

Department of Legislative Services  
Maryland General Assembly  
2012 Session

FISCAL AND POLICY NOTE  
Revised

Senate Bill 995

(Senator Brinkley, *et al.*)

Judicial Proceedings

Health and Government Operations and  
Judiciary

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Medical Marijuana - Caregivers - Certificate of Qualifying Patient

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This emergency bill establishes that it is an affirmative defense, in a prosecution for the possession of marijuana or related paraphernalia, that the defendant possessed marijuana or paraphernalia because the defendant was a caregiver and the marijuana or paraphernalia was intended for medical use by an individual with a debilitating medical condition. The bill specifies that 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.

In addition, the bill establishes specified legal protections (as well as limits on those protections) for patients who qualify to use medical marijuana and physicians who certify qualifying patients. The bill also provides a statutory form for a written certification of a qualifying patient.

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Fiscal Summary

**State Effect:** Minimal decrease in general fund revenues and expenditures due to the bill's establishment of an affirmative defense for caregivers in a prosecution for the possession of marijuana or related paraphernalia.

**Local Effect:** Minimal decrease in revenues and expenditures due to the bill's establishment of an affirmative defense for caregivers in a prosecution for the possession of marijuana or related paraphernalia.

**Small Business Effect:** None.

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## Analysis

### Bill Summary:

#### *Caregivers, Qualifying Patients, and Written Documents*

A “caregiver” is a State resident who (1) is at least 21 years of age or, if the individual is providing care to a family member, spouse, or domestic partner, is at least 18 years of age; (2) has not been convicted of a felony for either a crime of violence or a violation of a State or federal controlled substances law; and (3) is one of no more than two designated caregivers for a patient who has been diagnosed with a debilitating medical condition by a physician with whom the patient has a bona fide physician-patient relationship.

“Qualifying patient” means (1) a State resident who suffers from a debilitating medical condition and possesses a written certification issued to the patient by a physician with whom the patient has a bona fide physician-patient relationship; or (2) an individual who is not a State resident (or has been a State resident for fewer than 30 days), suffers from a debilitating medical condition, and possesses a valid written certification (or equivalent document) issued under the laws of another state that allows the individual to engage in the medical use of marijuana.

A “written certification” is a signed and dated document, valid for one year, that is (at least substantially) the statutory form specified in the bill. A written certification is valid only if provided in the course of a bona fide physician-patient relationship after the physician has completed a full assessment of the qualifying patient’s medical history. In addition, a written certification is valid for a patient who is a minor only if it is accompanied by a statement, from a custodial parent or legal guardian who is responsible for the minor’s health care decisions, affirming that (1) the physician has explained to the parent or guardian the potential risks and benefits of the medical use of marijuana; and (2) the parent or guardian agreed to allow the minor’s medical use of marijuana and control the minor’s acquisition and frequency of medical use of marijuana. A valid written certification (or its equivalent) issued under the laws of another state or U.S. district or territory that allows a patient to possess marijuana for medical purposes has the same force and effect as a written certification issued in Maryland.

#### *Legal Protections and Limitations*

A qualifying patient is not subject to arrest, citation, prosecution, or civil or administrative penalty – and may not be denied a right or privilege – for the medical use of marijuana. Furthermore, the possession of a written certification may not be the basis for a finding of probable cause to search an individual (or the individual’s property) or

otherwise subject the individual (or the individual's property) to inspection by a governmental unit. In addition, for the purposes of medical care (including organ transplants), a qualifying patient's use of marijuana in accordance with the bill is the equivalent of the authorized use of any other medication used at the direction of a physician and may not constitute the use of an illicit substance or otherwise disqualify a patient from needed medical care.

If a person is otherwise entitled to custody of (or visitation or parenting time with) a minor, the person may not – solely for conduct allowed under the bill – be denied that right or be presumed guilty of neglect or child endangerment. In addition, an individual is not subject to arrest or prosecution solely for being in the presence or vicinity of the medical use of marijuana by a qualifying patient as allowed under the bill.

A physician is not subject to arrest, prosecution, or civil or administrative penalty (including disciplinary action by an occupational or professional licensing board) – and may not be denied a right or privilege – solely for providing a written certification or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana. However, the bill may not be construed to prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition.

The bill neither authorizes an individual to engage in, nor prevents the imposition of penalties for, (1) performing a task under the influence of marijuana when doing so would constitute negligence or professional malpractice; (2) operating, navigating, or controlling a motor vehicle, aircraft, or boat while under the influence of marijuana; or (3) smoking marijuana in a public place, in a motor vehicle, or on private property (that is either rented from a landlord or an attached dwelling *and* subject to specified policies prohibiting the smoking of marijuana on the property).

The bill does not require a public or private health insurer to reimburse an individual for the costs associated with the medical use of marijuana.

**Current Law:** In a prosecution for the use or possession of marijuana or for the use or possession of drug paraphernalia related to marijuana, it is an affirmative defense that the defendant used or possessed the marijuana or marijuana paraphernalia 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. 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.

A “bona fide physician-patient relationship” is a relationship in which the physician has ongoing responsibility for the assessment, care, and treatment of a patient’s medical condition. A “debilitating medical condition” is a chronic or debilitating disease or medical condition or the treatment of a chronic or debilitating disease or medical condition that produces one or more of the following, as documented by a physician with whom the patient has a bona fide physician-patient relationship: (1) cachexia or wasting syndrome; (2) severe or chronic pain; (3) severe nausea; (4) seizures; (5) severe and persistent muscle spasms; or (6) any other condition that is severe and resistant to conventional medicine.

Medical necessity may be used not only as an affirmative defense, but also as a mitigating factor, in a prosecution for the possession or use of marijuana or related paraphernalia. Thus, a defendant who cannot meet the affirmative defense standard for a not guilty verdict may still have medical necessity considered by the court with regard to penalties on conviction. If a court finds that a defendant used or possessed marijuana or related paraphernalia because of medical necessity, the maximum penalty that the court can impose is a fine of up to \$100.

If a court does not find that there was medical necessity, a violator of prohibitions against simple possession or use of marijuana is guilty of a misdemeanor and subject to fines of up to \$1,000 and/or imprisonment for up to one year. A violator of prohibitions against use or possession with intent to use drug paraphernalia is guilty of a misdemeanor and subject to fines of up to \$500; for each subsequent violation, a violator is subject to fines of up to \$2,000 and/or imprisonment for up to two years.

The Board of Physicians may not reprimand, place on probation, or suspend or revoke a license of a licensee for providing a patient with a written statement, medical records, or testimony that, in the licensee’s professional opinion, the patient is likely to receive therapeutic or palliative relief from marijuana.

**Background:** In 1996, California became the first state to allow the medical use of marijuana. Since then, 15 other states (as well as the District of Columbia) have enacted similar laws. States with medical marijuana laws generally have some form of patient registry and provide protection from arrest for possession of up to a certain amount of marijuana for medical use. Maryland is an exception; although State law allows for medical necessity as an affirmative defense, it does not provide a means for patients to actually obtain marijuana.

Marijuana is classified as a Schedule I controlled substance at the federal level, making distribution a federal offense. In October 2009, the Obama Administration sent a memorandum advising federal prosecutors that it is not an efficient use of resources to prosecute individuals who use marijuana for medical purposes in accordance with state

laws. In June 2011, however, the Obama Administration sent another memorandum advising that, while this view of the efficient use of resources had not changed, persons who are in the business of cultivating, selling, or distributing marijuana (and those who knowingly facilitate such activities) are in violation of federal law and are subject to federal enforcement action.

Chapter 215 of 2011 required the Secretary of Health and Mental Hygiene to convene a workgroup to develop a model program for facilitating patient access to marijuana for medical purposes. The Secretary was required to report, by December 1, 2011, on the workgroup's findings, including draft legislation that would establish a program to provide access to marijuana in the State for medical purposes. Due to a lack of consensus, the workgroup ultimately submitted two separate plans for consideration by the General Assembly: one that is based on an investigational use model and another that more closely resembles the traditional medical marijuana program model that is used in other states. The present bill does not reflect either of these proposals.

**State Revenues:** General fund revenues decrease minimally due to fewer cases heard in the District Court as a result of the bill's establishment of an affirmative defense for caregivers in a prosecution for the possession of marijuana or related paraphernalia.

**State Expenditures:** General fund expenditures decrease minimally due to fewer people being committed to Division of Correction facilities for convictions in Baltimore City. The bill's impact on the number of people convicted of the possession of marijuana or related paraphernalia is expected to be minimal.

Generally, persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to a local detention facility. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

**Local Revenues:** Revenues decrease minimally to reflect fewer monetary fines collected from cases heard in the circuit courts due to the bill's establishment of an affirmative defense for caregivers in a prosecution for the possession of marijuana or related paraphernalia.

**Local Expenditures:** Expenditures decrease minimally as a result of fewer people being incarcerated for the possession of marijuana or related paraphernalia. 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 \$60 to \$160 per inmate in recent years.

## **Additional Information**

**Prior Introductions:** None.

**Cross File:** Although designated as a cross file, HB 1158 (Delegate Morhaim, *et al.* – Health and Government Operations and Judiciary) is not identical.

**Information Source(s):** Commission on Criminal Sentencing Policy, Governor's Office of Crime Control and Prevention, Judiciary (Administrative Office of the Courts), Department of State Police, Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, Department of Legislative Services

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