

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE

Senate Bill 552 (Senator Gladden)
Judicial Proceedings

Criminal Procedure - Penalties - The "Smart on Crime" Act

This bill alters penalties applicable to specified primary drug offenses under Title 5, Part I of the Criminal Law Article.

Fiscal Summary

State Effect: Potential decrease in general fund expenditures due to the bill's changes in sentencing provisions based on quantity and reviews of related sentencing. This could shift some incarcerations outside of Baltimore City to local detention facilities rather than State facilities. Whether that decrease is significant over time depends on the bill's effect on plea bargaining and sentencing practices, especially with regard to persons charged with multiple offenses, which cannot be accurately predicted at this time. Potential minimal revenue increases as more drug cases shift from the circuit courts to the District Court.

Local Effect: Potential significant increases in correctional facility costs. Potential decrease in revenues as more drug cases shift from the circuit courts to the District Court.

Small Business Effect: None.

Analysis

Bill Summary: Specifically, the bill provides that:

- a person convicted of the misdemeanor of possessing or administering a controlled dangerous substance is subject to maximum penalties of imprisonment for 90 days

or a fine of \$500 if the violation involves an amount of the substance equal to or less than one-tenth of a gram;

- eliminates the manufacture of a controlled dangerous substance from the current felony prohibition against the manufacture, distribution, or possession with intent to distribute a controlled dangerous substance;
- adds a prohibition against the manufacture of a controlled dangerous substance to a current felony prohibition against the manufacture, distribution, or possession of equipment used to produce a controlled dangerous substance;
- provides that a person convicted of distribution, or possession with intent to distribute, a controlled dangerous substance is guilty of a misdemeanor and subject to maximum penalties of imprisonment for five years and/or a fine of \$1,000 if the violation involved an amount of the substance equal to or less than specified amounts; and
- provides that a person is not eligible for the new misdemeanor penalty sentencing if convicted in the previous three years of such an offense or a crime of violence.

The bill provides that a person convicted of any of the covered offenses is not prohibited from participation in a drug treatment program under § 8-507 of the Health-General Article because of the length of the sentence.

A person serving a term of confinement that includes a mandatory minimum sentence imposed on or before October 1, 2008 for a violation of specified primary drug-related offenses is eligible to be granted:

- one hearing before the court to review the mandatory minimum sentence as provided in Maryland Rule 4-345 (*Sentencing – Revisory power of court.*), even if the defendant did not timely file a motion for reconsideration or a motion for reconsideration was denied by the court; and
- one sentence review of the mandatory minimum sentence by a review panel as provided in § 8-102 of the Criminal Procedure Article.

The court or the review panel may strike the restriction against parole or reduce the length of the sentence. All such applications for review must be filed on or before September 30, 2011.

Current Law: A person may not possess or administer a controlled dangerous substance to another, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice. A person may not obtain or attempt to obtain a controlled dangerous substance, or procure or attempt to procure the administration of a controlled dangerous substance by fraud, deceit, misrepresentation,

subterfuge, or other specified similar means. A violator is guilty of a misdemeanor and subject to maximum penalties of imprisonment for four years and/or a fine of \$25,000. However, a violation involving the use or possession of marijuana is subject to maximum penalties of imprisonment for one year and/or a fine of \$1,000. In a prosecution for the use or possession of marijuana, the defendant may introduce and the court must consider as a mitigating factor any evidence of medical necessity. A finding of medical necessity allows a court to impose a maximum fine of \$100.

For other specified primary crimes involving controlled dangerous substances and paraphernalia covered by the bill, a person may not:

- manufacture, distribute, dispense, or possess with intent to distribute a controlled dangerous substance;
- manufacture, distribute, or possess a machine, equipment, or device that is adapted to produce a controlled dangerous substance with intent to use it to produce, sell, or dispense a controlled dangerous substance;
- create, distribute, or possess with intent to distribute a controlled dangerous substance;
- manufacture, distribute, or possess equipment designed to render a counterfeit substance;
- keep a common nuisance; or
- pass, issue, make, or possess a false, counterfeit, or altered prescription for a controlled dangerous substance with intent to distribute the controlled dangerous substance.

A violator is guilty of a felony and subject to maximum penalties of imprisonment for five years and/or a fine of \$15,000. A subsequent offender under these prohibitions must be sentenced to imprisonment for two years, which term is nonsuspendable and nonparolable.

When the controlled dangerous substance is a Schedule I or Schedule II narcotic drug, a convicted person is subject to maximum penalties of imprisonment for 20 years and/or a fine of \$25,000. A repeat offender or conspirator, even if the prior conviction was under federal law or in another state, must receive a mandatory minimum sentence of 10 years and is subject to a maximum fine of \$100,000. The mandatory minimum sentence is nonsuspendable and nonparolable.

A third-time offender or conspirator convicted of those same primary crimes involving a Schedule I or Schedule II narcotic drug, if certain confinement and conviction prerequisites are met, is subject to a mandatory minimum nonsuspendable, nonparolable

sentence of 25 years and a maximum fine of \$100,000. A convicted offender or a conspirator with three or more separate convictions for such offenses is subject to a mandatory minimum nonsuspendable, nonparolable sentence of 40 years and a maximum fine of \$100,000.

When the controlled dangerous substance was specified other drugs – including PCP, LSD, and MDMA – a convicted person is subject to maximum penalties of imprisonment for 20 years and/or a fine of \$20,000. A repeat offender or conspirator, even if the prior conviction was under federal law or in another state, must receive a mandatory minimum sentence of 10 years and is subject to a maximum fine of \$100,000. The mandatory minimum sentence is nonsuspendable and nonparolable.

A second-time offender or conspirator convicted of those same primary crimes involving the specified other drugs, if certain confinement and conviction prerequisites are met, is subject to a mandatory minimum nonsuspendable, nonparolable sentence of 25 years and a maximum fine of \$100,000. A convicted offender or a conspirator with three or more separate convictions for such offenses is subject to a mandatory minimum nonsuspendable, nonparolable sentence of 40 years and a maximum fine of \$100,000.

A volume dealer, as defined by the amount of specified substances, is subject to a maximum fine of \$100,000 and, if the offense involved manufacturing, distributing, possessing with intent to distribute, or dispensing the controlled dangerous substance, the volume dealer is subject to a mandatory minimum nonsuspendable, nonparolable sentence of five years.

A second-time offender of one of the covered offenses is not prohibited from participation in a drug treatment program under § 8-507 of the Health-General Article because of the length of the sentence.

Persons previously convicted of a primary controlled dangerous substance offense (including volume dealers, drug kingpins, and importers) are prohibited from possessing a regulated firearm. A violator is subject to a nonparolable, nonsuspendable mandatory minimum sentence of five years.

Under § 8–102 of the Criminal Procedure Article, a person convicted of a crime by a circuit court and sentenced to serve a sentence that exceeds two years in a correctional facility is entitled to a single sentence review by a review panel.

Under Maryland Rule 4-345, generally, upon a motion filed within 90 days after its imposition: (1) in the District Court, if an appeal has not been perfected or has been dismissed; and (2) in a circuit court, whether or not an appeal has been filed, a court has

revisory power and control over a sentence, except that it may not revise the sentence after five years from the date the sentence was originally imposed and the court may not increase the sentence.

The court may not revise a sentence after five years from the date the sentence originally was imposed on the defendant and may not increase the sentence, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

Maryland Rule 4-345 also requires the State's Attorney to give notice to each victim and victim's representative who has filed an official request to be notified that states: (1) that a motion to modify or reduce a sentence has been filed; (2) that either the motion has been denied without a hearing or the date, time, and location of the hearing; and (3) if a hearing is to be held, that the victim or victim's representative may attend and testify. The court may modify, reduce, correct, or vacate a sentence only on the record in open court after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present. No hearing may be held on a motion to modify or reduce the sentence until the court has determined that the notice requirement has been met. If the court grants the motion, it must prepare or dictate into the record a statement of the reasons on which the ruling is based.

Under Health-General Article, § 8-507, a court is authorized to refer an individual to substance abuse treatment as an alternative to incarceration.

State Fiscal Effect: Not including drug kingpin convictions or volume dealers, in fiscal 2007, DOC had a drug offense intake (as the most serious offense) of 4,631 persons for the covered offenses as follows (including Baltimore City intakes with sentences less than 18 months):

<u>DOC CDS Offense Category</u>	<u>Intake</u>	<u>Average Sentence</u>
Possession	2,159	7.5 months
Possession w/ Intent to Distribute	1,069	53.1 months
Distribution	1,000	56.7 months
Conspire to Distribute	139	31.3 months
Possession Marijuana	77	3.2 months
Distribution Marijuana	6	8.4 months
Other CDS Offenses	181	24.6 months
Total	4,631	30 months

The Division of Parole and Probation's fiscal 2007 intake for persons who drew probation rather than imprisonment for similar offenses was as follows:

<u>Probation CDS Offense Category</u>	<u>Intake</u>
Possession	7,316
Possession w/ Intent to Distribute	2,196
Distribution	1,787
Conspire to Distribute	435
Possession Marijuana	2,542
Distribution Marijuana	101
Other CDS Offenses (incl. paraphernalia)	488
Total	14,865

The State Commission on Criminal Sentencing Policy reports that the State sentencing guidelines database indicates a total of 19 persons received a mandatory minimum 10-year sentence and 6 persons received a mandatory minimum 25-year sentence for a drug distribution conviction in fiscal 2007. None were sentenced to a 40-year mandatory minimum sentence during the year.

Because it is unknown what controlled dangerous substance, or the amounts of the substance(s), were at issue for any of the convictions and sentences cited above, it is difficult to know the extent to which this bill could decrease average incarceration terms and overall State incarceration costs.

In any case, it is assumed that this bill, by itself, would not affect the number of drug arrests or convictions in the State annually. However, because the bill would significantly reduce the amount of incarceration time imposed by a court for some unknown number of drug offenders, a significant number of offenders outside of Baltimore City would serve their sentences in local jail facilities. It is also assumed that, under the bill's maximum 90-day sentencing provision for some possession cases, more sentencing proceedings could result in no additional incarceration time under a sentencing order of "time served."

Accordingly, general fund expenditures for incarceration costs could decrease due to some people being committed to DOC facilities for shorter periods of time and some persons now sentenced to DOC facilities being sentenced to local facilities. This latter effect could also result in increased payments to counties for reimbursement of inmate costs. The actual number of convicted persons (prospectively) this may affect, or the effect on their actual sentences served, is unknown.

Persons serving a sentence longer than 18 months are incarcerated in DOC facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$2,600 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new DOC inmate (including medical care and variable costs) is \$526 per month. Excluding medical care, the average variable costs total \$148 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 DOC. The State reimburses counties for part of their incarceration costs, on a per diem basis, after a person has served 90 days. State per diem reimbursements for fiscal 2009 are estimated to range from \$19 to \$71 per inmate depending upon the jurisdiction. Persons sentenced to such a term in Baltimore City are generally incarcerated in DOC facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Given the number of persons now serving sentences for drug-related offenses, over time, the provisions of this bill would tend to lead to significant reductions in State correctional costs, but only to the extent that sentencing patterns for other offenses are not altered. The bill's impact on correctional costs for DOC could begin as early as fiscal 2009, and would tend to grow over time.

The bill is not expected to significantly impact the operations of State's Attorneys or the overall operations of the Public Defender. Referrals to substance abuse treatment under Health-General Article, § 8-507 are not expected to be affected. The Commission on Criminal Sentencing Policy advises that alterations to the classifications of offenses within its databases could be accommodated with existing budgeted resources.

Local Revenues: Because this bill would shift some unknown number of cases from the circuit courts to the District Court, revenues could decrease.

Local Expenditures: Expenditures could increase significantly as a result of a potential increase in the number of persons sentenced to local detention facilities rather than State facilities. Counties pay the full cost of incarceration for people in their facilities for the first 90 days of the sentence, plus part of the per diem cost after 90 days. Per diem operating costs of local detention facilities are expected to range from \$40 to \$129 per inmate in fiscal 2009.

Additional Information

Prior Introductions: None.

Cross File: HB 845 (Delegate Anderson, *et al.*) – Judiciary.

Information Source(s): State's Attorneys' Association, Judiciary (Maryland District Court), Department of Health and Mental Hygiene, Commission on Criminal Sentencing Policy, Department of Public Safety and Correctional Services, Department of Legislative Services

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