



## 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#:** 09-0958516

**Date:** 2/23/2009

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

#### 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, an offender's previous conviction for this offense must be alleged in the warrant, indictment, or information presented by the prosecutor (and the previous offense must have resulted in a conviction prior to the date of the offense for which he is now being prosecuted) for the enhanced penalty to apply. At the same time, 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 proposed amendment parallels the existing language for the third or subsequent conviction for manufacturing, selling, distributing, or possessing with intent to distribute a Schedule I or II drug (found in the same paragraph).

#### 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, 443 were sentenced under the enhanced penalty provisions of § 18.2-248(C) for a second or subsequent conviction. Under the proposal, only those offenders with a prior conviction that occurred before the date of the current offense could be sentenced under the enhanced penalty structure. With this change, 4 of the 443 offenders would no longer be eligible for the enhanced penalty provisions.
- Another 1,184 of the total 6,094 offenders had either prior convictions or multiple counts of this offense and, although eligible, were not sentenced under the enhanced penalty structure of § 18.2-248(C) for a second or subsequent conviction.
- 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 due to a prior conviction for the offense, 81% received a prison term, with a median sentence of 2.5 years.

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**Impact of Proposed Legislation:**

**State adult correctional facilities.** The impact of this proposal cannot be determined. The proposal may affect state-responsible (prison) bed space needs in two ways. First, 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. Second, the proposal specifies that an offender must have a prior conviction under § 18.2-248(C), and not simply multiple counts of the offense in the same sentencing hearing, in order for an offender to be eligible for the enhanced penalty for a second or subsequent offense. This is expected to decrease the number of offenders who are eligible for the enhanced penalty and may reduce the number of prison beds needed. The net effect of these two elements cannot be quantified. Furthermore, the impact of the proposal on prosecutorial charging practices is not known. 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.

**Adult community corrections resources.** Because the proposal specifies that out-of-state convictions may be counted as prior convictions under § 18.2-248(C), the proposal could result in felony convictions and subsequent supervision requirements for an additional number of offenders. As a result, the proposal may increase the need for adult community corrections resources. However, by limiting the prior convictions that may be counted to only convictions prior to the date of the current offense, the proposal may decrease the need for these resources. Since the number of cases that may be affected by the proposal cannot be determined, the potential impact on community corrections resources 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). 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.

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**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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