

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 798
(Senator Muse, *et al.*)
Judicial Proceedings

**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: General fund revenues and expenditures decrease, potentially significantly, due to the bill's elimination of criminal penalties for first and second offenses involving possession of specified amounts of CDS. General fund expenditures increase by \$191,670 in FY 2018 only for the Judiciary to make one-time programming changes. Special fund and general fund expenditures for the Department of Health and Mental Hygiene (DHMH) also increase, potentially significantly, due to more individuals attending drug treatment and education programs and undergoing substance abuse disorder assessments. Special fund revenues for DHMH also increase, due to the District Court remitting collected penalties to DHMH for drug treatment and education programs.

Local Effect: Local revenues and expenditures decrease, potentially significantly, due to the bill's elimination of criminal penalties for first and second offenses involving possession of specified amounts of CDS.

Small Business Effect: None.

Analysis

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

- 10 grams of marijuana;
- 300 milligrams of cocaine;
- 300 milligrams of heroin;
- 5 tablets of 3,4-methylenedioxymethamphetamine (MDMA);
- 5 tablets of lysergic acid diethylamide (LSD);
- 300 milligrams of methadone; or
- 200 milligrams of amphetamine.

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.

For an individual’s first or second finding of guilt for use or possession of a de minimis quantity of a CDS, or 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 DHMH and refer the person to an assessment for a substance abuse disorder. After the assessment, the court must refer the person to substance abuse treatment, if necessary.

The bill’s changes apply to existing law or to the law as reflected under specified provisions of Chapter 515 of 2016, which take effect October 1, 2017.

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 Dangerous 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.

A person may not possess or administer a CDS unless the CDS is obtained directly or by prescription or order from an authorized provider acting in the course of professional

practice. A person may also not obtain or attempt to obtain a CDS, or procure or attempt to procure the administration of a CDS, by specified methods, including by fraud, counterfeit prescription, or concealment of fact. A person who violates these provisions is guilty of a misdemeanor and on conviction is subject to imprisonment for up to four years and/or a fine of up to \$25,000. Repeat offenders are subject to twice the term of imprisonment and/or fines that are otherwise authorized.

In general, a defendant in possession of 10 grams or more of marijuana is guilty of a misdemeanor and subject to imprisonment for up to one year and/or a fine of up to \$1,000. However, 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 DHMH; 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.

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 DHMH for drug treatment and education programs.

Justice Reinvestment Act – Changes Effective October 1, 2017

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; (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.

Further, before imposing a sentence for these offenses, the court is authorized to order DHMH, 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. DHMH 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 DHMH 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.

Background: The Judiciary advises that in fiscal 2016, there were approximately 15,051 violations and 9,394 guilty dispositions involving the possession of less than 10 grams of marijuana. Additionally, according to the Judiciary, there were 23,713 violations and 8,206 guilty dispositions for possession of CDS other than marijuana in the District Court in fiscal 2016; there were 11,154 violations and 2,547 guilty dispositions for possession of CDS other than marijuana in the circuit courts in fiscal 2016.

According to DPSCS, in fiscal 2016, there were 305 intakes for which the most serious offense was possession of CDS other than marijuana, with an average sentence of

24.5 months. However, information is unavailable as to the number of violations involving de minimis quantities of CDS, as defined in the bill.

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 DHMH 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 DHMH for drug treatment and education programs. The Behavioral Health Administration in DHMH administers the Marijuana Citation Fund. Revenue to the fund totaled \$444,390 in fiscal 2016; the projected revenue for fiscal 2018 is \$475,000.

State Expenditures: 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 DHMH. The Judiciary advises that costs to make the required one-time programming changes total \$191,670 in fiscal 2018.

The Judiciary also advises that citations need to be recalled and revised to meet the bill's requirements, at an additional cost. 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.

General fund expenditures decrease, potentially significantly, due to fewer people being committed to State correctional facilities and reduced payments to counties for reimbursement of inmate costs. According to DPSCS, in fiscal 2016, there were 305 intakes for which the most serious offense was possession of CDS other than marijuana, with an average sentence of 24.5 months. However, information is unavailable as to the amounts of CDS involved in these violations. *For illustrative purposes only*, if 31 individuals (approximately 10% of the 305 intakes) were issued civil citations instead

of criminal penalties, assuming variable inmate costs of \$210 per month excluding health care, State incarceration expenditures could decrease by approximately \$162,750.

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 DHMH and to refer the individual for a substance abuse 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. Therefore, special fund expenditures for DHMH increase, potentially significantly, due to the expansion of the number of people who must attend education programs and undergo assessments. DHMH advises that the cost for an individual to attend a drug education program and undergo a preliminary assessment by DHMH is approximately \$230.

For illustrative purposes only, if all 9,394 individuals with guilty dispositions in fiscal 2016 for the use or possession of less than 10 grams of marijuana attended a drug education program and submitted to an assessment by DHMH as a result of the bill, special fund expenditures for DHMH could increase by \$2,160,620. To the extent that the Marijuana Citation Fund contains insufficient funds to cover those costs, general fund expenditures may also increase significantly.

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. A \$45 per diem State grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility; beginning October 1, 2017, counties may receive the additional \$45 per day grant for inmates sentenced to the custody of the State who receive reentry or other prerelease programming and services from a local facility. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

Additional Information

Prior Introductions: HB 1119 of 2016, a similar bill, received an unfavorable report from the House Judiciary Committee.

Cross File: HB 488 (Delegate Morhaim, *et al.*) - Judiciary.

Information Source(s): Anne Arundel, Baltimore, Charles, and Montgomery counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Department of Health and Mental Hygiene; Department of Public Safety and Correctional Services; Department of State Police; Department of Legislative Services

Fiscal Note History: First Reader - February 12, 2017

md/kdm

Analysis by: Sasika Subramaniam

Direct Inquiries to:

(410) 946-5510
(301) 970-5510