



## Impact Analysis on Proposed Legislation

### *Virginia Criminal Sentencing Commission*

#### **Senate Bill No. 484**

*(Patron – Obenshain)*

**Date Submitted:** 12/29/03

**LD #:** 04-7233782

**Topic:** Modification of sentencing guidelines for methamphetamine

#### **Proposed Change:**

The proposal adds § 17.1-807 to modify the sentencing guidelines for crimes involving methamphetamine. The proposed legislation mandates that the sentencing guidelines applicable to cocaine offenses be used in cases involving any substance that contains any quantity of methamphetamine.

Currently, methamphetamine is treated by the sentencing guidelines in the same manner as any Schedule I or II drug other than cocaine. Since July 1997, Virginia's sentencing guidelines have contained enhancements designed to increase the sentence recommendation in cases involving unusually large amounts of cocaine. The quantity enhancements for cocaine were grounded in historical research of felony drug cases in the Commonwealth.

The guidelines enhancements for selling cocaine increase the sentence recommendation by three years in cases involving 28.35 grams (1 ounce) or more but less than 226.8 grams (½ pound) of cocaine and by five years if the amount of cocaine is 226.8 grams (½ pound) or more. In cases with less than 28.35 grams of cocaine, no enhancement applies. The quantity enhancements implemented in 1997 were accompanied by other modifications which apply to first-time felons who sell relatively small amounts of cocaine. An offender who sells 1 gram (.04 ounce) or less of cocaine who has never been convicted of a felony receives a dual sentencing recommendation. The recommendation reflects the traditional term of incarceration provided by the guidelines as well as a recommendation for the detention center incarceration program. Currently, a judge may sentence such an offender in accordance with the recommendation for traditional incarceration or the recommendation for detention center incarceration and be considered in compliance with the guidelines. In its *2003 Annual Report*, however, the Sentencing Commission has recommended that the detention center recommendation be removed from the guidelines for drug offenses beginning July 1, 2004.

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. When a risk assessment worksheet is completed, offenders scoring 35 points or less on

the scale are recommendation 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. However, 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.

Although judges can utilize Virginia's discretionary sentencing guidelines as a tool in formulating sentences in most cases, the *Code of Virginia* specifies several mandatory minimum penalties for offenses involving Schedule I or II drugs, including methamphetamine. An offender who receives a third or subsequent conviction for selling a Schedule I or II drug is now subject to a three-year mandatory-minimum sentence (§ 18.2-248(C)), as is an offender who transports an ounce or more of a Schedule I or II drug into the Commonwealth (§ 18.2-248.01). An offender convicted under § 18.2-248.01 for transporting an ounce or more of a Schedule I or II drug into the Commonwealth a second time must serve a minimum of ten years.

Additional mandatory penalties apply to offenses involving larger quantities of drug. Under § 18.2-248(H), selling, manufacturing, distributing or possessing with intent to distribute 100 grams or more of methamphetamine or 200 grams or more of a mixture containing methamphetamine is a felony carrying a term of 20 years to life. The 20-year mandatory, minimum sentence can be suspended only if the offender meets all five of the following conditions: (1) the offender has no violent prior record; (2) the current offense did not involve violence or a firearm; (3) the current offense did not result in a serious injury or death; (4) the offender was not a leader in the current offense, nor a part of a continuing criminal enterprise; and (5) the offender cooperates to the fullest extent. This statute may be applied even when the offender has not been observed actively trying to manufacture, sell or distribute the methamphetamine. Under Virginia case law, when the intent to distribute is based upon circumstantial evidence, *Hunter v. Commonwealth* (213 Va. 569, also see *Dukes v. Commonwealth*, 227 Va. 119) found that "... quantity, when greater than the supply ordinarily possessed by a narcotics user for his personal use, is a circumstance which, standing alone, may be sufficient to support a finding of intent to distribute."

Under § 18.2-248(H1), selling, manufacturing, distributing or possessing with intent to distribute 100 grams to less than 250 grams of methamphetamine or 200 grams to less than one kilogram of a methamphetamine mixture as part of a continuing criminal enterprise is a felony carrying a penalty of 20 years to life. The 20-year mandatory minimum sentence cannot be suspended for any reason.

Under § 18.2-248(H2), selling, manufacturing, distributing or possessing with intent to distribute 250 or more grams of methamphetamine or one kilogram or more of a methamphetamine mixture as part of a continuing criminal enterprise is a felony carrying a penalty of life. The life sentence is mandatory, but can be reduced to 40 years only under the condition of substantial cooperation with law enforcement.

### **Data Analysis:**

According to fiscal year (FY) 2000 and FY2001 Pre/Post-Sentence Investigation (PSI) data, approximately 87% of convictions in Virginia for selling, manufacturing, distributing or possessing with intent to distribute a Schedule I or II drug (§ 18.2-248(C)) were associated with cocaine. More than

86% of the convictions for simple possession of a Schedule I or II drug involved some form of cocaine. During the same period, 2.5% of Schedule I or II drug sale convictions were linked to methamphetamine, as were 3.5% of simple possession convictions.

In 2001, the Commission conducted a comprehensive study of sentencing practices in methamphetamine cases at the request of the General Assembly (chapters 352 and 375 of *The Acts of the Assembly 2001*). According to calendar year (CY) 1995 through 2000 Pre/Post-Sentence Investigation (PSI) data, there were 418 confirmed convictions in Virginia's circuit courts for methamphetamine crimes during the six-year period. Of the total, there were 135 convictions under § 18.2-248(C) for selling, manufacturing, distributing or possessing with intent to distribute methamphetamine (the remaining 283 methamphetamine convictions were simple possession cases). Data indicate that approximately 4% of methamphetamine sale cases involve an ounce or more of the drug, the minimum quantity necessary to qualify for guidelines enhancements applicable in cocaine cases.

According to the Virginia State Police fiscal year (FY) 2000 Incident Based Reporting (IBR) database, there were 37 incidents reported to Virginia police involving the sale or distribution of methamphetamines or amphetamines. Of these, none were of sufficient quantity to invoke the three-year guidelines enhancement, and only two were of sufficient quantity to invoke the five-year enhancement described above. Of the two that would be eligible for sentence recommendation enhancements, one involved 467 grams, a quantity sufficient for conviction under drug kingpin statutes (§ 18.2-248(H), § 18.2-248(H2)). Offenses defined in §§ 18.2-248(H) and 18.2-248(H2) are not covered by the sentencing guidelines and trigger a lengthy mandatory, minimum sentence of either 20 years or life, respectively.

### **Impact of Proposed Legislation:**

By revising the sentencing guidelines recommendations applicable in methamphetamine cases, the proposed legislation may have an impact on state-responsible (prison) beds. Because cases involving large quantities of drugs are often processed through the federal court system and are not reflected in Virginia statistics, it is unclear if the proposal will impact the number of offenders prosecuted in Virginia's circuit courts in the future. Although Virginia's sentencing guidelines are discretionary, there has been an increase in the median sentence for those convicted of selling an ounce or more of cocaine since the quantity enhancements were added; however, judges have complied with the cocaine guidelines at a rate of less than 58% in these cases and nearly all of the departures have resulted in sentences below the guidelines recommendation.

Nonetheless, if offenders convicted in state courts for selling methamphetamine are treated similarly to offenders with the same amount of cocaine, then the impact is estimated to be 32 beds by FY2010. To calculate the potential impact of this proposal, it was assumed that the provision in guidelines that recommends detention center incarceration for first-time felons who sell small quantities will be eliminated from the guidelines beginning July 1, 2004 (as is recommended by the Sentencing Commission). The impact also reflects the fact that offenders selling more than 28.35 grams of methamphetamine will no longer be eligible for risk assessment consideration.

In addition, there will be an increased need for local-responsible (jail) bed space; based on the same methodology, there will be an increased need for three jail beds statewide, for a cost to the state of \$36,797 (using FY2002 jail inmate costs) for reimbursement to localities. There would be an additional statewide cost to the localities of \$25,041 for the same beds.

The sentencing guidelines would need to be modified to include methamphetamine wherever there is a specific reference to cocaine.

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

FY05	FY06	FY07	FY08	FY09	FY10
7	15	21	25	29	32

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

FY05	FY06	FY07	FY08	FY09	FY10
3	3	3	3	3	3

**Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$720,036 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 local-responsible 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, which would be effective on July 1, 2004, is treated as applying to all parole ineligible persons sentenced from that date onward.
2. Release dates for state-responsible felony convictions 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 Schedule I or II drug sale offenses, this 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%.
3. Sentences for persons convicted under § 18.2-248(C) with 28.35 grams or more of methamphetamine were randomly drawn from offenders convicted under the same statute with 28.35 grams or more of cocaine with the appropriate enhanced sentence recommendation (36 or 60 months). Sentences for persons convicted under § 18.2-248(C) with one gram or less of methamphetamine and no prior violent felony record were randomly drawn from offenders convicted under the same statute with one gram or less of cocaine and no prior violent felony

record, and, thus, eligible for a recommendation under risk assessment as a alternative to the ordinary sentence recommendation.

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