

Department of Planning and Budget

2020 Special Session I - Fiscal Impact Statement

1. Bill Number: HB5148 ER

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

2. Patron: Scott

3. Committee: Passed both Houses

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

5. Summary: This bill 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 bill replaces the current system with a four-level classification system for any offender who is not serving a sentence for the following offenses:

- 1) Class 1 felonies;
- 2) Solicitation to commit murder under § 18.2-29 or any violation of § 18.2-32 (defines first and second degree murder), 18.2-32.1 (murder of a pregnant woman), 18.2-32.2 (killing a fetus), or 18.2-33 (defines felony homicide);
- 3) Any violation of § 18.2-40 or 18.2-45 (pertaining to lynching and mob-attempted lynching);
- 4) Any violation of subsection A of § 18.2-46.5, of subsection D of § 18.2-46.5 if the death of any person results from providing any material support, or of subsection A of § 18.2-46.6, all of which pertain to certain terrorism offenses;
- 5) Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2;
- 6) Any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2, any violation of § 18.2-51.6 (strangulation) or 18.2-51.7 (female genital mutilation), or any felony violation of § 18.2-57.2 (assault and battery against a family or household member);
- 7) Any felony violation of § 18.2-60.3 (stalking);
- 8) Any felony violation of § 16.1-253.2 or 18.2-60.4 (pertaining to violation of provisions of protective orders);
- 9) Robbery under § 18.2-58 or carjacking under § 18.2-58.1;
- 10) Criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;
- 11) Any violation of § 18.2-90 (entering dwelling house, etc., with intent to commit murder, rape, robbery or arson);
- 12) Any violation of § 18.2-289 (use of machine gun for crime of violence) or subsection A of § 18.2-300 (possession or use of "sawed-off" shotgun or rifle);
- 13) Any felony offense in Article 3 (§ 18.2-346 et seq.) of Chapter 8 of Title 18.2 involving a minor (prostitution; commercial sexual conduct; commercial exploitation of a minor);

- 14) Any felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2 (pertaining to certain family offenses; crimes against children), except for a violation of § 18.2-362 (pertaining to bigamy), or subsection B of § 18.2-371.1 (pertaining to reckless disregard for human life by a parent, guardian, or other person responsible for the care of a child under the age of 18);
- 15) Any felony offense in Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2 (pertaining to crimes involving morals and decency), except for a violation of subsection A of § 18.2-374.1:1 (knowingly possessing child pornography);
- 16) Any violation of subsection F of § 3.2-6570 (pertaining to death of dog or cat that is a companion animal as a result of torture or physical mistreatment), any felony violation of § 18.2-128 (pertaining to trespass upon church or school property with intent to abduct a student), or any violation of § 18.2-481 (definitions of treason), 37.2-917 (pertaining to escape of person committed to custody as a sexually violent predator), 37.2-918 (pertaining to sexually violent predator on conditional release leaving the Commonwealth), 40.1-100.2 (employment involving sexually explicit visual material, pertaining to minors), or 40.1-103 (cruelty and injuries to children);
or
- 17) A second or subsequent violation of the following offenses, in any combination, when such offenses were not part of a common act, transaction, or scheme and such person has been at liberty as defined in § 53.1-151 between each conviction:
 - a) Any felony violation of § 3.2-6571 (pertaining to animal fighting);
 - b) Voluntary manslaughter under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2;
 - c) Any violation of § 18.2-41 (shooting, stabbing, etc., with intent to maim, kill, etc., by mob) or felony violation of § 18.2-42.1 (acts of violence by mob);
 - d) Any violation of subsection B, C, or D of § 18.2-46.5 (pertaining to certain acts of committing, conspiring and aiding and abetting acts of terrorism prohibited) or § 18.2-46.7 (act of bioterrorism against agricultural crops or animals);
 - e) Any violation of § 18.2-51 (shooting, stabbing, etc., with intent to maim, kill) when done unlawfully but not maliciously, § 18.2-51.1 (malicious bodily injury to law-enforcement officers, firefighters, search and rescue personnel, or emergency medical services personnel) when done unlawfully but not maliciously, or § 18.2-54.1 (attempts to poison) or 18.2-54.2 (adulteration of food, drink, drugs, cosmetics, etc.);
 - f) Arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony violation of § 18.2-79 (burning or destroying meeting house, etc.);
 - g) Any violation of § 18.2-89 (burglary) or 18.2-92 (breaking and entering dwelling house with intent to commit other misdemeanor);
 - h) Any violation of subsection A of § 18.2-374.1:1 (possession, reproduction, distribution, solicitation, and facilitation of child pornography);
 - i) Any violation of § 18.2-423, 18.2-423.01, 18.2-423.1, 18.2-423.2, all of which pertain to displaying items or symbols in certain places with the intent to intimidate, or 18.2-433.2 (pertaining to prohibited paramilitary activity); or
 - j) Any violation of subdivision E 2 of § 40.1-29 (pertaining to failing to pay wages of \$10,000 or more with the intent to defraud).

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, and that records from this review, including an explanation of the reasons why a person's classification level was or was not adjusted, must be maintained in the person'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 allows that a person's classification level under the new system may be immediately reviewed and adjusted following removal from a program, job assignment, or educational curriculum that was assigned pursuant to § 53.1-32.1 for disciplinary or noncompliance reasons. The bill also allows a person to appeal a reclassification determination was made as a result of that person's participation in and cooperation with programs, job assignments, and educational curriculums or his removal from a program, job assignment, or educational curriculum for disciplinary or noncompliance reasons. Such appeal must follow the manner set forth in the grievance procedure established by the Director pursuant to his powers and duties as set forth in § 53.1-10.

The bill establishes that the new earned-sentence-credit structure is effective on January 1, 2022.

A second enactment clause requires the Department of Corrections (DOC) to convene a work group to study the impact of the sentence credit amendments set forth in this bill. The bill requires the work group to include representatives of the Senate Committee on Finance and Appropriations, the House Committee on Appropriations, the Virginia State Crime Commission, and any other stakeholders the DOC deems appropriate; the bill also requires the Division of Legislative Services to provide staff support to the work group. DOC must report to the Governor and the General Assembly by July 1, 2021, the membership of the work group and the work group's plan for conducting such study, including any data and information upon which the work group will rely in conducting such study, and must report its finding and conclusions to the Governor and the General Assembly by December 1, 2022.

A fourth enactment clause 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 on January 1, 2022. 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.

Additional enactment clauses included in the bill require that DOC must ensure that educational, vocational, counseling, and substance abuse programs for earning sentence credits are available at all state correctional facilities, that DOC must ensure that educational, vocational, counseling, and substance abuse rehabilitative and reentry programs are available at all probation and parole offices, and that the Department of Criminal Justice Services must continue to administer grant funding to private entities for the purpose of assisting in reentry services.

6. **Budget Amendment Necessary:** Yes. Items 57 and 402.
7. **Fiscal Impact Estimates:** Final. See Item 8 below.
8. **Fiscal Implications:** 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 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 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 January 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 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 bill's second enactment clause 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 Governor and the General Assembly by December 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 bill. The impact this bill may have on the Division of Legislative Services is not known at this time.

For reference purposes, DOC reports that, as of February 28, 2020, 19,529 offenders had one or more convictions in the excluded offense categories in the 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 1,380 offenders would be eligible for release in the first year if the provisions of this bill were to take effect immediately. Approximately 13,313 offenders would be eligible sometime after the first year. These estimates are likely to change by the time the bill takes effect on January 1, 2022.

The Commonwealth currently pays localities \$12.00 per day for each state-responsible offender held in a jail. If 1,380 inmates were moved from local jails to DOC to fill vacancies created by this bill for a full year, the savings could be approximately \$6.0 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 1,380 offenders, DOC estimates that these new positions would cost approximately \$7.3 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 December 1, 2022, will provide better information to assess the fiscal impact the proposed earned-sentence-credit structure will have on the Commonwealth.

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 bill do not become effective until January 1, 2022; therefore, it is possible that the impact on OAG could be prorated depending on the length of time it needs to hire and train the new employees.

- 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, Division of Legislative Services

- 10. Technical Amendment Necessary:** None

- 11. Other Comments:** None