

Legislative Analysis



MANUFACTURE AND DELIVERY OF OPIATES

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House Bill 5137 (H-5) as reported from committee
Sponsor: Rep. Julie Alexander

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5138 (H-5) as reported
Sponsor: Rep. Joe Tate

House Bill 5627 as reported
Sponsor: Rep. Brian K. Elder

House Bill 5299 (H-1) as reported
Sponsor: Rep. David LaGrand

House Bills 5657 and 5658 as reported
Sponsor: Rep. Gary Howell

Committee: Judiciary
Complete to 6-3-20

BRIEF SUMMARY: House Bill 5137 would amend the Public Health Code to revise the maximum term of imprisonment for offenses involving the illegal manufacture, sale, delivery, and possession with intent to deliver Schedule 1 and 2 narcotics and cocaine.

House Bill 5138 would amend the sentencing guidelines to reflect the changes made to the maximum terms of imprisonment for offenses made by HB 5137 and to revise the felony classification for several offenses.

House Bill 5299 would amend the Code of Criminal Procedure to allow a court to order probation for certain controlled substance offenses for which probation is currently prohibited.

House Bill 5627 would repeal a provision in the Public Health Code that limits plea bargaining for certain controlled substance violations.

House Bills 5657 and 5658 are companion bills that would revise provisions in different acts to account for the repeal proposed by HB 5627.

FISCAL IMPACT: HBs 5137, 5138, and 5299 would have an indeterminate fiscal impact on state and local governments, and 5627, 5657, and 5658 would have no fiscal implications. (Please see **Fiscal Information**, below, for a more detailed discussion.)

THE APPARENT PROBLEM:

For several years, the nation has been in the throes of an epidemic of deaths due to overdoses of controlled substances. Many who have died reportedly became addicted to narcotic painkillers after surgery or dental procedures, with some graduating to street drugs when prescription drugs were not available. In 2018, about seven Michiganders died each day from a drug overdose. Though this was a slight decrease from 2017, deaths associated with opioids continue to be high, accounting for about five and a half deaths daily across the state, with Wayne and Macomb Counties reporting the highest overdose rates. In addition, the African American community is hardest hit. While the overdose rate among white residents decreased by 6.5% between 2017 and 2018, the overdose death rate among African American residents increased by almost 20%.

Most of the overdose deaths in Michigan involve opioids, in particular mixtures of heroin, fentanyl, and/or carfentanil. Many agree that a multifaceted approach to reducing opioid deaths is needed. In recent years, changes to Michigan law have increased access to Narcan (naloxone), which can halt an overdose in its tracks and save a person who may be moments away from dying. Prescribing protocols for pain management have been revised for health care providers, and interest in alternatives for managing pain, such as yoga and medical marijuana, has grown. However, the death rate from controlled substances, and opioids in particular, remains high. And, as the illegal drug market continues to shift from plant-based substances to synthetic drugs that are constantly changing, prosecution can be challenging.

Currently, Schedule 1 and 2 narcotic drugs, which have no or limited medical use, respectively, carry the strongest penalties for unlawful manufacture and delivery. However, many types of drugs, from carfentanil to codeine, are lumped together even though they carry different risks of addiction and death. It has been suggested that the penalties for these drugs be revised, with creation of a three-tier system in which the longest prison terms would be reserved for the drugs associated with the highest overdose rates.

THE CONTENT OF THE BILLS:

House Bill 5137 would revise a provision in the Public Health Code that prohibits the unlawful manufacture, creation, delivery, or possession with intent to deliver a Schedule 1 or Schedule 2 controlled substance that is a narcotic drug or cocaine. Currently, the penalties for a violation involving such substances *or any mixture containing those substances* are as follows:

- 1,000 grams or more is a felony punishable by imprisonment for life or any term of years and/or a fine of up to \$1.0 million.
- 450 grams but less than 1,000 grams is a felony punishable by imprisonment for up to 30 years and/or a fine of up to \$500,000.
- 50 grams but less than 450 grams is a felony punishable by imprisonment for up to 20 years or a fine of up to \$250,000.
- Less than 50 grams is a felony punishable by imprisonment for up to 20 years and/or a fine of up to \$25,000.

Under the bill, the above penalties would apply to a violation involving heroin, fentanyl, and carfentanil; a mixture of heroin, fentanyl, and carfentanil; or a mixture of any derivative of heroin, fentanyl, or carfentanil.

The above penalties would also apply to a violation involving an opiate other than heroin, fentanyl, or carfentanil or any mixture or derivative of those substances, and to any mixture containing such an opiate or to any derivative of that opiate. However, the maximum term of imprisonment for a violation involving less than 50 grams of the opiate, or mixture or derivative, would be reduced from 20 years to 10 years.

The penalty for a violation involving a Schedule 1 or 2 controlled substance that is a narcotic or cocaine other than those described above would be revised as follows:

- 1,000 grams or more would be a felony punishable by imprisonment for not more than 30 years (instead of life or any term of years) and/or a fine of up to \$1.0 million.
- 450 grams but less than 1,000 grams would be a felony punishable by imprisonment for up to 20 (instead of 30) years and/or a fine of up to \$500,000.

- 50 grams but less than 450 grams would remain a felony punishable by imprisonment for up to 20 years or a fine of up to \$250,000.
- Less than 50 grams would be a felony punishable by imprisonment for up to 10 (rather than 20) years and/or a fine of up to \$25,000.

Note on terminology

Section 7107 of the Public Health Code defines “narcotic drug” as one or more of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

- Opium and opiate and any salt, compound, derivative, or preparation of opium or opiate.
- Any salt, compound, isomer, derivative, or preparation thereof that is chemically equivalent or identical with any of the substances referred to above, but not including the isoquinoline alkaloids of opium.

Section 7108 defines “opiate” as a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. The term does not include, unless specifically designated as controlled under section 7212 of the code, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

A controlled substance is designated as Schedule 1 if it has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. A Schedule 2 controlled substance also has high potential for abuse but has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions, and its abuse may lead to severe psychic or physical dependence.

MCL 333.7401

House Bill 5138 would amend the sentencing guidelines in the Code of Criminal Procedure to change the felony classification for certain crimes involving Schedule 1 or 2 controlled substances that are narcotics or cocaine and to reflect the changes to the maximum term of imprisonment made by HB 5137 that may be imposed for certain violations, as follows:

Heroin, fentanyl, carfentanil, or mixture or derivative of heroin, fentanyl, or carfentanil

- 50 grams or more but less than 450 grams—Class A felony (instead of Class B).
- Less than 50 grams—Class B felony (instead of Class D).

Cocaine or Schedule 1 or 2 narcotic drug other than heroin, fentanyl, or carfentanil or other opiates not containing heroin, fentanyl, or carfentanil

- 1,000 grams or more—Class B felony (instead of Class A) and maximum term of imprisonment of 30 years (reduced from life imprisonment).
- 450 grams but less than 1,000 grams—Class B felony (instead of Class A) and maximum term of imprisonment of 20 years (reduced from 30 years).

- 50 grams but less than 450 grams—Class C felony (instead of Class B); maximum term of imprisonment remains at 20 years.
- Less than 50 grams—remains a Class D felony but maximum term of imprisonment of 10 years (reduced from 20 years).

The felony classifications and maximum terms of imprisonment would not be changed for offenses involving an opiate other than heroin, fentanyl, or carfentanil, with the exception for amounts of less than 50 grams, which is reduced from a maximum of 20 years to 10 years.

Further, the bill would make a technical correction to a provision pertaining to possession of a counterfeit prescription to reflect changes made to the Public Health Code by 2001 PA 236.

Note on felony classifications

Michigan uses an indeterminate sentencing structure in which the maximum term of imprisonment that may be imposed for an offense is established in statute and an appropriate range of imprisonment for a particular offender is determined by scoring various elements of the crime, known as offense variables, and then using a sentencing grid that relates to the felony classification of the offense to determine a sentence range appropriate for the offense and the offender. The score, and which grid is used, can make the difference as to whether an offender may be sentenced to community sanctions, such as probation, or is prison-bound, with a Class A felony typically resulting in a lengthier sentence than a Class E felony.

Scoring an offense as a Class A felony under the sentencing guidelines, rather than as a Class B, or a D felony as a Class B, as the bill would do, impacts the recommended sentence range for an offense by increasing the minimum sentence. Similarly, reducing a felony classification from Class A to Class B or from Class B to Class C, as the bill would do for certain substances, could result in a decrease in the minimum sentence that may be imposed for a violation.

MCL 777.13m

House Bill 5299 would amend the Code of Criminal Procedure to allow a court to order probation for certain controlled substance offenses for which probation is now prohibited.

Currently, a defendant found to be guilty of, or who pleads guilty to, a felony, misdemeanor, or local ordinance violation may be placed on probation if the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law. However, prosecution for certain crimes resulting in a guilty verdict or plea are not eligible for probation, including a prosecution of a ***major controlled substance offense***.

Major controlled substance offense is currently defined as a violation of section 7401(2)(a) of the Public Health Code and/or a violation of section 7403(2)(a)(i) to (iv) of the Public Health Code. Both sections establish penalties related to controlled substances classified in Schedule 1 or 2 as a narcotic drug or any derivative or preparation that is chemically equivalent to or identical with any of those substances (such as hydrocodone and oxycodone). Section 7401 pertains to the unlawful manufacture or possession with intent to deliver any amount of the substances, and section 7403 pertains to the unlawful possession of the substances in an amount of 25 grams or more.

The bill would delete the reference to *major controlled substance offenses*. The bill would instead specifically prohibit eligibility for probation for those found guilty upon verdict or plea of a violation of section 7401(2)(a)(i) to (iii), section 7401(2)(g), or section 7401(2)(h)(i) to (iii) of the Public Health Code, the latter two of which would be added by HB 5137.

The bill would therefore allow a court, after conviction, to place a defendant on probation for offenses involving possession for personal use of a controlled substance classified in Schedule 1 or 2 as a narcotic and also offenses involving the manufacture or possession with intent to deliver those substances in amounts of less than 50 grams (with the exception of heroin, fentanyl, or carfentanil).

The bill would prohibit eligibility for probation for offenses involving 50 grams or more of Schedule 1 or 2 controlled substances that are narcotics and also any amount of heroin, fentanyl, or carfentanil or a mixture of or mixture of any derivative of those substances.

MCL 771.1

House Bill 5627 would repeal section 7415 of the Public Health Code, which limits plea bargaining in certain drug cases. Section 7415 provides that, for a defendant charged with an offense (or conspiracy to commit an offense) specified in section 7401(2)(a)(i) or (ii) or 7403(2)(a)(i) or (ii), an examining magistrate cannot dismiss the case on motion of the prosecutor unless the dismissal is with prejudice (that is, a dismissal that precludes any further action on the same charge). The prosecuting attorney cannot reduce the charge if at the end of the preliminary examination it appears to the examining magistrate that one or more of the offenses has been committed and there is probable cause to charge the defendant. The section also prohibits the court from dismissing the case on motion of the prosecuting attorney, unless the dismissal is with prejudice, and prohibits the court from accepting a plea of guilty, guilty but mentally ill, or nolo contendere unless the defendant enters such a plea to at least one of the felony offenses under section 7401(2)(a)(i) to (iv) or 7403(2)(a)(i) to (iv) or to conspiracy to commit such an offense. The consent of the prosecuting attorney on the record is required for such a plea.

The offenses referenced in section 7401(2)(a)(i) and (ii) are for the unlawful manufacture, delivery, and possession with intent to manufacture or deliver, and section 7403(2)(a)(i) and (ii) for simple possession of, a Schedule 1 or 2 controlled substance that is a narcotic drug, or a drug described in section 7214(a)(iv) (cocaine), that is in an amount of 450 grams or more of any mixture containing that substance.

MCL 333.7415 (repealed)

House Bill 5657 would amend 1909 PA 17, which prohibits or limits the access of prisoners and employees of correctional facilities to certain items such as weapons, cell phones, and controlled substances. A person who violates the act is guilty of a felony punishable by imprisonment for up to five years or a fine of up to \$1,000, or both.

However, this penalty does not apply, and a person cannot be prosecuted under the act for giving, selling, or furnishing a controlled substance in violation of the act, if delivery of that controlled substance is a felony punishable by imprisonment for more than five years under sections 7401 to 7415 of the Public Health Code. The bill would eliminate the reference to

offenses under sections 7401 to 7415 (section 7415 would be repealed by HB 5627) and instead refer to felony offenses involving a controlled substance for which the maximum term of imprisonment exceeds five years under Part 74 of the Public Health Code.

The bill would retain, unchanged, a similar provision specifying that if the possession of a controlled substance is a felony punishable by imprisonment for more than five years under Part 74 of the Public Health Code, a person who possesses, or brings into a correctional facility, a controlled substance in violation of 1909 PA 17 could not be prosecuted under 1909 PA 17 for that possession.

MCL 800.285

House Bill 5658 would amend the Code of Criminal Procedure to eliminate a reference to section 7415 of the Public Health Code (which would be repealed by HB 5627). Under the act, a prosecuting attorney cannot dismiss a charge without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes. The bill would retain this provision.

However, the act also specifies that, if a defendant is charged with a major controlled substance offense, the requirements of section 7415 of the Public Health Code must apply upon the prosecuting attorney's motion to dismiss the charge. The bill would eliminate this provision.

MCL 767.29

Tie-bars

House Bills 5137 and 5138 are tie-barred to each other, and House Bill 5299 is tie-barred to House Bill 5137. House Bills 5657 and 5658 are tie-barred to HB 5627. A bill cannot take effect unless each bill to which it is tie-barred is also enacted.

Effective dates

House Bills 5137, 5138, and 5299 would each take effect 90 days after being enacted.

BACKGROUND INFORMATION:

Many use the terms “opiate,” “opioid,” and “narcotic” interchangeably, but various online medical and addiction treatment resources say that all *opiates* are *opioids*, but not all *opioids* are *opiates*. Generally speaking, an opiate is a natural substance derived from a poppy, whereas an opioid generally refers to a substance that is chemically made (not found in nature) or is derived from or contains an opiate. For example, morphine is an opiate, and heroin, which contains molecules of morphine, would be an opioid. However, section 7108 of the Public Health Code appears to include opioids in the definition of opiates, and section 7212 lists heroin as an opium derivative and not as an opiate. Many sources also maintain that all opioids and opiates are narcotics, but not all narcotics are opioids or opiates. According to the federal Drug Enforcement Administration (DEA), “narcotic” refers to opium, opium derivatives, and their semi-synthetic substitutes. To the DEA, morphine, heroin, and fentanyl, for example, are all considered narcotics.

The Public Health Code defines the terms “opiate” and “narcotic drug,” as described above, but the term “opioid” is not currently defined in statute.

FISCAL INFORMATION:

House Bill 5137 would have an indeterminate fiscal impact on the state and on local units of government. Reducing the statutory maximum sentence for delivery of a controlled substance classified in schedule 1 or 2 that is a narcotic drug other than the opiates and opioids specified in the bill or cocaine would result in a savings to the state due to a decrease in the amount of time offenders would serve in prison. In fiscal year 2019, the average cost of prison incarceration in a state facility was roughly \$39,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,800 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. Any change in penal fine revenue would affect funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

House Bill 5138 is a companion bill to HB 5137 and would amend sentencing guidelines to change the felony classification for crimes involving the manufacture or delivery of heroin, fentanyl, carfentanil, or a mixture of the three from Class B and Class D felonies (depending on the amount manufactured and/or delivered) to Class A and Class B felonies, respectively. Increasing the minimum sentence of those who are convicted would have an indeterminate fiscal impact on the state's correctional system, because convicted offenders would more likely be sentenced to prison instead of sentenced to jail or other community alternative placements. In fiscal year 2019, the average annual cost of prison incarceration in a state facility was roughly \$39,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,800 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Also, under the bill, sentencing guidelines would be amended to change the statutory sentence for delivery of Schedule 1 or 2 narcotic drugs or cocaine from Class A and Class B felonies (depending on the amount manufactured and/or delivered) to Class B and Class C felonies, respectively. Decreasing the minimum sentence of those who are convicted would have an indeterminate fiscal impact on the state and on local units because convicted offenders would more likely be sentenced to county jails or other community alternative placements instead of to prisons. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction.

House Bill 5299 would have an indeterminate fiscal impact on the state and on local units of government. Under provisions of the bill, specific offenses that currently are ineligible for probation would become eligible for probation. This would result in offenders spending less time in jails and/or prisons, which would result in a savings to the state and/or local units of government. An increase in the number of offenders sentenced to terms of probation would mean an increase in probation supervision costs. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. In fiscal year 2019, the average cost of prison incarceration in a state facility was roughly \$39,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,800 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Any impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. Any increase in

penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

House Bills 5627, 5657, and 5658 are companion bills to HBs 5137, 5138, and 5299. House Bills 5627, 5657, and 5658 are technical in nature and would have no fiscal impact on the state or on local units of government. HB 5627 would repeal a section of the Public Health Code that limits plea bargaining in drug cases including possession of a Schedule 1 or 2 controlled substance that is a narcotic drug, or cocaine. HB 5657 would change citation references to the Public Health Code, as described above. HB 5658 would amend the Code of Criminal Procedure to remove a reference to the section being repealed in HB 5627.

ARGUMENTS:

For:

No one sets out to be addicted to a substance that can kill in a moment. And many still grieve the loss of a mother, father, sibling, grandchild, niece, nephew, or friend who died of an overdose. Much has been and is being done on many fronts to address the issues of addiction and recovery, yet more is needed. House Bill 5137 would take a different approach from past efforts in deterring the unlawful manufacture and delivery of opioids. Instead of increasing the maximum term of imprisonment for a violation, the bill would instead keep current sentencing maximums for the substances responsible for the most deaths in the state but reduce the maximums for those drugs carrying less risk of addiction and death. House Bill 5138 would raise the felony classification for violations involving heroin, fentanyl, and/or carfentanil for the two lowest weight categories, which could result in longer minimum sentences and more offenders going to prison. House Bill 5299 would allow probation for some offenders convicted of manufacturing or delivering those controlled substances not designated for the higher penalties, something which is not available now. Taken together, the bills would allow more resources to be dedicated to the investigation and enforcement of crimes involving those drugs most responsible for the overdose deaths and the prosecution and incarceration of those supplying the drugs. It is hoped that this novel approach will succeed in further reducing overdose deaths in the state.

Response:

The manner in which Michigan law refers to or defines narcotics, opiates, and opium, and the lack of a definition of opioid, may make it difficult for many to understand which drugs will be subject to which penalties. The general use of the terms among addiction specialists, pharmacists, and others may lead some to believe that only cocaine offenses would enjoy the reduced maximum sentences. Perhaps if terminology in the Public Health Code and sentencing guidelines were updated, it would be clearer to the public which drugs would fall under the new subdivision (2)(g) added to section 7401 by HB 5137 and which would remain designated under the current subdivision (2)(a).

POSITIONS:

A representative of the Prosecuting Attorneys Association of Michigan testified in support of the bills. (5-27-20)

The Jackson County Prosecuting Attorney testified in support of HBs 5137 and 5138. (12-3-19)

The ACLU of Michigan indicated support for HBs 5137, 5138, and 5299. (2-25-20)

The following entities indicated support for HB 5137 and 5138:

- Department of State Police (2-25-20)
- Wayne County Prosecutors Office (12-3-19)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.