



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2039

(Patron – Miller)

LD #: 17103133

Date: 12/30/2016

Topic: Sentencing guidelines for possession of child pornography

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$989,660 (30 beds)
- **Local Adult Correctional Facilities:**
-\$48,321 (-4 beds)
- **Adult Community Corrections Programs:**
None (\$0)

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

* Provided by the Department of Juvenile Justice

Summary of Proposed Legislation:

The proposal amends § 19.2-298.01 and adds § 17.1-805.1 to the *Code* relating to sentencing guidelines.

In 1994, the General Assembly adopted legislation to abolish parole and implement truth-in-sentencing for felony offenses committed on or after January 1, 1995. The legislation adopted in 1994 included provisions for a system of discretionary sentencing guidelines to be used by circuit court judges in felony cases. The Sentencing Commission's duties and the framework of the guidelines system are laid out in § 17.1-800 through § 17.1-806. Pursuant to § 17.1-803, the Commission is to develop, maintain and modify discretionary sentencing guidelines that take into account historical data, when available, concerning sentences imposed for felony offenses committed on or after January 1, 1995, and such other factors as may be deemed relevant to sentencing. Per § 17.1-805, individuals with current or prior convictions for violent felony offenses receive enhancements on the guidelines that increase the recommended sentences for those offenders. Section 19.2-298.01 specifies that the guidelines must be prepared for the court and reviewed by the judge prior to sentencing. Judicial compliance with the guidelines is discretionary.

The proposal directs the Commission to make specific modifications to the sentencing guidelines for the possession of child pornography (§ 18.2-374.1:1(A) and (B)). Under the proposal, any defendant convicted of possessing child pornography must automatically be recommended for Section C of the guidelines, which will result in a recommended sentence range that includes a prison term. Furthermore, the midpoint of the sentencing guidelines range for possession of child pornography would be increased by 100% in cases in which the defendant has no previous conviction for a violent offense, by 200% in cases in which the defendant has previously been convicted of a violent felony carrying a statutory maximum penalty of less than 40 years, and by 400% in cases in which the defendant has previously been convicted of a violent felony with a statutory maximum of 40 years or more. The General Assembly has not enacted legislation to direct the Commission to modify the sentencing guidelines in any specific manner since the passage of sentencing reform legislation in 1994.

Finally, whenever a judge imposes a sentence below the guidelines midpoint recommendation for the possession of child pornography, the proposal would require the judge to examine all child pornography possessed by the defendant, including material for which he was not charged or convicted, and file a written statement with the record of the case that such review was conducted.

Analysis:

According to fiscal year (FY) 2011-FY2016 Sentencing Guidelines data, 596 offenders were convicted under § 18.2-374.1:1(A)) for a first-offense of possessing child pornography. This offense was the primary, or most serious, offense in 349 cases. Of these, approximately half (51%) received a state-responsible (prison) term; the median prison sentence during this time period was 2.8 years. Another 28.9% received a local-responsible (jail) term with a median sentence of six months. The remaining 20.1% did not receive an active term of incarceration to serve after sentencing.

Sentencing Guidelines data for FY2011 to FY2016 also indicate that 169 offenders were convicted under § 18.2-374.1:1(B)) for a second or subsequent offense of possessing child pornography. For 129 of these individuals, this was the primary offense at sentencing. Nearly all (88.4%) of these offenders were given a prison term, for which the median sentence was 3.4 years.

Impact of Proposed Legislation:

State adult correctional facilities. Modifying the sentencing guidelines as proposed is expected to increase the state-responsible (prison) bed space needs of the Commonwealth. Under the proposal, all offenders convicted of possessing child pornography must be recommended for Section C of the Other Sexual Assault/Obscenity worksheet, meaning that the guidelines would always recommend a range that includes a prison term. Moreover, the proposal specifies that the midpoint of the recommended sentencing range¹ for possession of child pornography would, at minimum, double and further increases are mandated if the offender has a prior conviction for an offense defined as violent in § 17.1-805(C). Each point assigned on Section C is equivalent to one month of incarceration added to the midpoint recommendation. If judges comply with the proposed guidelines ranges at rates comparable to those observed in midpoint enhancement cases during FY2011-FY2016, the impact on state-responsible (prison) beds is estimated to be 30 beds by FY2023. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$989,660.

Estimated Six-Year Impact in State-Responsible (Prison) Beds

FY18	FY19	FY20	FY21	FY22	FY23
5	18	25	28	29	30

Local adult correctional facilities. The proposal is expected to reduce the future need for local-responsible (jail) beds, as some offenders currently serving a jail term would serve a prison term under the proposal. The impact on local-responsible (jail) beds is estimated to be a decrease of four beds by FY2023 (state savings: \$48,321; local savings: \$70,069).

Estimated Six-Year Impact in Local-Responsible (Jail) Beds

FY18	FY19	FY20	FY21	FY22	FY23
-2	-4	-4	-4	-4	-4

¹ The Commission interpreted the proposal's use of "midpoint" to mean the starting midpoint recommendation (also known as the Primary Offense score) on Section C of the Other Sexual Assault/Obscenity worksheet.

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

Virginia's sentencing guidelines. If the proposal is enacted, the Commission must modify the sentencing guidelines for possession of child pornography as specified in the proposed § 17.1-805.1. These changes would become effective July 1, 2017.

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.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$989,660 for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

Assumptions underlying the adult state-responsible and local-responsible analyses include:

General Assumptions

1. State and local responsibility is based on § 53.1-20 as analyzed for the Secretary of Public Safety's Committee on Inmate Forecasting in 2016.
2. New cases resulting in state-responsible sentences were based on forecasts developed by the Secretary of Public Safety's Committee on Inmate Forecasting and approved in 2016.
3. Cost per prison bed was assumed to be \$32,509 per year as provided by the Department of Planning and Budget to the Commission pursuant to § 30-19.1:4. *Where the estimated bed space impact included a portion (or fraction) of a bed, a prorated cost was included in the estimated amount of necessary appropriation.*
4. Cost per jail bed was based on The Compensation Board's FY2015 Jail Cost Report. The state cost was calculated from the revenue portion and the resulting sum was \$31.42 per day or \$11,476 per year. The local cost was calculated by using the daily expenditure cost of \$79.64 per inmate (not including capital accounts or debt service) as the base, and subtracting revenues accrued from the state and federal governments, which resulted in \$45.56 per day or \$16,641 per year. *Where the estimated bed space impact included a portion (or fraction) of a bed, a prorated cost was included in the estimate.*

Assumptions relating to sentencing and time served

1. The impact of the proposed legislation, which would be effective on July 1, 2017, is phased in to account for case processing time.
2. It was assumed that judges would comply with the proposed sentencing ranges at rates similar to those observed during FY2011-FY2016. During that time period, when the primary (most serious) offense was possession of child pornography and the sentence recommendation was enhanced due to a prior violent offense, judges complied with the guidelines recommendation in 72% of the cases, with 24% of the sentences falling below the guidelines range and 4% of the sentences falling above the guidelines range.
3. In order to apply a compliance rate of 72%, a random sample of offenders who received a sentence below the proposed guidelines was selected and it was assumed that judges, under the proposal, would sentence these individuals at the low end of the proposed guidelines range.
4. The state-responsible bed-space impact was derived by estimating the difference between expected dates of release under current law and under the proposed legislation. Release dates were estimated based on the average rates at which inmates in Department of Corrections' facilities were earning sentence credits as of December 31, 2015. For person offenses, this rate was 8.6%.

Other Sexual Assault/Obscenity ➡ Section C Offender Name: _____

◆ Primary Offense

Prior Record Classification
☐ Category I ☐ Category II ☐ Other
(scores for attempted/conspired offenses are in parentheses)

A. All attempted or conspired offenses of possess, reproduce, transmit etc. child porn 1 count	(24)	(12)	(6)
B. All attempted or conspired offenses of electronic solicitation of minor 1 count	(24)	(12)	(6)
C. Entice, etc., minor to perform in porn; take part in child porn 1 count	68	34	17
D. Produce child porn; finance child porn Attempted, conspired or completed: 1 count	100	50	25
2 counts	216	108	54
E. Possess child porn (1st Offense) 1 count	Proposed: 60 48	36 24	24 12
F. Possess child porn (2nd or subsequent) 1 count	Proposed: 95 76	57 38	38 19
G. Reproduce, transmit, sell, etc., child porn 1 count	100	50	25
H. Procure minor for obscene material by communications system 1 count	68	34	17
I. Procure minor for prostitution, sodomy, etc. by communications system 1 count	68	34	17
J. Propose sex act by communications system, child less than age 15 1 count	68	34	17
K. Propose sex act by communications system, child less than age 15, offender 7+ years 1 count	148	74	37
L. Propose sex act by communications system, child age 15 or more, offender 7+ years (2nd+) 1 count	68	34	17

Score

--	--	--

◆ Primary Offense Remaining Counts Assign points to each count of the primary not scored above and total the points

Maximum Penalty 5	5
(years) 10	10
20	19
30	29
40 or more	39

0		
---	--	--

◆ Additional Offenses Assign points to each additional offense (including counts) and total the points

Primary offense B, H, I, J, K, or L: Electronic Solicitation	
Years	Points
Less than 1	0
1	1
2	2
3	3
4	4
5	8
10	12
20	15
30	18
40 or more	22

Primary offense: All other offenses	
Years	Points
Less than 1	0
1	1
2	2
3	3
4	4
5	5
10	10
20	19
30	29
40 or more	39

--	--	--

◆ Weapon Used, Brandished, Feigned or Threatened If YES, add 4

0	0	
---	---	--

◆ Victim Injury

Primary offense B, H, I, J, K, or L: Electronic Solicitation	
	Points
Threatened or emotional	14
Physical or life threatening	15

Primary offense: All other offenses	
	Points
Threatened or emotional	6
Physical or life threatening	9

0		
---	--	--

◆ Prior Convictions/Adjudications Assign points to the 5 most recent and serious prior record events and total the points

Maximum Penalty Less than 2	0
(years) 2, 3, 4, 5	1
10	3
20	6
30	9
40 or more	12

0		
---	--	--

◆ Prior Felony Sexual Assault Convictions/Adjudications

Number 1	8
of Counts: 2	15
3 or more	23

0		
---	--	--

◆ On Post-Incarceration Supervision If YES, add 5

0	0	
---	---	--

Total Score

See Other Sexual Assault Section C Recommendation Table for guidelines sentence range.

--	--	--