See also, *More Imprisonment does Not Reduce State Drug Problems*, The Pew Charitable Trusts, Mar. 8, 2018, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems#:~:text=More%20Imprisonment%20Does%20Not%20Reduce%20State%20Drug%20Problems%20%7C%20The%20Pew%20Charitable%20Trusts> (last visited Feb. 4, 2025); See also, Nora D. Volkow, *Addiction Should be Treated, Not Penalized*, 46 NEUROPSYCHOPHARMACOLOGY, 2048 (2021); See also, Jeffrey P. Bratberg, et. al., *Support Don’t Punish: Drug Decriminalization is Harm Reduction*, 63 J. AMER. PHARMACISTS ASSOC. 442-229 (2023).

² Bratberg, et. al., *supra* note 1.

³ Savinkina, *supra* note 1 at 7.

⁴ See Jennifer J. Carroll, et. al. *Drug Induced Homicide Laws May Worsen Opioid Related Harms: An Example from Rural North Carolina* 97 INT’L J. DRUG POLICY, 1-6 (2021).

⁵ El-Sabawi, et. al, *supra* note 5, at 1384.

⁶ Youngeon Lee, et. al., *Longitudinal Study on Deterrent Effect of Drug-Induced Homicide Law on Opioid-Related Mortality Across 92 Counties and the District of Columbia in the U.S.*, 52 J DRUG ISSUES, 131-143 (2022).

publication of their findings in 2023.⁷ A review of this study revealed a host of methodological issues, including problems with the data set, sampling strategies, and modeling decisions.⁸ While research into the causes and outcomes of drug abuse, addiction, and overdose should continue,⁹ there is consensus that longer prison sentences, which HB 1398 proposes, have not resulted in a reduction in self-reported drug use, drug overdose deaths, or drug arrests.¹⁰

In sum, given all the evidence that these laws do not decrease opioid-related harms, including serious bodily injury and death, HB 1398 is a well-intentioned, yet misguided, remedy to this public health crisis that is devastating the lives of Marylanders and their families. As discussed below, criminalization undermines a host of other empirically proven solutions to reduce opioid-related harms that Maryland should implement or expand.

III. RATHER THAN PURSUING COST-EFFECTIVE SOLUTIONS THAT ARE EMPIRICALLY PROVEN TO WORK, HOUSE BILL 1398 WILL WASTE MARYLAND’S LIMITED FISCAL RESOURCES

House Bill 1398 will unequivocally cost Maryland more money without addressing the overdose epidemic and the public health challenges associated with substance use at a time in which the State is experiencing a well-documented and unprecedented fiscal crisis of 3 billion dollars. This budgetary crisis is further compounded by uncertainties surrounding the fiscal impact of the federal actions of the Trump administration. To address the budget crisis, the Moore administration is proposing deep cuts to State-funded resources and services, including education and the developmental disabilities administration, among others.

House Bill 1398 will only intensify these economic woes. This assertion is not speculation. The fiscal and policy note that accompanied the identical 2024 version of this bill¹¹ stated, “the cumulative general fund expenditures may increase significantly as a result of the bill’s incarceration penalty due to people being committed to State correctional facilities for longer periods of time.”¹² Based on last year’s estimates “state costs could increase by **\$645,120** for each annual cohort of defendants sentenced under the bill’s increased penalty.”¹³ A ten-year projection of costs, based on these estimates, would cost the State more than **\$6 million**. Also, the increased costs cited in the fiscal policy note support the conclusions of the aforementioned

⁷ Youngeon Lee, et. al., *Retracted: Longitudinal Study on Deterrent Effect of Drug-Induced Homicide Law on Opioid-Related Mortality Across 92 Counties and the District of Columbia in the U.S.*, 52 J DRUG ISSUES, 131-143 (2022).

⁸ See Jennifer J. Carroll, et. al., *A Discussion of Critical Errors in a Longitudinal Study on the Deterrent Effect of Drug-Induced Homicide Laws on Opioid-Related Mortality Across 92 Counties and the District of Columbia in the United States*, 15 WORLD MED. & HEALTH POLICY, 587-612 (2022).

⁹ *Id.* at 5; See also Meghan Peterson, et. al., “One Guy Goes to Jail, Two People are Ready to Take His Spot”: Perspectives on Drug-Induced Homicide Laws Among Incarcerated Individuals, 70 INT’L J. DRUG POLICY, 47-53 (2019); See also, Taleed El-Sabawai et. al., *Drug Induced Homicide Laws and False Beliefs about Drug Distributors: Three Myths That Are Leaving Prosecutors Misinformed*, 60 AM. CRIM. L. REV., 1381 (2023). See also, Brandon Morrissey, et. al., *Prosecuting Overdose: An Exploratory Study of Prosecutorial Motivations for Drug-Induced Homicide Prosecutions in North Carolina*, 125 INT’L J. DRUG POLICY, (2024).

¹⁰ *More Imprisonment does Not Reduce State Drug Problems*, *supra* note 1; See also, Volkow, *supra* note 1.

¹¹ S.B. 1075, 2024 Leg., 446th Sess. (Md. 2024).

¹² Dept. of Legis. Serv., Fiscal and Policy Note, First Reader, S.B. 1075, 2024 Leg., 446th Sess. (Md. 2024) at 5.

¹³ *Id.* at 7.

Colorado study, which likewise found that these policies “could lead to... substantially increased costs.”¹⁴

It is worth noting that the 2024 fiscal and policy note for identical legislation supposes that only eight individuals would be prosecuted annually under this provision. There were more than 1,600 fentanyl-related deaths in Maryland from July 2023 through June 2024.¹⁵ There were presumably additional heroin-related deaths during that year and even more serious bodily injuries caused by fentanyl or heroin. The fiscal and policy note’s financial projection either illustrates the likely arbitrary, minimal enforcement of House Bill 1398 in less than 1% of fentanyl-related deaths or seriously underestimates the profound financial impact of the enforcement of this legislation.

Therefore, enacting House Bill 1398 is a misguided solution, particularly when there are cost-effective and empirically proven solutions to reduce opioid deaths, including alternative sentencing drug courts, increased naloxone access, fentanyl test strip distribution, and syringe service programs.¹⁶ There are also, as noted above, substantial punitive penalties already on the books. Despite the well-documented spike in overdoses and overdose deaths, there are recent reasons to be hopeful about our course. Earlier this month the Maryland Department of Health reported “a steep decline in opioid overdose deaths in 2024 compared to the previous year,¹⁷” citing data from Maryland’s Overdose Data Dashboard showing 1,553 reported fatal overdoses in 2024, which is a 38% decrease from the 2,511 fatal overdoses in 2023.¹⁸ We all share an urgent and common goal to reduce opioid-related harms in Maryland. Given the reality of our limited fiscal resources, our legislative efforts should be directed toward expanding these scientifically proven and impactful solutions that will improve the lives of Marylanders.

IV. HOUSE BILL 1398 WILL LIKELY EXACERBATE RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

Discriminatory enforcement of drug-related offenses has produced extreme, well-documented racial disparities throughout the criminal justice system. Despite the fact that Black people comprise 13% of the United States’ population, “[they] comprise 29% of those arrested for drug law violations, nearly 35% of those incarcerated in state or federal prison for any drug law violations, and roughly 35% of those incarcerated in state prison for possession only.”¹⁹ Maryland’s racialized enforcement of the War on Drugs is similarly alarming and intolerable. According to a study by the ACLU, “between 2018-2019, 96% of all marijuana possession charges

¹⁴ Savinkina, *supra* note 1 at 7.

¹⁵ United States Drug Enforcement Agency, *U.S. Attorney’s Office and DEA Announce Fentanyl Overdose Task Force*, Oct. 28, 2024, <https://www.dea.gov/press-releases/2024/10/28/us-attorneys-office-and-dea-announce-fatal-fentanyl-overdose-task-force>.

¹⁶ Amir Razaghizad, et. al., *The Effect of Overdose Education and Naloxone Distribution: An Umbrella Review of Systematic Reviews*, 111 AMR. J PUB. HEALTH, 1516, 1517 (2021); *See also, More Imprisonment*, *supra* note 1.

¹⁷ Scott Maucione, *Maryland Sees Steep Drop in Opioid Overdose Deaths*, WYPR, Feb. 5, 2025, <https://www.wypr.org/wypr-news/2025-02-05/maryland-sees-steep-drop-in-opioid-overdose-deaths>.

¹⁸ *Id.*

¹⁹ Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws are Counterproductive and Inhumane*, Nov. 2017, https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdf.

were filed against Black people in Baltimore City, even though Black people only represent around 60% of the city’s population,” and “[e]ven though Black people only made up about 65% of the population [in Prince George’s County]” 90% [of the people charged with possession of marijuana over 10 grams there] were Black.”²⁰

House Bill 1398, if enacted, is susceptible to broad and variable interpretation, which would allow for disparate enforcement based on geography, race and socioeconomic status of the “dealer” and “purchaser,” or the political whims of individual prosecutors. Enforcement of criminal laws like HB 1398 in other jurisdictions confirms that Maryland should be concerned about racially disparate and discriminatory enforcement under this legislation. For example, “[i]n McHenry County, Illinois, a county that has a [B]lack population of under 2%, prosecutors have brought [drug-induced homicide] cases against four [B]lack men from Chicago, which totals 35% of their 11 drug-induced homicide cases.”²¹ In Hennepin County, Minnesota, “[a]t the very least, [...] 72% of [the county attorney’s drug-induced homicide] prosecutions have been against [B]lack people despite a [B]lack population of 13% in the county in 2016.”²²

For the foregoing reasons, the Center for Criminal Justice Reform urges an unfavorable report on House Bill 1398.

²⁰ Neydin Milian & Yanet Amanuel, Let’s Not Repeat a Racist Past: The War On Drugs, ACLU of Maryland, Mar. 18, 2021, <https://www.aclu-md.org/en/news/lets-not-repeat-racist-past-war-drugs>.

²¹ Drug Policy Alliance, *supra* note 21.

²² *Id.*