

**Fiscal Impact Review
2017 General Assembly Session**

Date: February 1, 2017

Bill number: HB 2039 Amendment in the Nature of a Substitute; Sentencing guidelines for possession of child pornography.

Review requested by: Chairman Albo, House Courts of Justice

JLARC Staff Fiscal Estimates

JLARC staff concur with the Fiscal Impact Statement prepared by the Virginia Criminal Sentencing Commission that HB 2039-substitute is likely to have a fiscal impact. If enacted, HB 2039-substitute would restore the discretionary sentencing guidelines for possession of child pornography to the guidelines that existed on June 30, 2016.

VCSC estimates that HB 2039-substitute would result in a net increase of five state-responsible prison beds by FY23, for a fiscal impact of \$169,984. A fiscal impact is anticipated because the bill enhances discretionary sentencing ranges through statute, rather than allowing ranges to be set by VCSC based on historical sentencing data as specified by §17.1-803. Judges in Virginia comply with discretionary sentencing guidelines that have statutory enhancement at a higher rate than they have historically complied with the sentencing guidelines for possession of child pornography (§ 18.2-374.1:1 A and B). Greater compliance with sentencing guidelines for possession of child pornography would result in less mitigation of sentences due to such a legislative enhancement. This would result in more offenders being sentenced to state-responsible prison time and increase the length of the sentence for a subset of offenders.

An explanation of the JLARC staff review is included on the pages that follow.

Authorized for release:



Hal E. Greer, Director

Bill summary: HB 2039-substitute would restore the discretionary sentencing guidelines for possession of child pornography (§ 18.2-374.1:1 A and B) to the guidelines as they existed on June 30, 2016. In addition, it would require that the Virginia Criminal Sentencing Commission (VCSC) shall not adopt any future modifications or recommendations that would lower the discretionary sentencing guidelines from the guidelines that existed on June 30, 2016.

Discussion of fiscal implications:

Judges already have discretion when imposing sentences, but setting discretionary sentencing guidelines through legislative action would likely increase the rate at which judges comply with those discretionary sentencing guidelines. Higher rates of compliance with guidelines would increase the number of offenders that receive prison sentences and in some cases increase the length of sentences.

Change in sentencing guidelines

The VCSC adopted new reduced sentencing guidelines for possession of child pornography beginning July 1, 2016. With few exceptions, discretionary sentencing guidelines are traditionally set by the VCSC. Pursuant to § 17.1-803, VCSC uses historical sentencing data for imposed sentences to modify discretionary sentencing guidelines for felony cases in an ongoing manner to reflect actual sentencing practices. The *2015 Sentencing Commission Annual Report* indicated that, historically, sentences imposed for possession of child pornography were often falling below recommended sentencing guidelines. From FY11 to FY16, 67.5 percent of sentences imposed for possession of child pornography fell within the recommended sentencing guidelines, while mitigation (imposing sentences below the discretionary range) occurred in 21.8 percent of imposed sentences (Table 1). The *2015 Sentencing Commission Annual Report* recommended modifying the discretionary sentencing guidelines for possession of child pornography to bring the guidelines more in sync with actual sentencing.

TABLE 1
Rates of compliance with discretionary sentencing guidelines (FY11–FY16)

Assigned sentence length	Possession of child pornography	Crimes with sentencing guidelines receiving statutory enhancement
Mitigation (sentence less than guideline range)	21.8%	4%
Compliance (sentence within guideline range)	67.5	72
Aggravation (sentence greater than guideline range)	10.7	24
Total	100	100

SOURCE: Virginia Criminal Sentencing Commission

HB 2039-substitute would restore the sentencing guidelines for possession of child pornography to their June 30, 2016 levels and prevent VCSC from modifying the guidelines from these levels in the statute. Judges have historically complied with discretionary guidelines at a higher rate when the guidelines are established in Code, compared to the historical compliance rate for possession of child pornography. There are several felony offenses for which the General Assembly has statutorily enhanced discretionary sentencing guidelines to levels above which they would otherwise be set to by VCSC.¹ Offenders convicted of those felonies have historically received sentences that were in compliance with discretionary guidelines at a slightly higher rate (72 percent) than offenders convicted of possession of child pornography (67.5 percent) (Table 1). These offenders have also experienced far fewer instances where their sentences were mitigated below the sentencing guideline range (just 4 percent compared to 21.8 percent).

Discussions with Circuit Court clerks, judges, and a representative at the Office of the Executive Secretary of the Supreme Court of Virginia confirmed that discretionary sentencing guidelines established through Code may result in greater levels of judicial compliance. Judges would be aware that the General Assembly has restored discretionary sentencing guidelines for possession of child pornography because they both attend training conferences and receive updates from the VCSC regarding legislative action pertaining to sentencing guidelines. One clerk indicated that if HB 2039-substitute were enacted, judges would be far less likely than previously to mitigate recommended sentences for offenders convicted of possession of child pornography. A judge explained that some judges would be more likely to comply with discretionary sentencing guidelines that have been set by the General Assembly in Code.

Fiscal Impact

JLARC concurs with the methodology used by VCSC to predict the fiscal impact of HB 2039-substitute. VCSC assumes that the legislation will result in judges imposing sentences for possession of child pornography that are in compliance with the sentence guidelines at rates similar to existing crimes that have a statutory enhancement to their guidelines. This would result in fewer cases where sentences for possession of child pornography are mitigated and more instances where judges comply with the recommended range specified by sentence guidelines. This would result in slightly more offenders receiving state-responsible prison time and a subset of offenders receiving longer state-responsible prison sentences because that sentence would be within the discretionary guideline range, rather than below that range.

¹ § 17.1-805 requires that sentences shall be further increased for first degree murder, second degree murder, rape in violation of 18.2-61, forcible sodomy, object sexual penetration, and aggravated sexual battery.

VCSC estimates that the change to sentencing practices would result in an additional five state-responsible beds being occupied by offenders by FY23 at a cost of \$169,984. (Under statute, VCSC is required to report the highest estimated fiscal impact likely to occur in the next six fiscal years.) It is difficult to predict the exact extent to which HB 2039-substitute would increase sentences imposed by judges; however, the methodology and assumptions used by VCSC are reasonable.

Budget amendment necessary? Yes, a general fund budget amendment for the Department of Corrections would be necessary to reflect the additional state-responsible prison beds.

Agencies affected: Department of Corrections, Circuit Courts

Prepared by: Joe McMahon

Date: February 1, 2017