



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2362

Amendment in the Nature of a Substitute (Patron Prior to Substitute – Gilbert)

LD#: 09-0544516

Date: 2/3/2009

Topic: Second or subsequent sale, etc., of a Schedule I/II drug or possession of marijuana

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
Cannot be determined
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
None (\$0)

- **Juvenile Correctional Centers:**
None (\$0)
- **Juvenile Detention Facilities:**
None (\$0)

Summary of Proposed Legislation:

The proposal amends § 18.2-248(C) to clarify when the enhanced penalty for a second or subsequent conviction for manufacturing, selling, distributing, or possessing with intent to distribute a Schedule I or II drug applies.

Under current *Code*, the enhanced penalty for a second or subsequent conviction (5 years to life in prison instead of 5 to 40 years) can be applied at the discretion of the judge or the jury when imposing the sentence; the offender's prior conviction does not have to be specified in the warrant, indictment, or information filed by the prosecutor (*Patterson v. Commonwealth*, 17 Va. App. 644, 440 S.E.2d 412 (1994)). Moreover, the enhanced penalty for a second or subsequent conviction can be applied whenever the offender is being sentenced for multiple counts of this offense in the same sentencing hearing; if there are multiple counts, one count may be used as the first conviction and the remaining counts may be sentenced as second or subsequent convictions (*Able v. Commonwealth*, 16 Va. App. 542, 431 S.E.2d 337 (1993); *Jones v. Commonwealth*, 21 Va. App. 435, 464 S.E.2d 558 (1995)).

Under the proposal, any person convicted of a second offense under § 18.2-248(C) who has previously been convicted of such an offense or a substantially similar offense in any other jurisdiction may be subject to the enhanced penalty. The proposal clarifies that convictions in Virginia and those under similar laws in other jurisdictions may be counted as a prior offense making an offender subject to the enhancement.

The proposal also amends § 18.2-250.1 to clarify when the enhanced penalty for second or subsequent possession of marijuana applies. The proposal specifies that adult convictions and juvenile adjudications in Virginia, as well as convictions and adjudications under similar laws elsewhere, may be counted as a prior offense to make an offender eligible for the enhanced penalty for second or subsequent possession of marijuana, a Class 1 misdemeanor.

Analysis:

Based on an analysis of fiscal year (FY) 2006 and FY2007 Pre-Sentence Investigation (PSI) data:

- There were 6,094 offenders convicted of manufacturing, selling, distributing, or possessing with intent to distribute a Schedule I or II drug during the two-year period.
- Of those 6,094 offenders, 443 were sentenced under the enhanced penalty provisions of § 18.2-248(C) for a second or subsequent conviction; another 1,184 had either prior convictions or multiple counts of this offense and, although eligible, were not sentenced under the enhanced penalty structure.
- When sentenced under the enhanced penalty for a second or subsequent conviction, 83% of offenders received a state-responsible (prison) term and were given a median sentence of four years. Among offenders eligible for, but not sentenced under, the enhanced penalty structure, 81% received a prison term, with a median sentence of 2.5 years.

According to calendar year (CY) 2006 and CY2007 General District Court Automated Information System (CAIS) data, there were 22,341 misdemeanor convictions for possession of marijuana. Most (20,079) were convictions for a first possession of marijuana; of these, 23% were given a local-responsible (jail) term with a median sentence of 20 days. The remainder (2,262) were convictions for a second or subsequent possession of marijuana; 48% of these offenders were given a jail term with a median sentence of 30 days.

Impact of Proposed Legislation:

State adult correctional facilities. The proposed legislation may increase the state-responsible (prison) bed space needs of the Commonwealth. The proposal clarifies that convictions under similar laws in other jurisdictions may be counted as a prior offense to make an offender eligible for the enhanced penalty under § 18.2-248(C) for a second or subsequent conviction for manufacturing, selling, distributing, or possessing with intent to distribute a Schedule I or II drug. To the extent that out-of-state convictions have not been counted as prior convictions under § 18.2-248(C), this change could increase the number of offenders sentenced under the enhanced penalty and, thus, could increase future bed space needs. The number of additional convictions under the enhancement, however, cannot be estimated. While nothing in the proposal requires a change in judicial sentencing practices, Virginia's sentencing guidelines recommend a longer prison term for an offender sentenced under the enhanced penalty structure (at least 10 months longer) than an offender who is eligible but not sentenced under this provision.

Local adult correctional facilities. By clarifying that convictions and adjudications in Virginia and those in other jurisdictions may be counted as a prior offense to make an offender eligible for the enhanced penalty for second or subsequent possession of marijuana, the proposal could increase the need for local-responsible (jail) beds. The magnitude of the impact, however, cannot be quantified.

Adult community corrections programs. It is unlikely that the proposal will increase the need for adult community corrections programs.

Virginia's sentencing guidelines. The sentencing guidelines cover violations of § 18.2-248(C). Misdemeanor violations of § 18.2-250.1 are not covered by the guidelines as the primary, or most serious offense; such a conviction, however, could augment the guidelines recommendation if the most serious offense at sentencing is a covered offense. No adjustment to the guidelines would be necessary under the proposal.

Juvenile correctional centers. According to the Department of Juvenile Justice, the proposal is not expected to increase juvenile correctional center bed space needs.

Juvenile detention facilities. The Department of Juvenile Justice reports that the proposal is not expected to increase the bed space needs of juvenile detention facilities.

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 and is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

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