



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 224

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

LD#: 12105145

Date: 2/6/2012

Topic: Assault and battery of a family member

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000 *
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

- **Juvenile Correctional Centers:**
Cannot be determined
- **Juvenile Detention Facilities:**
Cannot be determined

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 890 of the 2011 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Summary of Proposed Legislation:

The proposal amends § 18.2-57.2, relating to assault and battery against a family or household member. Currently, under § 18.2-57.2, misdemeanor assault and battery of a family member is a single offense and relies upon the common law definition of assault and battery, without statutory modification or restriction. As such, the crime of assault and battery refers to any form of unlawful touching and no physical injury is required for a conviction (*Hardy v. Commonwealth*, 1867). Under the proposal, assault and battery would remain as currently defined in common law. The proposal creates the separate offense of battery that is accomplished through the application of physical force against a family or household member. Physical force is defined as force that is capable of causing physical pain or injury to the victim. Penalties prescribed in this section would remain the same.

The proposal also expands the list of offenses that may be counted as prior convictions for the purposes of enhancing the penalty for assault and battery of a family or household member to include unlawful wounding under § 18.2-51 and non-malicious injury by a caustic substance or fire, in violation of § 18.2-52. Under the proposal, a prior conviction for one of these offenses could be counted in order to raise the penalty for a third conviction for assault and battery of a family or household member from a Class 1 misdemeanor to a Class 6 felony. The proposal makes several technical changes to account for the addition of a subsection in § 18.2-57.2.

Currently, under § 18.2-57.2, assault and battery of a family or household member is a Class 6 felony if it is alleged in the warrant, petition, information, or indictment that the offender has been previously convicted of two offenses against a family or household member involving a violation of: § 18.2-57.2 (misdemeanor assault and battery against a family member), § 18.2-51 (malicious wounding), § 18.2-51.2 (aggravated malicious wounding), § 18.2-52 (malicious injury by means of a caustic substance or fire), or any similar offense in another jurisdiction within 20 years. Otherwise, assault and battery of a family or household member is a Class 1 misdemeanor.

The proposal was precipitated by a 4th Circuit Court of Appeals decision (*United States v. White*, 2010) relating to the possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)). The federal conviction, which rested upon a prior conviction in Virginia under § 18.2-57.2, was overturned because the court determined that Virginia's statute does not necessarily meet the legal definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(ii). Under federal law, the definition of a misdemeanor crime of domestic violence includes the use or attempted use of physical force or the threatened use of a deadly weapon. In contrast, the common law definition of battery (upon which § 18.2-57.2 is based) does not require physical force, beyond mere offensive touching, as an element of the crime. The appellate court vacated the conviction because there was no additional information in the record showing that the defendant's prior conviction otherwise met the federal definition of a misdemeanor crime of domestic violence. By creating a subsection in § 18.2-57.2 for battery that specifically requires the application of physical force against a family or household member, the proposal may remedy the issue expressed in *United States v. White* (2010).

Before July 1, 2004, prior felony assaults against a family or household member could not be used to enhance the penalty for a third or subsequent misdemeanor assault and battery against a family or household member within 20 years. Until the 2004 General Assembly added malicious and aggravated malicious wounding to the list of offenses that could be counted as prior convictions under § 18.2-57.2, only prior misdemeanor family assault and battery offenses could be counted as priors under this section. Convictions for other forms of felony assault, such as unlawful wounding in violation of § 18.2-51, involving a family or household member are not currently included in the list of prior convictions that would elevate a Class 1 misdemeanor under § 18.2-57.2 to a Class 6 felony.

Analysis:

According to the FY2009 and FY2010 Local Inmate Data System (LIDS), there were 6,259 offenders held pre- or post-trial in jail who were convicted of a Class 1 misdemeanor under § 18.2-57.2 for assaulting a family or household member. Another 589 offenders were held in jail and subsequently convicted of a Class 6 felony under this same provision for assaulting a family or household member.

- Of the 6,259 offenders convicted of the Class 1 misdemeanor, the vast majority (93%) received a local-responsible (jail) term, for which the median sentence was two months.
- Of the 589 offenders convicted of the Class 6 felony, approximately 94% were given some type of active incarceration to serve. The majority, 335, received a local-responsible (jail) term with a median sentence of seven months. Another 217 received a state-responsible (prison) term with a median sentence of two years.

LIDS data do not capture individuals who were never booked into a local or regional jail.

The Department of Juvenile Justice (DJJ) Court Service Units serve as the point of entry into the juvenile justice system. An "intake" occurs when a juvenile is brought before a court service unit officer for one or more alleged law violations. The DJJ reports averaging about 10 intake petitions per year for the three most recent fiscal years (FY2009 to FY2011) alleging a violation of § 18.2-57.2(B) of the *Code* by a person under the age of 18. The DJJ reports a total of three commitments to juvenile correctional centers during this time period for this offense.

Impact of Proposed Legislation:

State adult correctional facilities. By expanding the list of offenses that may be counted as prior convictions for the purposes of the felony enhancement in § 18.2-57.2(C), the proposal may have an

impact on the future state-responsible (prison) bed space needs of the Commonwealth.

The proposed changes may also have an impact on other statutes, in particular § 18.2-308.2:2, relating to making a false statement on a criminal history form required for purchasing a firearm. The federal criminal history form specifically asks the individual completing the form if he has ever been convicted of a misdemeanor crime of domestic violence. Due to differences in the definition of domestic violence under federal law and § 18.2-57.2 of the *Code of Virginia*, the State Police, when conducting the background check, now must determine if an individual's prior conviction under § 18.2-57.2 meets the criteria of the federal *Code* for domestic violence; if sufficient detail about the prior conviction cannot be found, prosecution for making a false statement on the criminal history form related to prior domestic violence may be hindered due to the 2010 decision in *United States v. White*. By creating a separate subsection within § 18.2-57.2 for battery that involves physical force, as proposed, identification of qualifying domestic violence convictions should be easier, which may assist in prosecutions under § 18.2-308.2:2 for false statements related to prior misdemeanor convictions for domestic violence.

Because it may result in additional felony convictions under several sections of the *Code*, the proposal may increase the future state-responsible (prison) bed space needs of the Commonwealth. However, since the number of additional felony convictions that may result cannot be estimated, the magnitude of the impact on prison bed space needs cannot be determined.

Local adult correctional facilities. Similarly, the proposal may increase local-responsible (jail) bed space needs; however, the magnitude of the impact cannot be determined.

Adult community corrections programs. Because the proposal could result in additional felony convictions and subsequent supervision requirements for some offenders, the proposal may increase the need for adult community corrections resources. The potential impact on community corrections programs, however, cannot be determined.

Virginia's sentencing guidelines. The sentencing guidelines cover felony violations of § 18.2-57.2 and § 18.2-308.2:2 that are processed in Virginia's circuit courts. No adjustment to the guidelines would be necessary under the proposal.

Juvenile correctional centers. According to the Department of Juvenile Justice (DJJ), the impact of the proposal on juvenile correctional center (JCC) bed space needs cannot be determined.

Juvenile detention facilities. The Department of Juvenile Justice reports that the proposal's impact on the bed space needs of juvenile detention facilities cannot be determined.

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; therefore, Chapter 890 of the 2011 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.