

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 488
Judiciary

(Delegate Moon)

Criminal Law - Use or Possession of a Controlled Dangerous Substance - De
Minimis Quantity

This bill establishes that the use or possession of a de minimis quantity of specified controlled dangerous substances (CDS) is a civil offense. The bill generally applies existing law relating to the use or possession of less than 10 grams of marijuana to the use or possession of a de minimis quantity of a CDS for a first or second finding of guilt and makes conforming changes. Existing criminal penalties continue to apply for a third or subsequent finding of guilt for use or possession of a de minimis quantity of a CDS.

Fiscal Summary

State Effect: Potential significant decrease in general fund revenues and minimal decrease in general fund expenditures due to the bill's elimination of criminal penalties for specified CDS offenses. General fund expenditures increase by approximately \$123,100 in FY 2022 only for the Judiciary to make one-time programming changes. Special and general fund expenditures increase for substance use treatment. Special fund revenues also increase from civil citation penalties.

Local Effect: Minimal decrease in local revenues and potential significant decrease in local expenditures due to the bill's elimination of criminal penalties for specified CDS offenses.

Small Business Effect: None.

Analysis

Bill Summary: “De minimis quantity of a controlled dangerous substance” means less than:

- 10 grams of marijuana;
- 2 grams of cocaine;
- 1 gram of heroin;
- 1 gram or five tablets of 3, 4-methylenedioxyamphetamine;
- 40 user units of lysergic acid diethylamide;
- 40 user units of methadone;
- 2 grams of methamphetamine; or
- 40 tablets of oxycodone.

Use or possession of a de minimis quantity of a CDS is a civil offense punishable by a fine of up to \$100 for a first finding of guilt and \$250 for a second finding of guilt. However, existing criminal penalties continue to apply for a third or subsequent finding of guilt involving possession of a de minimis quantity of a CDS other than marijuana.

For an individual’s first or second finding of guilt for use or possession of a de minimis quantity of a CDS, and for a third or subsequent finding of guilt for possession of less than 10 grams of marijuana, a court must order the individual to attend a drug education program approved by the Maryland Department of Health (MDH) and refer the person to an assessment for a substance use disorder. After the assessment, the court must refer the person to substance use treatment, if necessary.

Current Law: CDS are listed on one of five schedules (Schedules I through V) set forth in statute depending on their potential for abuse and acceptance for medical use. Under the federal Controlled Substances Act, for a drug or substance to be classified as Schedule I, the following findings must be made: (1) the substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in the United States; and (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision.

No distinction is made in State law regarding the illegal possession of any CDS, regardless of which schedule it is on, with the exception of marijuana.

Pursuant to Chapter 158 of 2014, possession of less than 10 grams of marijuana is a civil offense punishable by a fine of up to \$100 for a first offense and \$250 for a second offense. The maximum fine for a third or subsequent offense is \$500. For a third or subsequent offense, or if the individual is younger than age 21, the court must (1) summon

the individual for trial upon issuance of a citation; (2) order the individual to attend a drug education program approved by MDH; and (3) refer him or her to an assessment for a substance abuse disorder. After the assessment, the court must refer the individual to substance abuse treatment, if necessary.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. The law also established that the use or possession of marijuana involving smoking marijuana in a public place is a civil offense, punishable by a fine of up to \$500.

Chapter 515 of 2016 (also known as the Justice Reinvestment Act) altered the criminal penalties associated with the possession, administration, obtainment, and procurement of a CDS and related offenses. Effective October 1, 2017, a person who violates these provisions is subject to the following penalties: (1) for a first conviction, imprisonment for up to one year and/or a fine of up to \$5,000; (2) for a second or third conviction, imprisonment for up to 18 months and/or a fine of up to \$5,000; and (3) for a fourth or subsequent conviction, imprisonment for up to two years and/or a fine of up to \$5,000. The authorization to double penalties for repeat offenders applies only when the person has also been previously convicted of a crime of violence.

Additionally, Chapter 515 reduced the maximum incarceration penalty for the use or possession of 10 grams or more of marijuana from one year to six months (but retained the maximum fine of up to \$1,000).

Further, pursuant to Chapter 515, before imposing a sentence for these offenses, the court is authorized to order MDH, or a certified and licensed designee, to conduct an assessment of the defendant for a substance use disorder and determine whether the defendant is in need of and may benefit from drug treatment. MDH or the designee must conduct an assessment and provide the results, as specified. The court must consider the results of an assessment when imposing the defendant's sentence and, as specified, (1) must suspend the execution of the sentence, order probation, and require MDH to provide the medically appropriate level of treatment or (2) may impose a term of imprisonment and order the Division of Correction within the Department of Public Safety and Correctional Services (DPSCS) or a local correctional facility to facilitate the medically appropriate level of treatment.

In a prosecution for the use or possession of marijuana, it is an affirmative defense that the defendant used or possessed the marijuana because (1) the defendant has a debilitating medical condition that has been diagnosed by a physician with whom the defendant has a bona fide physician-patient relationship; (2) the debilitating medical condition is severe and resistant to conventional medicine; and (3) marijuana is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. Likewise, in a

prosecution for the possession of marijuana, it is an affirmative defense that the defendant possessed marijuana because the marijuana was intended for medical use by an individual with a debilitating medical condition for whom the defendant is a caregiver; however, such a defendant must notify the State's Attorney of the intention to assert the affirmative defense and provide specified documentation. In either case, the affirmative defense may not be used if the defendant was using marijuana in a public place or was in possession of more than one ounce of marijuana.

Finally, medical necessity may be used as a mitigating factor in a prosecution for the possession or use of marijuana. A defendant who cannot meet the affirmative defense standard for a not guilty verdict may introduce, and the court must consider as a mitigating factor (with regard to penalties on conviction), any evidence of medical necessity. Pursuant to Chapter 351 of 2015, if a court finds that the use or possession of marijuana was due to medical necessity, the court *must dismiss* the charge.

Under § 7-302(g) of the Courts and Judicial Proceedings Article, the District Court must remit penalties collected from civil citations issued under § 5-601(c)(2)(ii) of the Criminal Law Article (use or possession of less than 10 grams of marijuana) to MDH for drug treatment and education programs.

State Revenues: General fund revenues decrease, potentially significantly, due to the bill's civil citation penalties for first and second offenses involving the possession of specified amounts of CDS for cases heard in the District Court.

Special fund revenues for MDH increase as a result of the bill's expansion of the civil citation provision for marijuana for first and second offenses to include de minimis quantities of CDS. The bill expands the application of § 5-601(c)(2)(ii) of the Criminal Law Article, which, under existing provisions, only applies to use or possession of less than 10 grams of marijuana, to include first and second offenses involving de minimis quantities of specified CDS. Therefore, pursuant to § 7-302(g) of the Courts and Judicial Proceedings Article, the District Court must remit the civil citation penalties collected under the bill to MDH for drug treatment and education programs. The Behavioral Health Administration in MDH administers the Marijuana Citation Fund. Special fund revenues totaled \$317,288 in fiscal 2020 and \$546,559 in fiscal 2019. MDH advises that the reduced revenues in fiscal 2020 were a result of the ongoing COVID-19 pandemic.

State Expenditures: General fund incarceration expenditures decrease minimally due to the bill's elimination of criminal penalties for specified CDS offenses. General fund expenditures increase by \$123,108 in fiscal 2022 only for the Judiciary to make one-time programming changes. Special and general fund expenditures for MDH increase for

substance use treatment. Any reduction in caseloads for the Office of the Public Defender (OPD) is likely to result in a redirection of resources to address other OPD cases.

Judiciary

The bill eliminates criminal penalties for possession of specified amounts of CDS and instead establishes civil citations for first and second offenses. Therefore, the District Court obtains exclusive original jurisdiction over such cases, and the circuit courts no longer have concurrent jurisdiction with the District Court. The Judiciary advises that the bill requires the District Court to flag citations for de minimis quantities of CDS in its system (as is currently the practice for use or possession of less than 10 grams of marijuana) and permanently shield these citations from public inspection. The District Court must also remit collected penalties to MDH. The Judiciary advises that costs to make the required one-time programming changes total approximately \$123,108 in fiscal 2022.

The Judiciary also advises that citations need to be recalled and revised to meet the bill's requirements at an additional cost of approximately \$25,000. However, the Department of Legislative Services advises that the District Court can implement the changes during routine reprinting of these citations using existing budgeted resources.

Department of Public Safety and Correctional Services

General fund expenditures for DPSCS decrease minimally due to fewer people being committed to State correctional facilities and reduced payments to counties for reimbursement of inmate costs.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,900 per month. Excluding overhead, the average cost of housing a new State inmate (including health care costs) is about \$1,075 per month. Excluding all health care (which is a fixed cost under the current contract), the average variable costs total \$222 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

DPSCS advises that in fiscal 2020, 77 individuals were sentenced to DPSCS facilities exclusively for possession of a CDS other than marijuana. The effect of the COVID-19 pandemic on these statistics and the amounts of CDS involved in these violations is unknown at this time. *For illustrative purposes only*, if 40 of the individuals in this group are issued civil citations instead of criminal penalties, State incarceration expenditures could decrease by approximately \$106,560. This assumes that (1) variable inmates costs total \$222 per month excluding health care; (2) these individuals are first-time offenders; and (3) these individuals would have received the maximum one-year incarceration penalty.

Maryland Department of Health

The bill also requires a court to order an individual who commits a first or second offense involving the possession of a de minimis quantity of CDS (including first or second offenses involving the possession of less than 10 grams of marijuana) to attend a drug education program approved by MDH and to refer the individual for a substance use disorder assessment. Under existing provisions, these requirements only apply to individuals younger than age 21 or to third or subsequent offenses involving the possession of less than 10 grams of marijuana.

MDH advises that an assessment costs the State \$158.26 if not covered by private insurance. However, the Public Behavioral Health System permits only one assessment in a 12-month period, absent a break in treatment. MDH also advises that individuals pay for court-ordered alcohol and drug education programs out of pocket. Therefore, special fund expenditures for MDH increase due to the expansion of the number of people who must undergo assessments. To the extent that the Marijuana Citation Fund contains insufficient funds to cover this cost, general fund expenditures may also increase. The magnitude of this increase cannot be readily determined at this time. There were approximately 12,000 violations during fiscal 2020 and approximately 17,000 during fiscal 2019 filed in the District Court for possession of less than 10 grams of marijuana. The Judiciary advises that the decreased number of violations in fiscal 2020 was a result of the COVID-19 pandemic. A breakdown of individuals in this group by age, repeat offenses, and insurance status is not readily available.

Office of the Public Defender

Given overall caseloads and resources for OPD, any resources devoted to OPD criminal cases that result in civil citations under the bill will be redirected to other agency cases.

Local Revenues: Revenues decrease, potentially significantly, as a result of the bill's civil citation penalties for first and second offenses involving possession of de minimis amounts of CDS and cases no longer being heard in the circuit courts.

Local Expenditures: Expenditures decrease, potentially significantly, as a result of the bill's elimination of the incarceration penalty for first and second offenses for possession of de minimis amounts of CDS and fewer individuals being committed to local detention facilities. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. Per diem operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years.

Additional Information

Prior Introductions: Similar bills have been introduced during previous legislative sessions. HB 193 of 2020 received a hearing in the House Judiciary Committee but was subsequently withdrawn. HB 325 of 2018 received an unfavorable report by the House Judiciary Committee. Its cross file, SB 446, was referred to the Senate Judicial Proceedings Committee but was withdrawn. Similar bills were also introduced during the 2016 and 2017 sessions.

Designated Cross File: None.

Information Source(s): Carroll, Harford, Montgomery, and St. Mary's counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland Department of Health; Department of Public Safety and Correctional Services; Department of State Police; Department of Legislative Services

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