



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2140

(Patron – Yancey)

LD#: 15102478

Date: 12/31/2014

Topic: Enhanced penalties for gang and drug crimes

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000*
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
None (\$0)

- **Juvenile Correctional Centers:**
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 2014 Acts of Assembly, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Summary of Proposed Legislation:

The proposal modifies several sections of the *Code* relating to gang and drug crimes. Currently, under § 18.2-46.3:1, a third or subsequent conviction for a felony street gang offense under §§ 18.2-46.2 or 18.2-46.3 within 10 years is a Class 3 felony, punishable by imprisonment of 5 to 20 years. Under the proposal, the penalty for felony gang offenses under §§ 18.2-46.2 or 18.2-46.3 would be increased to a Class 3 felony if the offender has one prior conviction for a gang offense within ten years.

The proposal also increases the penalty for certain firearm offenses. Currently, under § 18.2-308.4(C), any person who possesses, uses, attempts to use, or displays a firearm while distributing, etc., a Schedule I or II controlled substance or more than one pound of marijuana is guilty of a Class 6 felony and is subject to a five-year mandatory minimum term of imprisonment. Under the proposal, the penalty for displaying a firearm in a threatening manner while distributing, etc., a Schedule I or II controlled substance or more than one pound of marijuana would be increased to a Class 5 felony and a seven-year mandatory minimum term would apply. Individuals who use or attempt to use a firearm while distributing, etc., a Schedule I or II controlled substance or more than one pound of marijuana would be guilty of a Class 5 felony and subject to a ten-year mandatory minimum term. For offenders who possess, display, or use a machine gun or a firearm equipped with a silencer, a 30-year mandatory minimum would apply. Under the proposed § 18.2-308.4(G), individuals convicted of a second or subsequent offense for possessing, etc., a firearm while distributing, etc., a Schedule I or II controlled substance or more than one pound of marijuana would be subject to a 25-year mandatory minimum term. For offenders convicted of a second or subsequent offense where the current or prior offense involved a machine gun or silencer, a mandatory minimum of life would apply.

The proposed amendments to § 18.2-248 increase the penalties for offenders who distribute, sell, etc., a Schedule I or II controlled substance if the offense results in the death or serious bodily injury of another. For instance, the proposed modifications to § 18.2-248(C1) establish a 10-year mandatory minimum term of imprisonment for any person who manufactures methamphetamine and death or serious bodily injury results from the use of this substance. If the offender has previously been convicted under § 18.2-248(C1) and either the instant or prior violation resulted in the death or serious bodily injury of another, a mandatory minimum term of 20 years would apply. An offender convicted of a third or subsequent conviction under § 18.2-248(C1) would be subject to a mandatory minimum term of imprisonment of life if the current or any of the prior convictions under this subsection involved the death or serious bodily injury of another. The proposal also increases the penalties for distribution, etc., of other Schedule I or II controlled substances if death or serious bodily injury results.

Currently, offenders who distribute, etc., a Schedule I or II controlled substance may, in certain circumstances, be convicted of felony homicide under § 18.2-33 if the offense results in the death of another (see, e.g., *Heacock v. Commonwealth*, 1984, and *Woodard v. Commonwealth*, 2013). However, the penalty enhancements contained in the proposal would not be limited to cases where the death of another was so closely related in time, place, and causal connection as to be part of the same felonious criminal enterprise.

Analysis:

According to the Office of the Chief Medical Examiner,¹ 805 individuals died in 2012 as the result of drugs or poisons in the Commonwealth. The causes of death for these individuals included prescription drugs, over-the-counter drugs, illegal (street) drugs, alcohol, inhalants, and other poisons. According to the Virginia Medical Examiner Data System, approximately 76% of the drug or poison deaths in 2012 were attributed to Schedule I or II controlled substances. Based on preliminary data provided by the Virginia Department of Health, Schedule I or II drugs caused 82% of the 912 drug or poison deaths in 2013.²

Existing data sources do not contain sufficient detail to determine the number of Schedule I or II overdose deaths that could be linked to the individual who distributed the drug or whether the controlled substance was distributed illegally. In addition, data sources are not sufficiently detailed to identify cases in which an offender distributed, etc., a Schedule I or II controlled substance and serious bodily injury resulted from the use of such substance.

According to the Circuit Court Case Management System (CMS) for fiscal year (FY) 2009 through FY2014, no offenders were convicted of a felony gang offense under § 18.2-46.3:1 as the primary, or most serious, offense in a case. According to Sentencing Guidelines data for FY2013 and FY2014, 72 offenders were convicted of a felony under § 18.2-46.2 for participating in a criminal act for the benefit, or at the direction, of a criminal street gang (these crimes were not committed in a school zone or other designated gang-free zone). Court databases for calendar year 2005 through FY2014 indicate that at least two of these offenders had previously been convicted under §§ 18.2-46.2 or 18.2-46.3 within 10 years, with the offenses committed on separate dates. Both of these offenders were sentenced to state-responsible (prison) terms of 1.5 years and two years, respectively.

¹ Virginia Department of Health, *Office of the Chief Medical Examiner's Annual Report, 2012*. Available at <http://www.vdh.state.va.us/medExam/documents/pdf/COMPLETED-Annual%20Report%202012.pdf> (accessed October 8, 2014).

² Virginia Medical Examiner Data System, Office of the Chief Medical Examiner, Virginia Department of Health. The data identifies the following drugs as Schedule I/II drugs: Amphetamine, Cocaine, Codeine, Fentanyl, Gabapentin, Heroin, Hydrocodone, Hydromorphone, Levorphanol, Meperidine, Meth, Methadone, Morphine (not with the presence of heroin), Oxycodone, Oxymorphone, Secobarbital, Tapentadol, THC, and Tramadol. Data maintained by the Office of the Chief Medical Examiner is by drug name and not Schedule. Data used for this analysis may exclude other drugs that are not easily identified as Schedule I/II.

According to Circuit Court CMS data for FY2009 through FY2014, a felony violation of § 18.2-308.4(C) for possession, etc., of a firearm while distributing, etc., a Schedule I or II controlled substance or more than one pound of marijuana was the primary, or most serious, offense in 230 cases. Examining court data for FY2000 through FY2014 reveals that at least two of these offenders had previously been convicted under § 18.2-308.4(C). Both of these offenders were sentenced to a state-responsible (prison) term of seven years and twenty years, respectively.

Impact of Proposed Legislation:

State adult correctional facilities. By increasing the penalty for numerous felony offenses, establishing mandatory minimum terms of imprisonment, and increasing the length of mandatory minimum terms in certain circumstances, the proposal is expected to increase the future state-responsible (prison) bed space needs of the Commonwealth. However, existing data sources do not provide sufficient detail to estimate the number of cases that would be affected by the proposal or, in regards to the proposed penalty enhancement to § 18.2-46.3:1 for certain offenders, the sentences that would be imposed under the increased penalty. Therefore, the impact on prison bed space needs cannot be determined.

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

Adult community corrections resources. The proposal is not expected to increase the need for community corrections resources and will likely delay the need for services for some offenders affected by the proposal, as they will stay in jail or prison longer prior to being released to the community.

Virginia's sentencing guidelines. No adjustment to the sentencing 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 2 of the 2014 Acts of Assembly, 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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