



Fiscal Impact Analysis on Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 224 (Patron – Herring)

LD#: 12101850

Date: 12/29/2011

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 would remain as currently defined in common law. The proposal creates the separate offense of battery, which is defined as the application of physical force against a family or household member following an assault. Penalties prescribed in this section would remain the same.

By dividing assault and battery of a family or household member into two separate subsections, the proposal expands § 18.2-57.2 to include assaults of a family or household member that do not occur in conjunction with a battery or offensive touching, as is currently required. The proposal also expands the list of offenses that may be counted as current or prior convictions for the purposes of enhancing the penalty for assault and battery of a family or household member to include assault of a family or household member. Under the proposal, any conviction for assault on a family member that does not occur with a battery could be counted in order to raise the penalty for a third conviction for assault of a family or household member from a Class 1 misdemeanor to a Class 6 felony. The proposal makes several additional 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. Whenever a warrant for a violation of § 18.2-57.2 is issued and the defendant is not a minor, magistrates must issue an emergency protective order. Under §§ 16.1-253.2 and 18.2-60.4, violating a protective order three or more times in 20 years (with at least one involving an act or threat of violence), assaulting a protected person causing serious physical injury, and entering the home of a protected person are Class 6 felonies. Other violations of a protective order are Class 1 misdemeanors, with the second violation carrying a mandatory minimum penalty of 60 days. Sections 18.2-308.1:4 and 18.2-119 prohibit the purchase or transportation of a firearm by individuals subject to protective orders as well as trespassing in violation of a protective order, respectively.

The proposal was likely 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 appears to 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 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. The proposal divides the crime of assault and battery of a family or household member into two separate subsections. By expanding the felony provisions of § 18.2-57.2 to include an assault against a family member that does not occur in conjunction with a battery or offensive touching, the proposal may increase the number of felony convictions. Existing data sources do not contain sufficient detail to identify how many convictions for simple assault (without battery or offensive touching) in violation of § 18.2-57 were committed against a family or household member. These cases would be directly affected by the proposal.

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 clarifying the definition of battery in § 18.2-57.2, 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. It is possible that a person under the age of 18 could commit a third simple assault of a family member within a 20 year period and be subjected to the enhanced penalties of this bill. In such an event, an adjudication for a Class 6 felony offense in juvenile and domestic relations district court would make that person eligible for commitment to a juvenile correctional center pursuant to subsection (A)(14) of § 16.1-278.8 of the *Code*. Therefore, the legislative proposal may have an impact on juvenile correctional center bed space needs. However, data is not maintained that distinguishes whether the victim of the simple assault is a family or household member. As such, there is no way to

measure the extent of this occurrence. Therefore, the Department of Juvenile Justice cannot estimate the actual impact on the bed space needs of juvenile correctional centers.

Juvenile detention facilities. If a person under the age of 18 commits a third simple assault of a family member within a 20 year period and is subject to the enhanced penalties of this bill, as proposed, the person could be subject to pre-trial detention in a juvenile detention facility pursuant to § 16.1-248.1. In addition, an adjudication for a Class 6 or a Class 5 felony in juvenile and domestic relations district court would make that person eligible for post-dispositional detention under § 16.1-284.1. Therefore, the legislative proposal may have an impact on juvenile detention bed space needs. However, the actual impact on juvenile detention bed space needs 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.

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