



## Fiscal Impact Statement for Proposed Legislation

### Virginia Criminal Sentencing Commission

#### Senate Bill No. 992

(Patron – Stuart)

LD#: 11102160

Date: 1/10/2011

Topic: Penalties for offenses involving imitation marijuana

#### Fiscal Impact Summary:

- **State Adult Correctional Facilities:**  
\$50,000 \*
- **Local Adult Correctional Facilities:**  
Cannot be determined
- **Adult Community Corrections Programs:**  
Cannot be determined

- **Juvenile Correctional Centers:**  
Cannot be determined
- **Juvenile Detention Facilities:**  
Cannot be determined

\* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 874 of the 2010 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

#### Summary of Proposed Legislation:

The proposal amends § 18.2-248.1 to make selling, distributing, or possessing with the intent to sell any substance that is an imitation of marijuana, any substance intended to imitate marijuana, or any substance that a person should reasonably know is used as an imitation for marijuana subject to the same penalties that exist for the sale, distribution, etc., of actual marijuana.

Current *Code* defines an “imitation controlled substance” as it relates to Schedule I through VI controlled substances; under § 18.2-247, the term “imitation controlled substance” is defined as a counterfeit controlled substance or a pill, capsule, tablet, or substance in any form that is not a controlled substance subject to abuse and either would be mistaken for a controlled substance or, by express or implied representations, purports to act like a controlled substance as a stimulant or depressant of the central nervous system (with a few exceptions). If the proposed provisions for imitation marijuana are applied using a definition that mirrors the definition of imitation controlled substances found in § 18.2-247, the proposal may cover the sale, etc., of synthetic marijuana (a chemical compound sprayed on dried herbs that, when smoked, has an effect similar to marijuana). However, synthetic marijuana can have numerous side effects that are not traditionally associated with marijuana, including rapid heart rate and seizures. Synthetic marijuana is also known as K2, Spice, or Mr. Smiley.

Under the proposal, the penalties for offenses associated with imitation marijuana are as follows:

Offense	Penalty
Sell, give, distribute, or possess with intent to distribute up to ½ ounce of imitation marijuana	Class 1 misdemeanor (up to 12 months)
Sell, give, distribute, or possess with intent to distribute imitation marijuana as an accommodation	Class 1 misdemeanor (up to 12 months)

Offense	Penalty
Sell, give, distribute, or possess with intent to distribute more than ½ ounce up to 5 pounds of imitation marijuana	Class 5 felony (1 to 10 years)
Sell, give, distribute, or possess with intent to distribute more than 5 pounds of imitation marijuana	Felony punishable by 5 to 30 years
Sell, give, distribute, or possess with intent to distribute imitation marijuana to an inmate as an accommodation	Class 4 felony (2 to 10 years)
Manufacture imitation marijuana, not for personal use	Felony punishable by 5 to 30 years
Third or subsequent felony for selling, giving, distributing, or possessing with intent to distribute imitation or actual marijuana	Felony punishable by 5 years to life (mandatory minimum of 5 years)

With several exceptions, the proposed penalties for offenses involving imitation marijuana mirror the penalties defined in current *Code* for crimes involving actual marijuana. Seven exceptions are:

- Under the proposal, simple possession of imitation marijuana is not a crime.
- The proposal does not define transportation of imitation marijuana into the Commonwealth as a separate and distinct crime, as does current *Code* for such acts involving actual marijuana.
- Selling, etc., marijuana to a minor and using a minor to assist in distribution of marijuana are subject to enhanced penalties not found in the proposal for imitation marijuana.
- Selling, etc., marijuana in a prohibited location is a separate and distinct felony from other offenses listed in the *Code*, but the proposal does not define this crime for imitation marijuana.
- Delivery of actual marijuana to an inmate is a class 5 felony. The proposal provides a separate penalty for distribution of imitation marijuana to an inmate only if it is as an accommodation.
- Possession of a firearm while in possession of actual marijuana or while distributing marijuana is subject to additional penalties not found in the proposal for imitation marijuana.
- The proposal does not include imitation marijuana in § 18.2-248(H1,ii,4), the statute that defines the penalty for the distribution of marijuana by a continuing criminal enterprise.

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### Analysis:

At this time, at least 15 states have made it illegal to possess or sell synthetic marijuana, including Alabama, Arkansas, Georgia, Hawaii, Iowa, Illinois, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Tennessee, and Washington. In addition, on November 24<sup>th</sup> 2010, the US Drug Enforcement Agency (DEA) announced its intent to exercise its emergency scheduling authority to temporarily control five chemicals used to make synthetic marijuana. These chemicals will be designated by the DEA as Schedule I substances for at least one year while the DEA and the Department of Health and Human Services study the effects of the chemicals. Local ordinances to ban synthetic marijuana have also been passed in several localities across the US.

The number of incidents in Virginia involving imitation (or synthetic) marijuana is not known.

Sentencing information for cases involving actual marijuana is available. According to fiscal year (FY) 2009 and FY2010 Sentencing Guidelines (SG) data, there were 1,752 felony sentencing events involving the distribution or conspiracy to distribute marijuana drug crimes. In these cases, the

marijuana drug crime was the primary (or most serious) offense. Nearly 83% of these cases involved a conviction for selling, distributing, possessing with intent to distribute, etc., more than ½ ounce but not over five pounds of marijuana. Nearly two-thirds (62%) of the offenders convicted of this crime were sentenced to a term of incarceration: 50% were given a local-responsible (jail) term and more than 11% received a state-responsible (prison) term. For the offenders committed to prison, the median sentence was two years. Of the felony marijuana distribution cases, five included an additional offense for possessing a hand gun and 21 included a conviction for distribution in a prohibited area.

Information for misdemeanor marijuana cases is available from two sources. First, according to the Local Inmate Data System (LIDS), which captures information on offenders held pre- or post-trial in jail, there were 12,753 convictions during FY2009 and FY2010 involving misdemeanor marijuana offenses. Approximately 60% of these cases involved a first-time possession of marijuana (punishable by up to 30 days in jail), while another 21% involved a subsequent possession offense (a Class 1 misdemeanor). The remaining 19% were convictions for sales-related offenses involving ½ ounce or less of marijuana or distribution of marijuana as an accommodation. Second, according to FY2009 and FY2010 data from the General District and Traffic Court Automated Information System (CAIS), there were 27,303 misdemeanor convictions for possession of marijuana, first or subsequent offense, under § 18.2-250.1. The data does not distinguish between a first offense, punishable up to a maximum of 30 days, and a subsequent offense, a Class 1 misdemeanor. The vast majority (93%) convicted under this statute were sentenced to probation. If the defendant received a local-responsible (jail) term, the median sentence was 15 days. There were another 1,577 convictions for violation of § 18.2-248.1, related to selling, distributing, etc., less than ½ ounce of marijuana or distribution of marijuana as an accommodation to an inmate (both Class 1 misdemeanors). Again, the vast majority (93%) was sentenced to probation; those sentenced to a local-responsible (jail) term received a median sentence of one month.

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**Impact of Proposed Legislation:**

**State adult correctional facilities.** By creating new felony crimes for certain acts involving imitation marijuana, the proposal may increase the future state-responsible (prison) bed space needs of the Commonwealth. The number of additional felony convictions that may result from the proposal cannot be estimated; therefore, the magnitude of the impact cannot be determined.

**Local adult correctional facilities.** Local-responsible (jail) bed space needs may increase due to the creation of new felony and misdemeanor crimes associated with imitation marijuana; however, the magnitude of the impact cannot be determined.

**Adult community corrections programs.** Because the proposal could result in additional felony and misdemeanor convictions and subsequent supervision requirements, the proposal may affect adult community corrections resources. Since the number of cases that may be affected cannot be determined, the potential impact on community corrections resources cannot be quantified.

**Virginia's sentencing guidelines.** The sentencing guidelines cover felony violations of § 18.2-248.1 that are processed in Virginia's circuit courts. No adjustment to the guidelines would be necessary under the proposal.

**Juvenile correctional centers.** According to the Department of Juvenile Justice (DJJ), the impact of the proposal on juvenile correctional center (JCC) bed space needs cannot be determined.

**Juvenile detention facilities.** The Department of Juvenile Justice reports that the proposal's impact on the bed space needs of juvenile detention facilities cannot be determined.

**Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 874 of the 2010 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.**

**Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.**

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