

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 927
Judiciary

(Delegates Ruth and 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 punishable by a maximum fine of \$100. A court may also order specified individuals to mental health assessments and treatment, as specified (in addition to authorizations under current law for substance abuse disorder assessments and treatment). A trial for a citation issued for a violation involving a *de minimis* quantity of a CDS must proceed in drug court, if the District Court in the district having venue has a drug court. **The bill generally takes effect October 1, 2023. Section 1 of the bill terminates, and Section 2 of the bill takes effect, if the termination provision in Section 15 of Chapter 26 of 2022 takes effect. (Section 15 specifies that Section 3 of that Act takes effect January 1, 2023, and terminates June 30, 2023.)**

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. Special fund revenues increase from civil citation penalties. General fund expenditures increase by \$172,800 in FY 2024 only for the Judiciary to make one-time programing changes. General fund and special fund expenditures increase for specified assessments/treatment, as discussed below.

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: Potential meaningful.

Analysis

Bill Summary: “*De minimis* quantity of a CDS” means equal to or less than the specified amounts for each particular substance as detailed in **Exhibit 1**.

Exhibit 1 *De Minimis* Quantity Amounts Attributed to Specified CDS

<u>Controlled Dangerous Substance</u>	<u><i>De Minimis</i> Quantity Amount</u>
Cocaine	100 milligrams
Cocaine Base (<i>i.e.</i> , crack)	65 milligrams
Heroin	60 milligrams
3,4-Methylenedioxymethamphetamine (<i>i.e.</i> , MDMA)	200 milligrams
Lysergic acid diethylamide (<i>i.e.</i> , LSD)	Two user units
Psilocybin (<i>i.e.</i> , mushrooms)*	Two user units
Methadone	Two user units
Methamphetamine	60 milligrams
Oxycodone or Hydrocodone*	Two tablets

*Mushrooms and hydrocodone in the specified amounts are included in the definition of “*de minimis* quantity of a CDS” under Section 1 but not Section 2 of the bill. As noted above, Section 1 takes effect October 1, 2023, but is abrogated and of no further effect if the termination provision in Section 15 of Chapter 26 of 2022 takes effect (scheduled for the end of June 30, 2023, under current law).

Source: Department of Legislative Services

Use or possession of a *de minimis* quantity of a CDS is a civil offense punishable by a fine of up to \$100. A trial for a citation issued for a violation involving a *de minimis* quantity of a CDS must proceed in drug court, if the District Court in the district having venue has a drug court.

For a person younger than age 21 who commits a violation involving the use or possession of the personal use amount of cannabis, the use or possession of the civil use amount of cannabis, or a *de minimis* quantity of a CDS, a court *may*, in addition to authorizations under current law for substance abuse disorder assessments and treatment, refer the person to a mental health assessment and, if necessary, mental health treatment.

Current Law:

Controlled Dangerous Substances

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. Cannabis (also known as marijuana) is listed on Schedule I. 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 cannabis.

Criminal Penalties for Controlled Dangerous Substances (Other Than Cannabis)

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 guilty of a misdemeanor and 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.

Cannabis

Pursuant to Chapter 26 and the passage of the associated constitutional referendum, as of January 1, 2023, statute distinguishes between a “personal use amount” and a “civil use amount” of cannabis. **Exhibit 2** shows a comparison of what is included under the definitions of each of these terms.

Exhibit 2
Comparison of “Personal Use Amount” and “Civil Use Amount” Definitions

Personal Use Amount

- up to 1.5 ounces of usable cannabis;
- up to 12 grams of concentrated cannabis; or
- cannabis products containing up to 750 milligrams of delta-9-THC; or
- (as of July 1, 2023) up to two cannabis plants

Civil Use Amount

- more than 1.5 ounces but not more than 2.5 ounces of usable cannabis;
- more than 12 grams but not more than 20 grams of concentrated cannabis; or
- cannabis products containing more than 750 milligrams but not more than 1,250 milligrams of delta-9-THC

THC: tetrahydrocannabinol

Note: Effective July 1, 2023, personal use amount also includes up to two cannabis plants. Cannabis plants are not included in the definition of civil use amount; thus, cultivating any number of plants from January 1, 2023, to June 30, 2023, and more than two plants as of July 1, 2023, is a criminal misdemeanor with a maximum penalty of imprisonment for three years and/or a \$5,000 fine

Source: Department of Legislative Services

Effective July 1, 2023, an individual at least age 21 may possess the personal use amount of cannabis. **Exhibit 3** shows the penalties related to cannabis possession from January 1, 2023, through June 30, 2023, and the penalties that take effect July 1, 2023.

Smoking Cannabis in a Public Place: Chapter 26 also altered the penalty for the civil offense of smoking cannabis in a public place to a fine of up to \$250 for a first finding of guilt and a fine of up to \$500 for a second or subsequent finding of guilt.

Paraphernalia Repeal: Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. Chapter 26 altered the definition of “drug paraphernalia” to specifically exclude cannabis from the specified items that, when used with other CDS, would constitute drug paraphernalia. The Act also repealed the list of drug paraphernalia examples that can be used to ingest or inhale a CDS into the human body and repealed the penalty provisions for controlled

paraphernalia related to the use or possession of marijuana (a maximum of imprisonment of one year and/or a \$1,000 fine under current law).

Exhibit 3
Civil and Criminal Penalties for Possession of Cannabis under Current Law
Effective January 1, 2023, through June 30, 2023, and Effective July 1, 2023

<u>Offense</u>	<u>Offense Type</u>	<u>Maximum Penalty Effective January 1 through June 30, 2023</u>	<u>Maximum Penalty Effective July 1, 2023</u>
Possession of the personal use amount	Civil	\$100 fine*	\$100 fine for individual younger than age 21*
Possession of the civil use amount	Civil	\$250 fine*	\$250 fine*
Possession of more than the civil use amount	Criminal misdemeanor	Six months imprisonment and/or \$1,000 fine	Six months imprisonment and/or \$1,000 fine

*With respect to a person younger than age 21, the court may (1) order the person to attend a drug education program approved by the Maryland Department of Health; (2) refer the person to an assessment for substance abuse disorder; and (3) refer the person to substance abuse treatment, if necessary.

Source: Department of Legislative Services

Debilitating Medical Conditions and Medical Necessity: In a prosecution for the use or possession of cannabis, it is an affirmative defense that the defendant used or possessed the cannabis 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) cannabis is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. Likewise, in a prosecution for the possession of cannabis, it is an affirmative defense that the defendant possessed cannabis because the cannabis 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 cannabis in a public place or was assisting the person for whom the defendant is a caregiver in using cannabis in a public place or was in possession of more than one ounce of cannabis.

Finally, medical necessity may be used as a mitigating factor in a prosecution for the possession or use of cannabis. A defendant may introduce, and the court must consider as a mitigating factor, any evidence of medical necessity. If a court finds that the use or possession of cannabis was due to medical necessity, the court *must dismiss* the charge.

Marijuana Citation Fund

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 the personal use or civil use amount of cannabis) to the Maryland Department of Health (MDH) for drug treatment and education programs.

State Revenues: General fund revenues decrease, potentially significantly, due to the elimination of criminal penalties for 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 (§ 5-601(c)(2)(ii) of the Criminal Law Article) for offenses involving the personal use or civil use amount of cannabis to include *de minimis* quantities of 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 \$235,148 in fiscal 2022, \$274,539 in fiscal 2021; and \$317,288 in fiscal 2020. MDH previously advised that the reduced revenues in fiscal 2020 were a result of the ongoing COVID-19 pandemic. However, revenues for the fund have continued to decline through fiscal 2022.

State Expenditures: General fund expenditures increase by \$172,756 in fiscal 2024 only for the Judiciary to make one-time programming changes. Other effects on general fund and special fund expenditures cannot be quantified but are discussed below.

Judiciary

The bill eliminates criminal penalties for possession of specified amounts of CDS and instead establishes civil citations for violations. 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 the personal or civil use amount of cannabis) and permanently shield these citations from public inspection and inclusion in the Case Search website. 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 \$172,756 in fiscal 2024.

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.

While the bill requires cases tried on a citation for use and possession of a *de minimis* quantity of specified CDS to proceed in drug court, the overall effect of the bill on drug court participation remains unclear for the following reasons:

- information on the quantities of CDS possessed by current drug court participants is not readily available;
- drug court participation is voluntary;
- individuals who may be drug court participants under existing statute may receive citations for civil offenses under the bill; and
- individuals subject to citations may opt to pay the fine instead of going through a drug court program.

The Judiciary advises that there are 32 drug courts operating in the State across 21 counties and Baltimore City.

Department of Public Safety and Correctional Services

General fund expenditures for the Department of Public Safety and Correctional Services (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 \$4,970 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 19 individuals in fiscal 2021 and 77 individuals in fiscal 2020 were sentenced to DPSCS facilities exclusively for possession of a CDS other than marijuana (now cannabis). The effect of the COVID-19 pandemic on these statistics and the amounts of CDS involved in these violations are unknown at this time. *For illustrative purposes only*, if 15 of the individuals in this group are issued civil citations instead of criminal penalties, State incarceration expenditures could decrease by approximately \$50,760. This assumes that (1) variable inmate costs total \$282 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 authorizes a court to order an individual younger than age 21 who commits an offense involving the possession of a *de minimis* quantity of CDS to attend a drug education program approved by MDH and to refer the individual for a substance use disorder or mental health assessment (and treatment, if necessary). Under existing provisions, the substance abuse disorder assessment, treatment, and education provisions only apply to offenses by individuals younger than age 21 involving the personal or civil use amounts of cannabis. Furthermore, existing statute does not refer to mental health assessments/treatment.

General fund expenditures for MDH increase to the extent that (1) courts refer individuals to assessments and/or mental health treatment under the bill *and* (2) referred individuals do not have insurance or are not Medicaid recipients. MDH has previously advised that a substance use disorder assessment costs the State \$179.55 if not covered by private insurance. MDH did not provide any information regarding the potential costs to conduct mental health assessments under the bill.

The Marijuana Citation Fund may be used to offset substance use disorder treatment and education costs. Special fund expenditures for MDH increase to offset drug education and substance use disorder treatment, to the extent that funds are available, due to the bill's authorization to refer an expanded population for drug education or treatment. The

magnitude of this increase cannot be readily determined at this time as any such increase depends on actual sentencing practices under the bill.

Office of the Public Defender

Given overall caseloads and resources for the Office of the Public Defender (OPD), any resources devoted to OPD criminal cases that result in civil citations under the bill are assumed to be redirected to other agency cases.

Local Revenues: Local revenues decrease minimally due to the elimination of criminal penalties for offenses involving the possession of *de minimis* amounts of CDS and cases no longer being heard in the circuit courts. The Maryland State Commission on Criminal Sentencing Policy reports that 432 individuals were sentenced to 499 counts of possession of a CDS in the State's circuit courts during fiscal 2022. However, this data does not identify the specific CDS or quantity of CDS involved in each case. Moreover, this analysis assumes that most possession of CDS cases are heard in the District Court, and fines imposed in circuit court possession of CDS cases affected by the bill are not a significant source of local revenues.

Local Expenditures: Local expenditures decrease, potentially significantly, as a result of the bill's elimination of the incarceration penalty for offenses of possession of *de minimis* quantities of CDS and fewer individuals being committed to local detention facilities.

Small Business Effect: Small business behavioral health providers may treat additional patients under the bill (*e.g.*, substance use and mental health assessments and treatment).

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See HB 1054 and SB 784 of 2022; HB 488 of 2021; and HB 193 of 2020.

Designated Cross File: None.

Information Source(s): Baltimore and Frederick counties; City of Havre de Grace; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Health; Department of Legislative Services

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