

Department of Planning and Budget

2020 Special Session I - Fiscal Impact Statement

1. Bill Number: HB5148 S1

House of Origin	<input type="checkbox"/> Introduced	<input type="checkbox"/> Substitute	<input type="checkbox"/> Engrossed
Second House	<input type="checkbox"/> In Committee	<input checked="" type="checkbox"/> Substitute	<input type="checkbox"/> Enrolled

2. Patron: Scott

3. Committee: Rehabilitation and Social Services

4. Title: Department of Corrections; earned sentence credits.

5. Summary: This substitute bill provides that any person serving a sentence imposed upon conviction for a felony offense, other than a Class 1 felony, who is terminally ill and is not serving a sentence imposed upon a conviction for either first or second degree murder under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2 is eligible for consideration by the Parole Board for conditional release. The bill also provides that any person serving such sentence (i) who is 65 years of age or older and has served at least five years of the sentence imposed or (ii) who is 60 years of age or older and has served at least 10 years of the sentence imposed is eligible for consideration by the Parole Board for conditional release without the need to petition the Parole Board.

This bill also changes the sentence credits certain offenders can earn. Under current law, an inmate may earn a maximum of four and one-half sentence credits for each 30 days served. This substitute bill replaces the current system with a four-level classification system for any offender who is not serving a sentence for the following offenses:

- Class 1 felonies;
- An act of violence as defined in subsection A of § 19.2-297.1 (sentence of person twice previously convicted of certain violent felonies);
- A felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2 (laws that pertain to family offenses; crimes against children, etc.);
- Unlawful creation of image of a nonconsenting person under the age of 18 in violation of subsection D of § 18.2-386.1;
- Production, publication, sale, or financing of child pornography in violation of § 18.2-374.1;
- Display of child pornography or grooming video or materials to a child in violation of § 18.2-374.4;
- Any of the following felony offenses where the victim was a minor:
 - solicitation of prostitution in violation of § 18.2-346,
 - aiding prostitution or illicit sexual intercourse in violation of § 18.2-348,
 - using vehicles to promote prostitution or unlawful sexual intercourse in violation of § 18.2-349,
 - trafficking or pandering in violation of subdivision (3) or (4) of § 18.2-355,

- receiving money for procuring a person for prostitution or other unlawful acts in violation of § 18.2-356,
- pandering in violation of § 18.2-357,
- commercial sex trafficking in violation of § 18.2-357.1, or
- performing or causing to be performed certain sexual acts on or by certain family members in violation of subsection B of § 18.2-361.

All other offenders would be classified under the proposed system, which awards and calculates earned sentence credits based on an inmate's level of participation in and cooperation with all programs to which the inmate is assigned pursuant to § 53.1-32.1 (Classification system; program assignments; mandatory participation) and behavioral conduct as follows:

- Level I - For inmates receiving Level I sentence credits, 15 days would be deducted from the inmate's sentence for every 30 days served. Level I sentence credits must be awarded to inmates who participate in and cooperate with all programs to which the inmate is assigned pursuant to § 53.1-32.1 and who have no more than one minor correctional infraction and no serious correctional infractions.
- Level II - 7.5 days would be deducted from the inmate's sentence for every 30 days served. Level II sentence credits must be awarded to inmates who participate in and cooperate with all programs to which the inmate is assigned pursuant to § 53.1-32.1 but who require improvement in not more than one area.
- Level III - 3.5 days would be deducted from the inmate's sentence for every 30 days served. Level III sentence credits must be awarded to inmates who participate in and cooperate with all programs to which the inmate is assigned pursuant to § 53.1-32.1 but who require significant improvement in two or more areas.
- Level IV - No earned sentence credits can be awarded to any inmate who fails to participate in and cooperate with all programs to which the inmate is assigned pursuant to § 53.1-32.1 or who causes substantial security or operational problems at the correctional facility.

The bill requires that an inmate must be reevaluated and classified each year, or sooner if required by Board regulation, and that documentation of such classification, along with a calculation of the inmate's earned sentence credits, must be included in the inmate's correctional file. The bill provides that an inmate's classification and calculation of earned sentence credits will not be lowered or withheld due to a lack of programming, educational, or employment opportunities at the correctional facility at which the inmate is confined. The bill also sets reporting requirements when an inmate's classification is downgraded and allows an inmate to appeal such reclassification determinations. The bill requires that such appeals be filed and conducted in accordance with Board regulations, and provides that such regulations require appeals to be heard before a neutral and independent arbiter.

The bill provides that any inmate who was confined in a local or regional jail prior to conviction or sentencing must be credited for time served. During such confinement in a local or regional jail, the inmate would be entitled to receive Level I sentence credits unless the inmate was classified at a different level at the time he was released from his most recent period of confinement, in which case the inmate would receive sentence credits in accordance with such prior classification.

The bill contains an enactment clause that provides that the new classification system applies retroactively to the entire sentence of any inmate who is confined in a state correctional facility and participating in the earned-sentence-credit system. If it is determined that, upon retroactive application of the provisions of the legislation, the release date of any such inmate passed prior to the effective date of this act, the inmate must be released upon approval of an appropriate release plan and within 60 days of such determination; however, no inmate will have a claim for wrongful incarceration on the basis of such retroactive application.

If an inmate is released prior to completion of any reentry programs deemed necessary by DOC on the inmate's most recent annual review or prior to completion of any programs mandated by court order, the inmate is required to complete such programs under post-release community supervision, provided that release prior to completion of any programs required by the court is not strictly prohibited by the terms of the court order.

A third enactment clause requires the provisions of the first enactment amending § 53.1-202.3 of the Code of Virginia and of the second enactment (the sentence credit amendments) to take effect on July 1, 2022. It also requires the Department of Corrections (DOC) to convene a work group to study the impact of the sentence credit amendments and to report to the General Assembly on its findings by July 1, 2022. The work group must include representatives or staff from the Virginia State Crime Commission, the Senate Committee on Finance and Appropriations, the House Committee on Appropriations, the Division of Legislative Services, and any other stakeholders the Department deems appropriate.

A fourth enactment clause included in the substitute bill requires DOC to report annually to the General Assembly beginning July 1, 2023, regarding the number of inmates released pursuant to the earned sentence credit provisions set forth in the act who commit an offense subsequent to release that causes the person to return to the custody of DOC. The report must include, for each inmate, the original offense for which the inmate was convicted and the later charge or charges and subsequent conviction or convictions that caused the recommitment.

6. **Budget Amendment Necessary:** Yes. Items 402 and 429.
7. **Fiscal Impact Estimates:** Preliminary. See Item 8 below.
8. **Fiscal Implications:** The bill defines terminally ill as having a chronic or progressive medical condition caused by injury, disease, or illness where the medical prognosis is the person's death within 12 months. DOC estimates that on average, it may have approximately 16 terminally ill inmates within an annual period and that of that average, few if any would be serving sentences for the excluded offenses proposed by the substitute bill. DOC reports that it spends an average of approximately \$84,000 per individual during the last 12 months

of an inmate's life for offsite medical, pharmaceutical, and housing costs. In the event that release occurs with only six months of life remaining, DOC estimates that savings would be reduced to approximately \$50,000 per individual, and if the inmate is released with three months of life remaining, the approximate savings per individual is reduced to approximately \$30,000 per individual.

Although the bill increases the number of offenders who are eligible for parole, it is not possible to know how many of these may be granted parole. Any savings associated with this bill are dependent upon the number of offenders actually released from prison. Further, DOC reports that in order for offenders to be released, housing placement must be secured for them in the community before they are released. In the event that housing placement cannot be secured for an offender, the individual would remain in the care of DOC for public safety reasons, and any associated savings would not be realized.

According to the Parole Board, one additional part-time parole examiner, at an estimated cost of \$39,023 per year, would be required to review parole considerations for offenders made eligible for parole under the provisions of this bill.

The 1994 General Assembly Special Session II abolished discretionary and mandatory parole release for felony offenses committed on or after January 1, 1995. A system of earned sentence credits was established under code section 53.1-202.3 whereby felony offenses committed on or after January 1, 1995, may earn a maximum of 4.5 sentence credits for every 30 days served.

Under the provisions of the substitute bill, offenders serving sentences for offenses enumerated above would continue earning sentence credits under the current system. For offenders who meet the proposed new eligibility requirements, this bill expands and substantially increases the credit earning rates by establishing a tiered system that mandates offenders earn credits based on program participation and behavioral conduct. The substitute bill delays the effective date of the new earned-sentence-credit structure, including the retroactive calculation of the entire sentence of any inmate who is confined in a state correctional facility and participating in the earned sentence credit system, until July 1, 2022.

This bill will require changes to the Virginia Corrections Information System (VACORIS), which DOC uses to track offender data including time served and sentence credits earned. DOC estimates that it would cost a total of \$1.0 million to modify VACORIS to incorporate the new earned-sentence-credit tiers. According to DOC, no significant time computation changes have been made to VACORIS since 2006 and the agency expects that the process to make the required changes may take up to two years to analyze, develop, and fully test. The delayed effective date of the substitute bill provides time for DOC to begin implementing and testing the necessary changes, but the \$1.0 million required to make the systems changes would be needed immediately.

According to DOC, the process of updating VACORIS would require two new Information Technology (IT) specialists, at an annual cost of \$107,951 each (including salary and benefits), to manage the vendor-change process. These costs would be incurred beginning in

FY2021, with the personnel costs prorated based on the date of the passage of the bill. In addition to the IT specialists required in FY2021, DOC estimates the need for 10 new time computation staff, at an annual cost of \$69,836 each (including salary and benefits), which would assist with testing VACORIS changes. DOC identified a start date for all 12 of these positions of March 1, 2021, which would equate to \$304,753 in FY2021.

The substitute bill's third enactment clause also requires DOC to convene a workgroup to study the impact of the sentence credit amendments and to report (i) the state fiscal impact of the sentence credit amendments, including any cost savings realized by reducing the length of time spent by inmates in state correctional facilities; (ii) the number of inmates affected by the sentence credit amendments and the distribution of such inmates among state correctional facilities; (iii) a detailed six-year plan describing the estimated releases by facility under the bill, accounting for any offenders that will be transferred from jail, as well as offenders who would be otherwise released in the covered years; and (iv) any other information DOC deems relevant. The study must be presented to the General Assembly by July 1, 2022. DOC believes that it could conduct the required study using existing resources and does not expect a fiscal impact as a result of this provision in the substitute bill.

For reference purposes, DOC reports that, as of February 28, 2020, 19,038 offenders had one or more convictions in the excluded offense categories in the substitute version of the bill or who were otherwise not impacted by this bill (those who are parole-system offenders and those sentenced to life imprisonment or to death). Such offenders would not be eligible to participate in the new earned-sentence-credit structure proposed by the bill.

DOC estimates that as of February 28, 2020, as many as 1,906 offenders would be eligible for release in the first year if the provisions of this bill were to take effect immediately. Approximately 13,299 offenders would be eligible sometime after the first year. These estimates are likely to change by the time the bill takes effect on July 1, 2022.

The Commonwealth currently pays localities \$12.00 per day for each state-responsible offender held in a jail. If 1,906 inmates were moved from local jails to DOC to fill vacancies created by this bill for a full year, the savings could be approximately \$8.3 million. Actual savings would be determined based on the number of inmates released from DOC facilities, the schedule of those releases, and the schedule of the transfer of eligible state-responsible prisoners from local and regional jails to DOC facilities.

After eligible state-responsible inmates have been removed from local and regional jails, DOC will begin to realize savings in prison operations to the extent that the prison population is reduced. DOC reports that it spent an average of \$33,994 for each inmate held in a DOC facility. However, it is not possible to estimate when those savings might begin to occur until more information is known about the number of and rate at which credits will be earned by inmates and the impact these calculations along with other factors will have on the prison and jail forecast.

DOC expects that once released, offenders would be supervised by probation and parole officers, resulting in additional need for resources to expand reentry services and programs in

various probation and parole districts. Currently, the type of supervision is categorized by distinct levels of supervision that correspond with an offender's treatment plan, with an overall ratio of 70 offenders for each supervising officer. The actual number of P&P officers needed depends on the level of supervision released offenders require. Additionally, DOC would need to hire and train additional release planning coordinator positions, mental health and substance abuse services staff for community release, sex offender screening staff, as well as additional programming and academic instruction staff for expanded reentry services.

Based on releasing 1,906 offenders, DOC estimates that these new positions would cost approximately \$8.6 million each year. Future costs for such positions would depend on the number of offenders who are transferred from jails, the number of offenders who require various types of re-entry programming, and the rate at which offenders are released into community supervision. Because the bill requires DOC to determine whether implementation of this act will result in any cost savings, the agency would have to determine, as offenders are released, whether savings can be reallocated for these additional positions without requiring new funding. Capital funding also may be needed for additional P&P office space, depending on the number of probation and parole officers hired.

Prisoners who were incarcerated for sexually violent offenses and eligible for parole under the bill could be subject to the Civil Commitment of Sexually Violent Predators (SVP) Act (§ 37.2-900 et seq.). The SVP Act applies to prisoners in the DOC who are incarcerated for sexually violent offenses who are nearing their release date. According to the Department of Behavioral Health and Developmental Services (DBHDS), although the number of sex-offenders who would be eligible for parole is not known at this time, it could affect the SVP population if sex-offenders are transferred to civil commitments at faster rates than they are under current law. This would have an impact on the costs of operating these facilities; however, the impact cannot be determined at this time.

It is expected that the report DOC presents to the General Assembly by July 1, 2022, will provide better information to assess the fiscal impact the proposed earn-sentence-credit structure will have on the Commonwealth. However, it is not known if the report will be presented in time to make any necessary adjustments to the 2022-2023 budget.

The Attorney General's Office (OAG) expects an increase in requests for advice and litigation associated with the proposed legislation, which would require two new attorney positions, two new paralegals and one new secretary to address the workload presented by the proposed legislation. The OAG estimates the annual cost for these additional positions, including indirect and travel-related costs, at \$604,131. The provisions of the substitute bill do not become effective until July 1, 2022; therefore, the impact on OAG is expected to begin in FY2023.

- 9. Specific Agency or Political Subdivisions Affected:** Department of Corrections; Local Correctional facilities, Virginia Parole Board, Compensation Board, Department of Behavioral Health and Developmental Services, Courts, Office of the Attorney General

- 10. Technical Amendment Necessary:** None

11. Other Comments: Chapter 1289, 2020 Acts of Assembly, contains the following language in Item 429, relating to conditional geriatric release:

Notwithstanding the provisions of § 53.1-40.01, Code of Virginia, the Parole Board shall annually consider for conditional release those inmates who meet the criteria for conditional geriatric release set out in § 53.1-40.01, Code of Virginia, except that upon any such review the Board may schedule the next review as many as three years thereafter. If any such inmate is also eligible for discretionary parole under the provisions of § 53.1-151 et seq., Code of Virginia, the board shall not be required to consider that inmate for conditional geriatric release unless the inmate petitions the board for conditional geriatric release.