



## Impact Analysis on Proposed Legislation

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*Virginia Criminal Sentencing Commission*

### House Bill No. 1053

*(Patron – Albo)*

**Date Submitted:** 12/30/03

**LD #:** 04-0795134

**Topic:** Restructuring portions of Title 18.2

#### **Proposed Change:**

This proposal is recommended by the Virginia State Crime Commission and is a response to House Joint Resolution Number 687 (2001). The proposal amends, adds and repeals numerous sections of Title 18.2 of the *Code of Virginia* to restructure portions of the criminal code. Many additional revisions are ancillary but necessitated by the substantive changes to *Code* that are proposed. A summary of the proposed legislation and changes in criminal penalties follows.

- A new felony class is added to the existing six felony classes. The Class 1 felony category is renamed “capital felony,” while the Class 2 felony category is renumbered to Class 1. The new class is numbered Class 2 and carries a proposed penalty range of 5 to 40 years. Felony Classes 3 through 6, and their respective penalties, are left unchanged.
- For the crimes of abduction, arson, assault, burglary, carjacking, drug distribution, fraud regarded as larceny, larceny, property destruction and robbery, degrees of each crime are established, although penalties for some offenses remain unchanged by the proposal.
- The terms “armed with deadly weapon” and “serious bodily injury” are defined and applied as aggravators to define first-degree burglary, carjacking and robbery, while “serious bodily injury” is applied to define first-degree arson in cases involving an occupied church or dwelling.
- The penalties for malicious wounding of a police officer and malicious wounding with a caustic substance are changed from 5 to 30 years to the new Class 2 felony (5 to 40 years).
- Language that currently creates a spousal exception for the crimes of forcible sodomy and object sexual penetration is eliminated, as was done with rape during the 2002 General Assembly Session.
- The distinct penalty for a second conviction for manufacturing, selling, distributing or possessing with intent to distribute (hereafter referred to as simply “selling” or the “sale” of) a Schedule I or II drug is eliminated.
- The penalty for a third or subsequent conviction for selling a Schedule I or II drug is changed from 5 years to life to the renumbered Class 1 felony (20 years to life) and language is inserted which requires that the prior convictions were for separate transactions with different dates for each conviction; the three-year mandatory minimum penalty remains unchanged.
- The penalty for a third or subsequent felony sale of marijuana is revised from 5 years to life to the new Class 2 felony (5 to 40 years) and language is inserted which requires that the prior convictions were for separate transactions with different dates for each conviction; the three-year mandatory minimum penalty is unaffected by the proposal.

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- The penalty for the sale of more than 5 pounds of marijuana is changed from 5 to 30 years to a Class 3 felony (5 to 20 years).
- The penalty for selling a Schedule I or II drug to a minor at least three years junior is increased from 10 to 50 years to the renumbered Class 1 felony (20 years to life), while selling marijuana or a Schedule III or IV drug to a minor at least three years junior is changed from 10 to 50 years to the new Class 2 felony (5 to 40 years); existing mandatory minimum penalties remain unchanged.
- For other drug distribution offenses, the crimes are classified into the proposed felony schema, but penalties are not affected.
- The threshold for felony larceny (and fraud offenses regarded as larceny) and certain arson crimes is changed from \$200 to \$500, while the threshold for felony property damage (vandalism) is reduced from \$1,000 to \$500.
- Three degrees of larceny/fraud are established based on dollar amounts (theft of \$25,000 or more is first-degree larceny, theft of \$10,000 to \$24,999 is second-degree larceny, and theft of \$500 to \$9,999 is third-degree larceny); however, the proposal defines larceny from a person involving \$5 up to \$24,999 as second-degree larceny, while theft of a firearm would be at least third-degree larceny (even if the value was less than \$500) and theft of a motor vehicle would be at least second-degree larceny (even if its value was less than \$10,000).
- The penalty for attempts and conspiracies to commit abduction are raised to the same penalty as other non-drug attempts and conspiracies.
- Enactment of the proposal is delayed until July 1, 2005.

### Data Analysis:

The table below provides information on offenses for which the proposal revises the penalty structure.

Felony Crime	Current Penalty	Proposed Penalty	Number of Cases (1997-2001)	Avg. Imposed Sentence (before suspended time)
Robbery armed with deadly weapon and serious bodily injury (§ 18.2-58)	5 yrs.- Life	20 yrs.-Life	136	22 yrs.
Robbery other than above (§ 18.2-58)	5 yrs.- Life	5-40 yrs.	3,168	14 yrs.
Carjacking armed with deadly weapon and serious bodily injury (§ 18.2-58.1)	15 yrs.- Life	20 yrs.-Life	10	26 yrs.
Carjacking other than above (§ 18.2-58.1)	15 yrs.- Life	5-40 yrs.	153	18 yrs.
Malicious wounding of a police officer (§ 18.2-51.1)	5-30 yrs.	5-40 yrs.	71	7 yrs.
Malicious wounding with a caustic substance (§ 18.2-52)	5-30 yrs.	5-40 yrs.	9	8 yrs.
Arson of occupied dwelling or church with serious bodily injury (§ 18.2-77(A,ii))	5 yrs.-Life	20 yrs.-Life	7	17 yrs.
Arson of occupied dwelling or church with no serious bodily injury (§ 18.2-77(A,ii))	5 yrs.-Life	5-40 yrs.	115	11 yrs.

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Felony Crime	Current Penalty	Proposed Penalty	Number of Cases (1997-2001)	Avg. Imposed Sentence (before suspended time)
Burglary of dwelling with intent to commit murder, rape, robbery or arson - with deadly weapon or serious bodily injury (§ 18.2-90)	20 yrs.-Life (weapon) or 5-20 yrs. (no weapon)	5-40 yrs.	50	18 yrs.
Burglary of other structure with intent to commit murder, rape, robbery or arson - with deadly weapon or serious bodily injury (§ 18.2-90)	20 yrs.-Life (weapon) or 5-20 yrs. (no weapon)	5-40 yrs.	13	16 yrs.
Burglary of dwelling with intent to commit larceny, assault & battery or felony other than murder, rape, robbery or arson - with deadly weapon or serious bodily injury (§ 18.2-91)	20 yrs.-Life (weapon) or 5-20 yrs. (night/no wpn) or 1-20 yrs. (statutory/ no wpn)	5-40 yrs.	238	10 yrs.
Burglary of other structure with intent to commit larceny, assault & battery or felony other than murder, rape, robbery or arson - with deadly weapon or serious bodily injury (§ 18.2-91)	20 yrs.-Life (weapon) or 5-20 yrs. (night/no wpn) or 1-20 yrs. (statutory/ no wpn)	5-40 yrs.	55	7 yrs.
Burglary of occupied dwelling with intent to commit misdemeanor - with deadly weapon or serious bodily injury (§ 18.2-92)	20 yrs.-Life (weapon) or 1-5 yrs. (no weapon)	5-40 yrs.	15	14 yrs.
Burglary of dwelling with intent to commit larceny, assault & battery or felony other than murder, rape, robbery or arson – no deadly weapon and no serious bodily injury (§ 18.2-91)	1-20 yrs.	1-10 yrs.	2,907	6 yrs.
Burglary of other structure with intent to commit larceny, assault & battery or felony other than murder, rape, robbery or arson – no deadly weapon and no serious bodily injury (§ 18.2-91)	1-20 yrs.	1-10 yrs.	1,738	6 yrs.
Larceny \$25,000 or more (§ 18.2-95(ii))	1-20 yrs.	5-20 yrs.	106*	5 yrs.
Larceny \$10,000 to \$24,999 (§ 18.2-95(ii))	1-20 yrs.	1-10 yrs.	3,224*	6 yrs.
Larceny \$500 to \$9,999 (§ 18.2-95(ii))	1-20 yrs.	1-5 yrs.	7,117*	4 yrs.
Larceny \$200 to \$499 (§ 18.2-95(ii))	1-20 yrs.	0-12 mos.	5,653*	4 yrs.
Larceny from a person \$5 to \$24,999	1-20 yrs.	1-10 yrs.	1,533*	5 yrs.
Larceny of a firearm	1-20 yrs.	At least 1-5 yrs.	146	5 yrs.

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Felony Crime	Current Penalty	Proposed Penalty	Number of Cases (1997-2001)	Avg. Imposed Sentence (before suspended time)
Motor vehicle theft	1-20 yrs.	At least 1-10 yrs.	1,357	5 yrs.
Theft of credit card (§ 18.2-192(1,a))	1-20 yrs.	1-5 yrs.	1,176	3 yrs.
Selling Schedule I or II drug – 3 <sup>rd</sup> or subsequent conviction (§ 18.2-248(C))	5 yrs.-Life	20 yrs.-Life	8	16 yrs.
Manufacture marijuana (§ 18.2-248.1(c))	5-30 yrs.	5-20 yrs.	156	6 yrs.
Selling marijuana – 3 <sup>rd</sup> or subsequent conviction (§ 18.2-248.1(d))	5 yrs.-Life	5-40 yrs.	0	Na
Selling 5 lbs. or more of marijuana (§ 18.2-248.1(a,3))	5-30 yrs.	5-20 yrs.	224	8 yrs.
Sell Schedule I or II drug to minor at least 3 years junior (§ 18.2-255(A))	10-50 yrs.	20 yrs.-Life	10	7 yrs.
Sell 1 oz. or more of marijuana to minor at least 3 years junior (§ 18.2-255(A))	10-50 yrs.	5-40 yrs.	2	13 yrs.
Sell less than 1 oz. marijuana to minor at least 3 years junior (§ 18.2-255(A))	10-50 yrs.	5-40 yrs.	19	9 yrs.
Sell Schedule III or IV drug to minor at least 3 years junior (§ 18.2-255(A))	10-50 yrs.	5-40 yrs.	0	Na
Attempted and conspired abduction	1-10 yrs.	Based on § 18.2-22, § 18.2-26	3	5 yrs.
Forcible sodomy or object sexual penetration of spouse not covered by § 18.2-67.1 or § 18.2-67.2	1-20 yrs.	5 yrs.-Life	13** (FY2003 only)	5 yrs.

Data Source: FY2000 and FY2001 Pre/Post-Sentence Investigation (PSI) database; Virginia Criminal Sentencing Commission Larceny/Fraud Study (2000)

\* The number of cases is estimated. The value of property stolen larceny cases is not available on automated databases maintained by the Commonwealth. The Virginia Criminal Sentencing Commission conducted a special study of felony larceny crimes in 2000 and found the following:

- 0.6% of cases involved property valued at \$25,000 or more
- 18.1% of cases involved larceny not from a person with property valued at \$10,000 up to \$24,999
- 39.9% of cases involved larceny not from a person with property valued at \$500 up to \$10,000
- 8.6% of cases involved larceny from a person with property valued at \$5 up to \$24,999
- 32% of cases involved larceny not from person with property valued at \$200 up to \$500.

\*\* These acts may now be prosecuted as marital sexual assault under § 18.2-67.2:1. During fiscal year (FY) 2003, following the elimination of the spousal exception clause in the rape statute (§ 18.2-61), there were 13 convictions for marital sexual assault, according to the Local Inmate Data System (LIDS)).

Note: These data reflect cases involving one count of the specified offense where the offense was the primary (or most serious) offense in the case. Data include attempted and conspired offenses. Sentencing data reflect the average sentence imposed for the specified offense and do not include sentences for other offenses at conviction.

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**Impact of Proposed Legislation:**

The proposed legislation may affect state-responsible (prison) bed space needs in several ways.

- (1) For those offenses whose statutory maximums have been increased by the proposal, there may be an increased need for prison beds. Many of these offenses currently have maximum penalties of ten years or more; thus, the proposed changes will not have an impact within the six-year window specified in § 30-19.1:4 for legislative impact statements.
- (2) For those offenses whose statutory minimums have been increased by the proposal, there may be an increased need for prison beds. This impact is difficult to assess because judges may suspend time from the statutory minimum specified in *Code* for nearly all crimes, but a jury must impose the statutory minimum and may not suspend any portion of the sentence (although a judge in Virginia is permitted by law to suspend all or a portion of a sentence imposed by a jury, judges let the jury sentence stand in about 75% of the trials with a jury).
- (3) For those offenses whose statutory maximums have decreased under the proposal, there may be a reduced need for beds associated with lower statutory maximums than under current *Code*. Because nearly all of the offenses affected by the proposed reductions in statutory maximums would still have maximum penalties of ten years or more, few of these changes will have an impact within the six-year forecast window required by § 30-19.1:4.
- (4) Reducing the amount dollar threshold for felony destruction of property (vandalism) from \$1,000 to \$500 will increase the number of cases prosecuted as felonies and will likely have a more immediate effect. Conversely, increasing the dollar threshold for felony larceny from \$200 to \$500 (and increasing the threshold in certain fraud and arson crimes) will reduce the need for prison beds as fewer cases will be prosecuted as felonies. Instead, larceny, fraud and arson cases involving less than the proposed felony threshold would be prosecuted as misdemeanors and subject to up to 12 months in a local-responsible (jail) bed.

Assessing the net impact of proposed changes described above, it is estimated that there will be a net high impact on state-responsible (prison) bed space needs of less than one bed early in the first year of implementation of the proposed legislation. By the end of the first year, however, the proposal is expected to result in a net reduction of beds. The net impact of the proposal is expected to reduce the need for state-responsible (prison) beds by nine by July 2010. Beyond the six-year forecast window, however, the long-term impact of the proposal is expected to result in the need for additional prison beds.

The bed space requirements for local-responsible (jail) inmates may be impacted to two ways. First, for those offenses affected by raising the amount threshold for some current felony crimes (such as larceny, fraud and arson), limiting the statutory maximum to a Class 1 misdemeanor, there will be an increased need for jail beds as judges will no longer sentence these offenders to prison unless there is an accompanying felony. Second, for those offenses affected by lowering the dollar thresholds for felony prosecution (such as property destruction), there will be a decreased need for jail beds as judges will be able to sentence these offenders to prison for the current crime alone.

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Based on the same methodology used above, there will be an increased need for 97 jail beds statewide by June 2010, for a cost to the state of \$1,061,275 (using FY2002 jail inmate costs) for reimbursement to localities. There would be an additional cost for the localities of \$722,201 for the same beds.

There is an expected shift from state community corrections to local community corrections associated with the proposal, but the size of the shift in resources that may be necessary cannot be determined with existing data.

Should the proposal be adopted, a variety of changes to the sentencing guidelines would be necessary. The proposed enactment date of July 1, 2005, would allow the Virginia Criminal Sentencing Commission the time necessary to revise its guidelines in accordance with the proposed changes to Title 18.2.

**Estimated Six-Year Impact in State-Responsible (Prison) Beds**

FY05	FY06	FY07	FY08	FY09	FY10
0	-33	-35	-26	-19	-9

**Estimated Six-Year Impact in Local-Responsible (Jail) Beds**

FY05	FY06	FY07	FY08	FY09	FY10
0	39	89	93	96	97

The Department of Juvenile Justice (DJJ) reports that, if the proposal is enacted, changes affecting statutory minimums and maximum sentences greater than 20 years have no impact on the minimum confinement assigned under the Department’s Length of Stay (LOS) guidelines. However, for other offenses where the penalty structure changes, the minimum confinement under the LOS guidelines would change as described in the table below:

Maximum Adult Penalty		Minimum confinement Under LOS Guidelines	
Current	Proposed	Current	Proposed
20 years	5 or 10 years	12-18 months	6-12 months
20 years	12 months	12-18 months	3-6 months*
5 or 10 years	12 months	6-12 months	3-6 months*
12 months	5 years	3-6 months*	6-12 months

\* The Code specifies that a juvenile is eligible for commitment if he is adjudicated for a felony, has a prior felony adjudication or has accumulated a total of four Class 1 misdemeanor adjudications.

**Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0 for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.**

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**Assumptions underlying the analysis include:**

**General Assumptions**

1. State and local responsibility is based on § 53.1-20 as analyzed for the Secretary's Committee on Inmate Forecasting in 2003.
2. New cases representing state-responsible sentences were based on forecasts developed for the Secretary's Committee on Inmate Forecasting and approved in August 2003. New cases representing felony no incarceration and local-responsible sentences were based on forecasts developed by the Virginia Criminal Sentencing Commission using the PSI database. New cases representing misdemeanor sentences were based on forecasts developed by the Virginia Criminal Sentencing Commission using the LIDS database.
3. Cost per prison bed was assumed to be \$22,606 per year as provided by the Department of Planning and Budget to the Commission pursuant to § 30-19.1:4. ***Where the estimated bed space impact included a portion (or fraction) of a bed, a prorated cost was included in the estimated amount of necessary appropriation.***
4. Cost per jail bed was based on The Compensation Board's FY2002 Jail Cost Report. The state cost was calculated from the revenue portion and the resulting sum was \$29.81 per day or \$10,889 per year. The local cost was calculated by using the daily expenditure cost of \$54.12 per inmate (not including capital accounts or debt service) as the base, and subtracting revenues accrued from the state and federal governments, which resulted in \$20.29 per day or \$7,410 per year. ***Where the estimated bed space impact included a portion (or fraction) of a bed, a prorated cost was included in the estimate.***

**Assumptions relating to sentence lengths**

1. The impact of the proposed legislation on criminal provisions, which would be effective on July 1, 2005, is phased in to account for case processing time.
2. The bed-space impact was derived by estimating the difference between expected dates of release under current law and under the proposed legislation. Release dates were estimated based on the average rates at which inmates in Department of Corrections' facilities were earning sentence credits as of December 31, 2002. For sexual assault offenses the rate was 9.81%, for Schedule I/II drug sale offenses the rate was 9.83%, fraud and larceny offenses the rate was 9.54%, and for other property offenses (arson and vandalism) the rate was 9.95%. Release dates for local-responsible felony convictions were estimated based on data provided by the Compensation Board on the average percentage of time actually served by felons sentenced in FY2003 to local jails; this rate was 89.7%. Release dates for local-responsible misdemeanor convictions were estimated based on data provided by the Compensation Board on the average percentage of time actually served by misdemeanants, with no accompanying felony, sentenced in FY2003 to local jails; this rate was 39.66%.

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