



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 745

Amendment in the Nature of a Substitute (Patrons Prior to Substitute – Herring et al.)

LD#: 11105675

Date: 2/25/2011

Topic: Penalties for offenses involving synthetic cannabinoids and bath salts

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 adds § 18.2-248.1:1 to create specific penalties for possessing, selling, giving, distributing, or possessing with intent to distribute, synthetic cannabinoids. The proposal also amends several existing statutes, including §§ 18.2-255, 18.2-255.1, 18.2-255.2, 18.2-258, 18.2-258.02, 18.2-258.1, 18.2-308.4, 18.2-474.1, 53.1-203 and 54.1-3446, to define penalties specific to synthetic cannabinoids. Synthetic cannabinoids, also known as synthetic marijuana, K2, spice or Mr. Smiley, are dried herbs sprayed with a chemical compound that, when smoked, creates a high similar to marijuana. However, synthetic cannabinoids can have numerous side effects that are not traditionally associated with marijuana, including rapid heart rate and seizures.

Although the proposal defines synthetic cannabinoids as any substance that contains several specific chemical compounds, it also accounts for the potential for innovation regarding the chemicals comprising synthetic cannabinoids. Specifically, any drug not listed in the proposed § 18.2-248.1:1 or the Drug Control Act that is privately compounded, with the specific intent to circumvent the criminal penalties for synthetic cannabinoids, to emulate or simulate the effects of synthetic cannabinoids through chemical changes would be subject to the same criminal penalties for synthetic cannabinoids.

Under the proposal, the penalties for offenses associated with synthetic cannabinoids are as follows:

| Offense | Penalty |
|---|---------------------------------------|
| Possess synthetic cannabinoids | Class 1 misdemeanor (up to 12 months) |
| Sell, give, distribute, or possess with intent to distribute synthetic cannabinoids | Class 6 felony (1 to 5 years) |

| Offense | Penalty |
|---|---|
| Give, distribute, or possess with intent to distribute synthetic cannabinoids for accommodation | Class 1 misdemeanor (up to 12 months) |
| Manufacture or possess with intent to manufacture synthetic cannabinoids | Felony punishable by 5 to 30 years |
| Distribute synthetic cannabinoids to a minor | Felony punishable by 10 to 50 years Mandatory minimum of 2 years |
| Sell material that advertises synthetic cannabinoid paraphernalia to a minor | Class 1 misdemeanor (up to 12 months) |
| Distribute synthetic cannabinoids in prohibited area | Felony punishable by 1 to 5 years Mandatory minimum of 1 year for 2 nd or subsequent offense |
| Distribute synthetic cannabinoids in prohibited area as an accommodation | Class 1 misdemeanor (up to 12 months) |
| Maintain a common nuisance relating to synthetic cannabinoids | Class 1 misdemeanor (up to 12 months) for first offense Felony punishable by 1 to 5 years for subsequent offense |
| Maintain a fortified drug house relating to synthetic cannabinoids | Felony punishable by 1 to 10 years |
| Obtain synthetic cannabinoids by fraud, use a fictitious or revoked manufacture/distribution license, or assume the title of a doctor, etc., to obtain synthetic cannabinoids | Felony punishable by 1 to 5 years |
| Purchase/transport firearm after two or more misdemeanor drug convictions (including possession of synthetic cannabinoids) in a three-year period | Misdemeanor punishable by up to 12 months |
| Possession of firearm while distributing synthetic cannabinoids | Class 6 felony (1 to 5 years) Mandatory minimum of 5 years |
| Delivery of synthetic cannabinoids to a prisoner | Class 5 felony (1 to 10 years) |
| Prisoner possess, sell, etc., synthetic cannabinoids | Class 5 felony (1 to 10 years) |

In addition to any other punishment, the proposal requires that an offender make restitution, as the court deems appropriate, to any innocent property owner whose property is damaged, destroyed, or otherwise rendered unusable as a result of synthetic cannabinoid production. Offenders who possess synthetic cannabinoids would be eligible for a deferred disposition under § 18.2-251 if they meet several criteria.

With some exceptions, the proposed penalties for offenses involving synthetic cannabinoids mirror the penalties defined in current *Code* for crimes involving marijuana. Three of the exceptions are:

- Possession of marijuana is a misdemeanor punishable by up to 30 days for the first conviction; a second or subsequent conviction for possession of marijuana is a Class 1 misdemeanor. Under the proposal, possession of synthetic cannabinoids is a Class 1 misdemeanor upon the first conviction;
- A third or subsequent conviction for selling, giving, distributing, manufacturing, etc., marijuana carries a five-year mandatory minimum sentence. The proposal does not include a similar mandatory minimum penalty for synthetic cannabinoids; and
- The proposal does not include synthetic cannabinoids in § 18.2-248(H1,ii,4), the statute that defines the penalty for the distribution of marijuana by a continuing criminal enterprise.

The proposal also adds synthetic cannabinoids to numerous other sections of the *Code* relating to controlled substances and marijuana. For instance, the proposal gives the Virginia Alcoholic Beverage Control Board the authority to suspend or revoke a business' license for certain activities involving synthetic cannabinoids. In addition, localities would have the authority to require the removal, repair, etc., of buildings and other structures harboring illegal use of synthetic cannabinoids and property used in connection with or derived from the distribution, etc., of synthetic cannabinoids would be subject to lawful seizure.

Individuals who are addicted to or are unlawful users or distributors of synthetic cannabinoids, or individuals who have been convicted of illegal possession or distribution of synthetic cannabinoids within a three-year period, would be ineligible for a concealed handgun permit under the proposed changes to § 18.2-308. Offenders whose charges relating to synthetic cannabinoids had been disposed of under § 18.2-251 in the three years preceding the application would also be ineligible for a concealed handgun permit.

In addition, the proposal expands the list of powers and duties of probation and parole officers to include ordering and conducting random drug and alcohol tests on offenders who the officer has reason to believe are engaged in the illegal use of synthetic cannabinoids. The proposal also makes several changes to the *Code* regarding procedures for processing and disposing of synthetic cannabinoids. Possession, etc., of synthetic cannabinoids by students, school employees, and certain elected or appointed officers would trigger additional non-criminal repercussions, including the expulsion of any student who brings synthetic cannabinoids onto school property or to a school-sponsored activity, absent special circumstances.

Finally, the proposal amends § 54.1-3446 to include 3,4-methylenedioxypyrovalerone (MDPV) and 4-methylphenedrone (mephedrone or 4-MMC) as a Schedule I drug in the Drug Control Act.

- MDPV is a psychoactive drug with stimulant properties which acts as a norepinephrine-dopamine reuptake inhibitor (NDRI). It is also known as MDPK, Magic, Super Coke and PV. It has been sold as a legal drug alternative and marketed in the United States as "bath salts" (under such names as Cloud 9, Ivory Wave, Ocean, Charge Plus, White Lightning, Scarface, Hurricane Charlie, Red Dove and White Dove). MDPV acts as a stimulant and has been reported to have amphetamine-like or cocaine-type effects.
- 4-MMC is a synthetic stimulant and entactogen drug of the amphetamine and cathinone classes. Slang names include meph, drone, and MCAT. It produces similar effects to MDMA, amphetamines and cocaine. If sold for human consumption, it can be controlled under the Federal Analog Act, but it can be sold legally if labeled as "plant food" or "bath salts."

Currently, possession of a Schedule I or II drug is a Class 5 felony, punishable by imprisonment of 1 to 10 years. Selling, distributing, or manufacturing a Schedule I or II drug, or possessing such a drug with intent to sell, distribute, or manufacture, is punishable by 5 to 40 years with a maximum fine of \$500,000. The maximum sentence for a second or third conviction of selling, distributing, etc., is life

imprisonment, with the third offense carrying a mandatory minimum sentence of five years. Distribution of a Schedule I or II drug by accommodation is a Class 5 felony. The Code includes additional felonies for transporting a Schedule I or II drug into the Commonwealth, distributing a Schedule I or II drug to a person under the age of 18, distributing near schools or other specified properties, and for possessing a Schedule I or II drug while possessing a firearm.

Analysis:

At this time, at least 15 states have made it illegal to possess or sell synthetic marijuana or cannabinoids, including Alabama, Arkansas, Georgia, Hawaii, Iowa, Illinois, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Tennessee, and Washington. In addition, on November 24th 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 synthetic cannabinoids 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 a 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.

The number of incidents in Virginia involving the possession or distribution of 4-methylephedrone or 3,4-methylenedioxypyrovalerone is not known.

Sentencing information is available for cases involving drugs currently listed in Schedules I or II. According to fiscal year (FY) 2009 and FY2010 Sentencing Guideline (SG) data, there were 13,213 felony sentencing events involving Schedule I or II drug crimes. In these cases, the Schedule I or II drug crime was the primary (or most serious) offense. Approximately 60% of these convictions involved simple possession. Nearly half of the offenders convicted of simple possession were sentenced to a term of incarceration: 38% were given a local-responsible (jail) term and 11% received a state-responsible (prison) term. For possession offenders committed to prison, the median sentence was 1.6 years. Offenders convicted for selling, distributing, etc., (§ 18.2-248(C)) were much more likely to be incarcerated. While 24% were sentenced to serve time in jail, 63% received a prison term. For offenders committed to prison for a sales or distribution-related offense, the median sentence was 2.2 years.

Impact of Proposed Legislation:

State adult correctional facilities. The proposal may increase the future state-responsible (prison) bed space needs of the Commonwealth in three ways. First, by creating new felony crimes for certain acts involving synthetic cannabinoids, the proposal may increase the number of individuals who would be subject to terms of incarceration in state-responsible facilities. Second, expanding the authority of probation and parole officers to conduct drug tests to detect use of synthetic cannabinoids would increase the likelihood that an offender may be found in violation of his terms of probation for unlawful use of a controlled substance. Third, by expanding the list of prohibited Schedule I drugs, the proposal expands the applicability of several existing felonies. 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 synthetic cannabinoids; 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. Simple possession of a Schedule I or II drug (§ 18.2-250(A)) and sales and distribution-related offenses defined in § 18.2-248(C) are currently covered by the sentencing guidelines as the primary (most serious) offense. Therefore, many of the crimes involving 3,4-methylenedioxypyrovalerone and 4-methylephedrone would be covered by the sentencing guidelines. However, as new crimes defined in the proposed § 18.2-248.1:1, felony convictions for offenses involving synthetic cannabinoids would not be covered by the sentencing guidelines as the primary (most serious) offense. However, a conviction under one of these provisions (as an additional offense) could augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. 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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