

Department of Legislative Services
 Maryland General Assembly
 2004 Session

FISCAL AND POLICY NOTE
Revised

House Bill 295 (The Speaker and the Minority Leader, *et al.*)
 (By Request – Administration)

Judiciary

Judicial Proceedings

Crimes - Substance Abuse - Parole - Civil Commitment - Diversion

This Administration bill provides for the evaluation of nonviolent offenders for drug or alcohol dependency and for the diversion of such defendants to treatment services rather than incarceration.

Fiscal Summary

State Effect: The bill requires \$3 million in the FY 2005 budget to be specifically dedicated to the provisions of this bill. The FY 2005 budget provides that \$3 million of the appropriation to the Alcohol and Drug Abuse Administration may only be expended for substance abuse treatment as an alternative to incarceration. Incarceration costs for the Division of Correction (DOC) could decrease. The bill could also have some computer reprogramming costs for the Judiciary.

(in dollars)	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
SF Revenue	-	-	-	-	-
GF Expenditure	3,000,000	-	-	-	-
SF Expenditure	-	-	-	-	-
Net Effect	(\$3,000,000)	\$0	\$0	\$0	\$0

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Minimal for most jurisdictions, but for some **this bill could impose a mandate on a unit of local government.**

Small Business Effect: A small business impact statement was not provided by the Administration in time for inclusion in this fiscal note. The Department of Legislative Services assessment is discussed below.

Analysis

Bill Summary: The bill's provisions are as follows:

Parole Commission

The Parole Commission is required to consider a drug or alcohol evaluation when determining whether an inmate is suitable for parole. An inmate who has been determined to be amenable to drug or alcohol treatment may be released on parole prior to serving one-fourth of the sentence in order to undergo drug or alcohol treatment if the person is not serving a sentence:

- for a violent crime or for abuse and other offensive conduct;
- for a fourth offense of a narcotic or hallucinogenic violation;
- as a volume dealer, a kingpin, or a controlled dangerous substance (CDS) importer, or for use of a weapon in relation to drug trafficking;
- for possession of a firearm as a convicted drug felon; or
- for use of a minor to manufacture or distribute CDS.

Prosecutorial Options

The bill creates a new structured diversion system for State's Attorneys to use in nonviolent offenses through "*nolle prosequi* for drug or alcohol treatment" or "stet for drug or alcohol treatment."

- An offer of treatment diversion may be made via a motion by a State's Attorney or upon request of the defendant.
- In order to qualify, a defendant must be evaluated for drug or alcohol abuse by the Department of Health and Mental Hygiene (DHMH), its designee, or a private provider and, if the evaluation determines that the defendant is amenable to treatment, an appropriate treatment program that is approved by ADAA must be recommended.
- A defendant must accept the offer and sign a consent to disclosure of such treatment information as may be necessary to allow the disclosure of the disposition to criminal justice units.
- A State's Attorney must dismiss the charge and enter it on the stet or *nolle prosequi* docket upon successful completion of the drug or alcohol treatment by the defendant.
- A defendant may only receive one disposition of *nolle prosequi* or stet with the requirement of alcohol or drug treatment.
- The bill provides for the expungement of such charges.

- Unless indigent, a defendant who receives such a disposition must pay an administrative fee of \$150 to be paid into the Maryland Substance Abuse Fund created by the bill.
- The diversion system does not apply to: (1) a person charged with a crime of violence, abuse and other offensive conduct, stalking or harassment, second degree assault, reckless endangerment, volume dealer, kingpin, importer of CDS, use of weapon as a separate crime in connection with CDS, carrying a firearm if a convicted felon, or use of a minor in connection with CDS; or (2) a person who has been convicted of a crime of violence within the previous five years.
- A court may not strike the entry of judgment or defer further proceedings or stay the entering of judgment and place a defendant on probation for certain drunk or drugged driving offenses if within the preceding five years the defendant has been convicted of a drunk or drugged driving offense or has been placed on probation under the provisions of this bill after being charged with a drunk or drugged driving offense.

In any case where the court agrees that, upon successful completion of any treatment ordered as a condition of probation, the court will enter a probation before judgment (PBJ), when the defendant successfully completes the treatment, the Division of Parole and Probation must notify the court and the court must enter PBJ.

In any other case, on the successful completion by a defendant of any treatment ordered as a condition of probation, the Division of Parole and Probation must notify the court and the State's Attorney. Unless the State's Attorney files an objection within 30 days, the court may enter a PBJ. If the State's Attorney files a timely objection, the court must hold a hearing.

Prior to the revocation of any probation, in addition to any other factors the court considers in connection with determination of an appropriate sentence, the court must consider any evaluation or recommendation of any licensed health care professional, and relevant information about the defendant's drug or alcohol abuse, and make a finding on the record as to the defendant's amenability to treatment and the interest of justice.

Maryland Substance Abuse Fund

The bill establishes the Maryland Substance Abuse Fund, as a nonlapsing special fund, to be used for evaluation and treatment of criminal defendants for drug or alcohol abuse problems. The fund consists of the \$150 administrative fee cited above, appropriations in the State budget to the fund, investment earnings of the fund, and other money accepted for the benefit of the fund from a public or private source. The fund must be used by ADAA in the following priority order for: (1) planning expenses and related costs incurred by local drug and alcohol councils established under this bill; (2) planning expenses and related costs incurred by any State unit designated to coordinate planning

by local drug and alcohol councils and review grant requests from local governments; and (3) substance abuse evaluation and treatment services, including services provided through a drug treatment court. Administrative expenditures from the fund may be made only in accordance with the State budget. Disbursements from the fund must supplement, and may not substitute for, any other funds appropriated for substance abuse evaluation and treatment services.

The bill prohibits the fund from reverting or being credited to the general fund or any other State special fund.

Substance Abuse Evaluations and Treatment

Before or during a criminal trial or before sentencing, the court may order DHMH to evaluate a defendant to determine whether, by reason of drug or alcohol abuse, the defendant is in need of and may benefit from treatment, if it appears to the court that the defendant has an alcohol or drug abuse problem, or the defendant alleges an alcohol or drug dependency. If the court orders such an evaluation, the evaluator shall conduct an evaluation of the defendant and submit a complete report of the evaluation within seven days to the court, DHMH, and the defendant or defendant's attorney. Whenever an evaluator recommends treatment, the report must name a specific program able to provide the recommended treatment, and give an actual or estimated date when the program can begin treatment of the defendant. A designee of DHMH may carry out any of its duties in this regard if appropriate funding is provided. A court may order inpatient evaluation of a defendant if appropriate.

A court that finds in a criminal case that a defendant has an alcohol or drug dependency may commit the defendant as a condition of release, after conviction, or at any other time the defendant voluntarily agrees to participate in treatment, to DHMH for treatment that the department recommends. A defendant need not file motion for reconsideration. A court must first order an outpatient or inpatient evaluation of the defendant.

A designee of DHMH may carry out any of its duties under these provisions if appropriate funding is provided.

The bill provides for supervision and transportation of defendants committed for treatment. If the defendant withdraws consent to treatment, DHMH must notify the court and return the defendant to the court within seven days for further proceedings. A commitment must be for at least 72 hours and not more than one year, which may be extended by the court upon a showing of good cause. DHMH may terminate treatment if it determines that treatment is not in the best interest of the defendant or the defendant is no longer amenable to treatment. When a defendant is to be released from treatment, DHMH must notify the court. If a defendant escapes from treatment, DHMH is required to notify the court, which may issue an arrest warrant. The time during which a

defendant is held for evaluation or treatment is credited against any sentence imposed by the court.

Local Alcohol and Drug Abuse Councils

The bill requires each county to have a local drug and alcohol abuse council. The bill specifies the membership of a council and provides that the Governor or the Governor's designee may designate another local agency or organization as a county's council. A council is allowed to determine its own governing structure and must submit a plan, as specified, to ADAA. A council must submit a summary report to the Governor by December 1, 2004 on its membership, organization, rules, progress in developing a plan, and compliance with the bill's provisions applicable to a council. On July 1, 2005, and every two years thereafter, a council must submit a local plan to the Governor and report every six months to ADAA on its plan implementation progress.

The bill provides for the review of public or private applications or grant proposals in a county by the local council. A county, or a county unit, applying for State funds involving evaluation, prevention, or treatment services within that county must submit that application to the local council for its consideration. ADAA may provide each local council with any necessary technical assistance. ADAA must provide any funds available from the Maryland Substance Abuse Fund or other sources for operation of the local council on submission of a request for funds and approval of a council's budget in accordance with ADAA regulations. The planning, reporting, and review requirements for a local council under these provisions do not apply unless appropriate State funding for fulfilling the requirements has been provided.

The bill requires DHMH to report to the Governor and the General Assembly by December 31, 2005 on the implementation and costs or savings of these provisions.

In addition, the bill stipulates that, unless an appropriation of at least \$3 million is dedicated in the fiscal 2005 State budget to specifically carry out these provisions, these provisions are null and void and of no force and effect.

The bill's provisions relating to local drug and alcohol councils are effective July 1, 2004. All other provisions are effective October 1, 2004.

Current Law: "*Nolle prosequi*" means a formal entry on the record by the State that declares the State's intention not to prosecute a charge. On motion of the State's Attorney, a court may indefinitely postpone trial of a charge by marking the charge "stet" on the docket. A stетted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of the court for good cause.

A person who has been charged with the commission of a crime, including a violation of the Transportation Article for which a term of imprisonment may be imposed, may file a

petition listing relevant facts for expungement of a police record, court record, or other record maintained by the State or a political subdivision if one of nine specified conditions is met, including entry of a *nolle prosequi* or the indefinite postponement of a trial on a criminal charge via a “stet” on the docket. Procedures and deadlines for such filings are specified. A person is not entitled to expungement if: (1) the petition is based on the entry of probation before judgment, a *nolle prosequi*, or a stet, or the grant of a pardon by the Governor; and (2) the person, since the full and unconditional pardon or entry, has been convicted of a crime other than a minor traffic violation, or the person is a defendant in a pending criminal proceeding.

Before or during a criminal trial or prior to sentencing, a court may order DHMH to evaluate a defendant to determine whether, by reason of drug or alcohol abuse, the defendant is in need of and may benefit from treatment if it appears to the court that the defendant has an alcohol or drug abuse problem or the defendant alleges an alcohol or drug dependency. The court must set and may change the conditions under which the examination is to be conducted.

Except in a capital case, on consideration of the nature of the charge, the court: (1) may require or permit an examination to be conducted on an outpatient basis; and (2) if an outpatient examination is authorized, must set bail for the defendant or authorize the release of the defendant on personal recognizance. If a defendant is to be held in custody for examination: (1) the defendant may be confined in a detention facility until DHMH is able to conduct the examination; or (2) the court may order confinement of the defendant in a medical wing or other secure unit of a detention facility, if the court finds it appropriate for the health or safety of the defendant.

If the court finds that, because of the apparent severity of the alcohol or drug dependency or other medical or psychiatric complications, a defendant in custody would be endangered by confinement in a jail, the court may order DHMH to either place the defendant, pending examination, in an appropriate health care facility or have local health department staff, or other qualified, appropriate personnel immediately conduct an evaluation of the defendant.

Unless DHMH retains a defendant, the defendant must be promptly returned to the court after an examination. A defendant who is detained for an examination may question at any time the legality of the detention by a petition for a writ of habeas corpus.

Procedures governing an evaluation of a defendant are specified. Before a court commits a defendant to DHMH for evaluation, the court must consult with ADAA. DHMH must provide the required evaluation services. DHMH has the obligation to engage in reasonable efforts to facilitate the admission of a defendant to an appropriate evaluation facility.

If a court finds in a criminal case that a defendant has an alcohol or drug dependency, the court may commit the defendant as a condition of release, after conviction, or at any other time the defendant voluntarily agrees to treatment to DHMH for inpatient, residential, or outpatient treatment. Before a court may commit a defendant to DHMH, the court must: (1) offer the defendant the opportunity to receive treatment; (2) obtain the written consent of the defendant to receive treatment and for the reporting of information back to the court; and (3) consult with ADAA. DHMH must provide required services.

The procedures for admission of a defendant to the appropriate treatment facility are provided. A defendant's withdrawal of consent to treatment must be promptly reported to the court. Procedures for returning a defendant to the court, further proceedings, and the commitment of such a defendant are specified.

Any time served by a criminal defendant held for evaluation or committed treatment must be credited against the sentence imposed by the court.

In determining whether an inmate is suitable for parole, the Parole Commission must consider 10 specified factors, including the physical, mental, and moral qualifications of the inmate and the progress of the inmate during confinement.

Background: Due to recent increases in prison population growth and the growth of budget deficits, many states have recently tried to modify their sentencing and release policies, particularly with respect to nonviolent drug offenders. The latest prisoner survey released by the U.S. Justice Department in July 2003 found that after two years of slowing prison growth, the nation's incarcerated population rose at three times the rate of the previous year.

Many states have recently begun making changes in sentencing and release policies in order to limit and control incarceration costs. Some have sought explicit treatment alternatives to incarceration – especially for the nonviolent drug offender. For example, since 1993, Kansas has operated under presumptive sentencing, which is based on the assumption that incarceration is reserved for serious offenders. In Arizona and California, as a result of ballot initiatives, the approach to drug offenders has shifted to mandated treatment rather than incarceration.

In a typical year in Maryland, 20,000 offenders are placed under the supervision of the Department of Public Safety and Correctional Services (DPSCS) for drug convictions, with over 75% of those offenders being granted probation rather than incarceration at DOC. Those receiving terms of incarceration, rather than probation, are often repeat offenders who are often also involved in other serious offenses. Over the past five fiscal years, the drug offender standing population has increased nearly 18% from 4,648 offenders in 1999 to 5,477 in 2003.

DPSCS currently attempts to provide treatment to the less dangerous of those drug offenders and gives them consideration for early release, but most are not minor drug users and almost none are first-time, simple drug possession offenders.

Nationally, drug treatment courts have often shown reduced incidence of new arrests for those who attend or graduate. Such courts strive to make productive and taxpaying citizens out of their clientele, rather than simply to eliminate the person's presence among the inmate population. With 1,078 drug courts in operation around the country, these programs have often claimed to reduce criminality and to increase criminal justice system savings as high as \$10 for every \$1 spent by a state. There are currently adult drug courts operating in Baltimore City and Anne Arundel, Harford, and Prince George's counties. Juvenile drug treatment courts currently operate in Baltimore City and Anne Arundel, Baltimore, and Harford counties. Additional drug treatment courts are in the planning stages in 10 jurisdictions.

The House Special Committee on Drug and Alcohol Abuse and the Senate Special Committee on Substance Abuse have had an ongoing interest in the diversion of drug and alcohol dependent offenders to treatment rather than incarceration.

State Fiscal Effect: While this bill provides for the evaluation and diversion of certain offenders into drug treatment services, rather than to prison, its provisions are largely permissive and do not require the diversion of any persons to treatment. Without knowing how many persons would actually be diverted under the provisions of this bill to drug or alcohol treatment services as qualified and amenable to treatment, it is difficult to accurately estimate the bill's year-to-year effect.

For purposes of illustration only, if in any fiscal year 100 persons were evaluated as amenable and committed to ADAA for treatment services under this bill, and if half of those persons were not found indigent, the following would occur:

- the Maryland Substance Abuse Fund would receive \$7,500 in special fund revenue to be used by ADAA for: (1) planning expenses and related costs incurred by local drug and alcohol councils; (2) planning expenses and related costs incurred by any State unit designated to coordinate planning by local drug and alcohol councils and review grant requests from local governments; and (3) substance abuse evaluation and treatment services, including services provided through a drug treatment court;
- persons mandated to treatment under this bill would almost certainly need a highly therapeutic community treatment environment, rather than any other available residential treatment modality. Offenders who would normally be committed to a prison sentence require an extensive and highly structured treatment environment as offered in a therapeutic community. The cost of such treatment is estimated at \$11,833 per year. Accordingly, treatment costs would be \$1,183,300 (\$11,833 x 100). ADAA reports that, while the cost of such care appears to be high,

compared to that of a less restrictive treatment environment (other residential treatment can cost about \$4,900 per patient per year), current research demonstrates considerable benefit from initiating treatment at this level of care. A significant increase is found in program completion and employability while a reduction in drug use, arrest rates, and the offenders return to institutional incarceration is realized as the offender participates in the addictions continuum of care;

- any per person savings for DOC would be at the variable inmate cost of \$1,440 per year. While it is not clear how many of the 100 persons committed to ADAA would otherwise go to prison, if half of the 100 persons would have been imprisoned, the savings for DOC would be \$72,000; and
- any savings that would accrue to the Division of Parole and Probation are believed to be minimal.

In addition, the bill's creation of a Maryland Substance Abuse Fund would require changes to the District Court and circuit courts computer systems and forms. The Judicial Information Systems' cost estimates for these one-time reprogramming modifications in fiscal 2005 are \$39,936 for the District Court and \$77,280, statewide. However, the Department of Legislative Services advises that if other legislation is passed requiring computer reprogramming changes, economies of scale could be realized. This would reduce the costs associated with this bill and other legislation affecting the Judiciary.

The fiscal 2005 budget has approximately \$130 million for drug and alcohol treatment services in the State, an increase of about \$5.7 million over fiscal 2004. Of that amount, \$3 million may only be expended for substance abuse treatment as an alternative to incarceration. This bill requires that at least \$3 million be dedicated in the fiscal 2005 State budget to specifically carry out these provisions. After fiscal 2005, the actual rate at which State's Attorneys and courts may initiate diversion and commitment procedures under the provisions of this bill may be governed, year to year, by available treatment slots and the extent to which State spending can help eliminate waiting lists at appropriate treatment providers.

The Office of the State's Attorneys' Coordinator and the Office of the Public Defender report that the bill's provisions will have no fiscal impact on the operations of State's Attorneys or public defenders, statewide, respectively. The Department of Juvenile Services reports that the bill will have no fiscal impact.

Local Fiscal Effect: A limited survey of local governments generally elicited a view that the provisions of this bill would have minimal or no fiscal impact, depending on the number of diversions.

Caroline County believes that the bill's provisions are somewhat "cumbersome," especially as it relates to the local drug and alcohol abuse councils, but would not impose

any significant costs on the county. Caroline County further believes that the bill does not provide any benefits for defendants that could not be pursued under existing law.

Montgomery County reports that the bill would require the hiring of an additional therapist and a community therapist aide in fiscal 2005 at a cost of \$120,000, plus \$10,000 for urine monitoring, lab equipment, and supplies and \$100,000 for unidentified contractual services. These costs arise from case management responsibilities and a need to formalize the county's role, and scope, for evaluations, referrals, and placements.

Small Business Effect: Potential meaningful. In fiscal 2002, all residential drug and alcohol treatment service providers in the State had admissions of 1,138 patients. The extent to which this bill may expand the number and quality of existing and future drug and alcohol treatment services providers in the State cannot be readily predicted, but would be largely dependant on the extent to which commitments to treatment are actually increased and State spending on treatment services impacts diversion and commitment initiatives by prosecutors and the courts.

Additional Information

Prior Introductions: None.

Cross File: SB 194 (The President, *et al.*) (By Request – Administration) – Judicial Proceedings.

Information Source(s): Office of the State's Attorneys' Coordinator, Department of Juvenile Services, Montgomery County, Carroll County, Caroline County, Charles County, Judiciary (Maryland District Court, Administrative Office of the Courts), Office of the Public Defender, Department of Health and Mental Hygiene (Alcohol and Drug Abuse Administration), Department of Public Safety and Correctional Services (Division of Correction, Division of Parole and Probation, Division of Pretrial Detention and Services), Department of Legislative Services

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