



## Fiscal Impact Statement for Proposed Legislation

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### Virginia Criminal Sentencing Commission

#### House Bill No. 1682 (Patron – Wyatt and Avoli)

**LD#:** 23103837

**Date:** 01/09/2023

**Topic:** Fentanyl as a weapon of terrorism

#### Fiscal Impact Summary:

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

- **Juvenile Direct Care:**  
Cannot be determined \*\*
- **Juvenile Detention Facilities:**  
Cannot be determined \*\*

\*\*Provided by the Department of Juvenile Justice

\* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the Acts of Assembly of 2022, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only include the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with the proposed legislation.

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#### Summary of Proposed Legislation:

The proposal amends § 18.2-46.4 of the *Code of Virginia* relating to weapons of terrorism. The proposal expands the list of materials that are defined as weapons of terrorism by adding any mixture or substance containing a detectable amount of fentanyl, including its isomers, esters, ethers, salts, and salts of isomers. This expansion affects several existing felony offenses relating to acts of terrorism under § 18.2-46.5 (committing or aiding an act of terrorism) and § 18.2-46.6 (possession, manufacture, or distribution of a weapon of terrorism). The proposal amends § 18.2-46.6 to provide that any person who sells, gives, distributes, or manufactures a weapon of terrorism when that weapon of terrorism is, or contains, any mixture or substance containing a detectable amount of fentanyl is guilty of a Class 2 felony.

Currently, manufacture, sale, distribution, or possession with intent to distribute a Schedule I or II drug, such as fentanyl, is a felony punishable by imprisonment of 5 to 40 years (§ 18.2-248).<sup>1</sup>

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<sup>1</sup> In 2013, the Virginia Court of Appeals reversed a conviction of felony murder related to the distribution and use of ecstasy and ruled that the “time and place elements of the felony-murder rule were not established” in that case (*Woodard v. Commonwealth*, 61 Va. App. 567, 739 S.E.2d 220 (2013)). In *Woodard*, the Court ruled that a conviction under § 18.2-33 (felony murder) for a death caused by a controlled substance requires that the killing be so closely related in time, place, and causal connection as to be part of the same felonious criminal enterprise.

Pharmaceutical fentanyl is a synthetic opioid, approved for treating severe pain; it is 50 to 100 times more potent than morphine.<sup>2</sup> Illicitly manufactured fentanyl is available on the drug market in different forms, including liquid and powder.<sup>3</sup> Powdered fentanyl looks just like many other drugs. It is commonly mixed with drugs like heroin, cocaine, and methamphetamine and made into pills that are made to resemble other prescription opioids.

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## **Analysis:**

According to the Circuit Court Case Management System (CMS) for fiscal year (FY) 2017 through FY2022, two offenders were convicted of a felony under § 18.2-46.6 for offenses involving the possession of an actual or imitation weapon of terrorism. In one case, the violation was the primary (most serious) offense at sentencing. This offender, convicted of two counts of possession of a weapon of terrorism with intent to terrorize (Class 2 felony), was sentenced to serve a state-responsible (prison) term of 99 years. The other offender, convicted of two counts of possession of an imitation weapon of terrorism with intent to intimidate (Class 6 felony), along with a primary offense of felony eluding under § 46.2-817(B), was sentenced to serve a local-responsible (jail) term of 20 months; however, this offender was given a 5-year suspended sentence on each count of the imitation weapon of terrorism violations. There were no felony convictions for offenses under § 18.2-46.5.

Criminal justice data systems in the Commonwealth have not systematically captured the type or quantity of drug(s) associated with manufacturing, selling, giving, distributing, etc., controlled substances. In 2017, the Commission modified the Sentencing Guidelines cover sheet and began to collect the specific type of drug in cases in which a drug offense is the primary (or most serious) offense in the sentencing event. The cover sheet now includes check boxes for recording drugs such as: cocaine, codeine, fentanyl, heroin, hydrocodone, methadone, oxycodone and methamphetamine. The FY2021-FY2022 Sentencing Guidelines data indicate that, among cases in which the manufacture, sale, distribution, etc., of a Schedule I or II drug is the most serious offense, 11% of the cases involved fentanyl.

According to the Office of the Chief Medical Examiner, 1,627 individuals died in the Commonwealth during 2019 as the result of drug overdoses. This figure increased to 2,309 in 2020 and 2,667 in 2021.<sup>4</sup> The causes of death for these individuals included prescription drugs, over-the-counter drugs, illegal (street) drugs, alcohol, inhalants, and other poisons.

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## **Impact of Proposed Legislation:**

**State adult correctional facilities.** By creating a new Class 2 felony and expanding the applicability of several existing felonies, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. Available data sources do not contain sufficient detail to estimate the number of additional felony convictions that may result from enactment of the proposal; therefore, 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 resources.** Because the proposal could result in convictions and subsequent supervision requirements for an additional number of offenders, the proposal may increase the need for adult community corrections resources. Since the number of cases affected cannot be determined, the potential impact on community corrections cannot be quantified.

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<sup>2</sup> <https://www.cdc.gov/opioids/basics/fentanyl.html>

<sup>3</sup> <https://www.cdc.gov/stopoverdose/fentanyl/index.html>

<sup>4</sup> <https://www.vdh.virginia.gov/content/uploads/sites/18/2022/07/Quarterly-Drug-Death-Report-FINAL-Q1-2022.pdf> (accessed October 6, 2022)

**Virginia's Sentencing Guidelines.** Convictions for existing felonies under §§ 18.2-46.5 and 18.2-46.6 of the *Code* are not covered by the Sentencing Guidelines as the primary, or most serious, offense. The proposed Class 2 felony under the amended § 18.2-46.6 also would not be covered. However, such convictions may augment the Guidelines recommendation (as additional offenses) if the most serious offense at sentencing is covered by the Guidelines. No adjustment to the Guidelines would be necessary under the proposal.

**Juvenile direct care.** According to the Department of Juvenile Justice, the impact of the proposal on direct care (juvenile correctional center or alternative commitment placement) 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.

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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; therefore, Chapter 2 of the Acts of Assembly of 2022, Special Session I, 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.**

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