



Impact Analysis on Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 912

(Patron – Phillips)

Date Submitted: 12/30/03

LD #: 04-6579460

Topic: Modification of sentencing guidelines for multiple drug convictions

Proposed Change:

The proposal adds § 17.1-807 to modify the sentencing guidelines for drug offenders with a prior felony conviction or adjudication for a drug crime. The proposed legislation mandates that the sentencing guidelines applicable to drug offenses shall not include a recommendation for probation if the offender has a prior felony drug conviction or adjudication.

The sentencing guidelines in use today were established by a Special Session of the 1994 General Assembly (§ 17.1-805). The guidelines largely reflect historical patterns of sentencing and time served by offenders during 1988 to 1992, prior to the abolition of parole and institution of truth-in-sentencing in Virginia. The sentencing guidelines are structured to provide sentencing recommendations for nonviolent offenders (as specified in §17.1-805) that are consistent with time served by those offenders under the parole system. In addition, the sentencing guidelines used today contain legislatively-mandated enhancements for offenders convicted of violent crimes and those with prior convictions for violent felonies. These enhancements dramatically increase the sentence recommendations for violent offenders, with recommendations equating to prison terms up to six times longer than the terms violent offenders served under the parole system.

Under current guidelines, offenders convicted under § 18.2-248 (C) for selling, manufacturing, distributing, or possessing with intent to distribute a Schedule I or II are always recommended for a term of incarceration of more than six months, even if it is the offender's first conviction. Similarly, offenders who sell a Schedule I, II, III or IV drug or marijuana to a minor, offenders convicted for a third felony sale of marijuana, and offenders who sell more than five pounds of marijuana or transport more than five pounds of marijuana into the Commonwealth are always recommended for incarceration in excess of six months (transporting a Schedule I or II drug into the Commonwealth is not covered by the guidelines). For other drug offenses, such as simple possession of a Schedule I or II drug, the offender may receive an incarceration recommendation based on the combination of factors related to the number of counts of the offense, additional offenses at conviction, possession of a firearm or knife at the time of the offense, and the offender's criminal record.

In 1998, the Sentencing Commission recommended and the General Assembly accepted, a modification to the drug offense guidelines for possession of a Schedule I or II drug. Effective July 1998, the Commission added a factor to both Sections A and B of the guidelines worksheets to increase the

likelihood that offenders convicted of possessing a Schedule I or II drug are recommended for a term of incarceration if they have two or more prior convictions or adjudications for possessing, selling, manufacturing, distributing, or possessing with intent to distribute a Schedule I or II. This modification was based on analysis of punishment practices in drug cases sentenced under truth-in-sentencing provisions.

Under the proposal, second-time drug offenders would always be recommended for a term of incarceration, regardless of historical sentencing practices in those cases.

In July 2002, pursuant to legislative directive and after years of empirical study and pilot testing, the Sentencing Commission incorporated its nonviolent offender risk assessment instrument into the guidelines and implemented use of the instrument statewide. The risk assessment instrument is completed for drug, fraud and larceny offenders who are recommended for an active term of incarceration by the sentencing guidelines and who satisfy the eligibility criteria established by the Commission. Offenders with any current or prior convictions for violent felonies (defined in § 17.1-803) and offenders who sell 28.35 grams (1 ounce) or more of cocaine are excluded from risk assessment consideration. When a risk assessment worksheet is completed, offenders scoring 35 points or less on the scale are recommended for sanctions other than traditional incarceration. Judges are considered in compliance with the guidelines if they sentence within the recommended incarceration range or if they follow the recommendation for alternative punishment. The proposal would preclude second-time drug offenders from being evaluated under the risk assessment component of the guidelines.

Data Analysis:

During fiscal year (FY) 2003, the Sentencing Commission received 7,049 guidelines forms for felony drug offenses. In 64% of these cases, the offender was recommended for a term of incarceration under the sentencing guidelines. Among offenders recommended for probation without an active term of incarceration, the vast majority (85%) were first-time felony drug offenders. Only 15% of drug offenders recommended for probation had a prior felony drug conviction or adjudication scored on the guidelines (a total of 373 offenders for the year). Under the proposal, these 373 offenders would have to receive an incarceration recommendation instead of the current probation recommendation.

A portion of drug offenders recommended for incarceration were eligible for risk assessment consideration and, because they scored below the threshold established for risk assessment, received a dual sentencing recommendation that included alternative punishment other than incarceration. Although 45% of eligible drug offenders were recommended by risk assessment for alternative punishment overall during FY2003, only 31% of repeat drug offenders were recommended for an alternative punishment (a total of 403 offenders). The proposal would bar these 403 offenders from risk assessment consideration. In these cases, the original sentencing guidelines recommendation for incarceration would remain in effect.

Impact of Proposed Legislation:

By revising the sentencing guidelines for repeat drug offenders, the proposal is expected to increase the state-responsible (prison) bed space needs of the Commonwealth. The proposal would require an

incarceration recommendation for offenders who currently receive a probation recommendation under the sentencing guidelines or a recommendation for alternative punishment under the risk assessment component of the guidelines. Over the next six years, the net high state-responsible impact would be approximately 92 beds.

In addition, there will be an impact on local-responsible (jail) bed space; based on the same methodology, there will be an increased need for 45 beds statewide, for a cost to the state of \$490,203 (using FY2002 jail inmate costs) for reimbursement to localities. There would be an additional cost to the localities of \$333,585 for the same beds.

If the proposal is adopted, it would be necessary to revise the sentencing guidelines in accordance with the proposed changes.

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

FY05	FY06	FY07	FY08	FY09	FY10
38	61	73	80	86	92

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

FY05	FY06	FY07	FY08	FY09	FY10
46	46	46	46	45	45

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$2,085,082 for periods of imprisonment in state adult correctional facilities and is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

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 felony sentences were based on forecasts developed by the Secretary's Committee on Inmate Forecasting in August 2003.
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, 2004, 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 drug offenses the rate was 9.94%. 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 misdemeanor 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 39.66%.

3. Sentences for persons convicted of drug crimes under § 18.2-247 et seq. with two prior convictions under the same article of the *Code* and recommended for probation by the guidelines were randomly assigned sentences from those whose recommendation was one day to six months. Sentences for persons convicted of drug crimes under § 18.2-247 et seq. with a prior conviction under the same article of the *Code*, recommended for incarceration, but eligible for an alternative sanction (including probation) by the risk assessment instrument were randomly assigned sentences from those who were not sentenced prior to statewide use of risk assessment, recommended for incarceration with a prior drug conviction (but no violent prior record).

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