



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2144 ***(Patron – Miyares)***

LD#: 21100518

Date: 12/15/2020

Topic: Felony homicide

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
At least \$184,195 (5 beds) *
- **Local Adult Correctional Facilities:**
None (\$0)
- **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

* 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.

Summary of Proposed Legislation:

The proposal amends § 18.2-33 to expand the definition of felony homicide. Under the proposal, a person would be guilty of felony homicide if the felonious act that resulted in the accidental death of another 1) involved the manufacture, distribution, etc., of a Schedule I or II drug, and 2) such other person's death results from his use of the controlled substance, and 3) such controlled substance is the proximate cause of the death, regardless of the time or place death occurred in relation to the commission of the drug distribution. Felony homicide is punishable by imprisonment of 5 to 40 years.

The proposal is precipitated by a Virginia Court of Appeals decision (*Woodard v. Commonwealth*, 2013) relating to felony murder convictions in cases involving drug overdoses. In 1984, the Supreme Court of Virginia held that when "death results from ingestion of a controlled substance, classified in law as dangerous to human life, the homicide constitutes murder of the second degree within the intentment of Code § 18.2-33 if the substance had been distributed to the decedent in violation of the felony statutes of this Commonwealth" (*Heacock v. Commonwealth*, 228 Va. 397, 405, 323 S.E.2d 90, 95 (1984)). The Court of Appeals of Virginia upheld another felony murder conviction under § 18.2-33 for a methadone overdose death in 2012 (*Hylton v. Commonwealth*, 60 Va. App. 50, 723 S.E.2d 628 (2012)). However, in 2013, the same court 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 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. The proposal would allow offenders who manufacture, distribute, etc., a Schedule I or II

controlled substance to be convicted of felony homicide if the recipient's use of the drug was the proximate cause of the death, regardless of the time or place death occurred in relation to the commission of the underlying felony.

Analysis:

According to the Office of the Chief Medical Examiner's *Fatal Drug Overdose Quarterly Report*, October 2020, 1,626 individuals died in the Commonwealth during 2019 as the result of drugs. This was the largest number ever seen in Virginia until 2020. In the second quarter of 2020, there was a preliminary increase of 66.8% in drug related deaths compared to the second quarter of 2019. For the first half of 2020, there were 2,053 fatal drug overdoses. 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 *Fatal Drug Overdose Quarterly Report*,¹ most drug deaths in 2019 were attributed to one or more Schedule I or II controlled substances. For example, 59.3% of the deaths were attributed to fentanyl, 34.2% to heroin, 12.2% to methamphetamine, and 11.0% to cocaine. Overall, in 2019, 79.8% of the fatal drug overdoses were for opioids (i.e., all versions of fentanyl, heroin, prescription opioids, U-47700 and opioids unspecified).

Examination of Sentencing Commission data for Fiscal Year (FY) 2011 through FY2020 indicates that judges sentenced 30 individuals, convicted of manufacturing, distributing, etc., Schedule I or II drugs, to terms of incarceration that exceeded what was recommended by sentencing guidelines and cited a death as the reason for the upward departure. All of these individuals received a state-responsible (prison) term with a median sentence of five years. There may have been other cases during the ten-year period in which the manufacture, distribution, etc., of a Schedule I or II drug was associated with a death; however, additional cases could not be identified with the available data.

Individuals convicted of felony homicide under the proposed changes to § 18.2-33 may be sentenced similarly to offenders sentenced under existing provisions. According to the Sentencing Guidelines Database for fiscal year FY2019 and FY2020, 27 individuals were convicted of felony murder under § 18.2-33. The murder was the primary, or most serious, offense in all but three cases. Among cases where the murder was the primary offense, all of the offenders were sentenced to a state-responsible (prison) term for which the median sentence was 20.5 years. These data do not indicate that the deaths were associated with the use of drugs. Two of the 27 individuals were also charged with a felony drug offense—one for distributing a Schedule III drug under § 18.2-248(E1), and one for possession of a Schedule I or II drug under § 18.2-250(A,a); however, it is not clear if the drug charges were associated with the deaths.

Impact of Proposed Legislation:

State adult correctional facilities. Under current law, offenders whose manufacture, distribution, etc., of a Schedule I or II drug results in the unintentional death of another may only be convicted of felony homicide if the death is so closely related in time, place, and causal connection as to be part of the same felonious criminal enterprise (*Woodard v. Commonwealth*, 2013). The proposal would allow offenders who manufacture, etc., a Schedule I or II drug to be convicted of felony homicide (punishable by up to 40 years imprisonment) if the recipient's use of the drug was the proximate cause of the death, regardless of the time or place death occurred in relation to the commission of the underlying felony. The proposal would take precedence over the decision in *Woodard v. Commonwealth* and allow felony prosecutions and convictions for such acts to resume. By expanding the applicability of felony homicide to additional circumstances beyond what is currently allowed by law, the proposal is expected to result in a net increase in periods of imprisonment in state adult correctional facilities (prison). Thus, the proposal will likely

¹ 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. Identifiable Schedule I/II drugs included in this analysis are cocaine, methamphetamine, fentanyl, heroin and other opioids.

increase the future state-responsible (prison) bed space needs of the Commonwealth above what would otherwise be needed. The impact is estimated to be at least five beds statewide by FY2027. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$184,195.²

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

FY22	FY23	FY24	FY25	FY26	FY27
0	0	0	1	3	5

Local adult correctional facilities. The proposal is not expected to increase the local-responsible (jail) bed space needs, as all of the identified offenders who could be affected by the proposed change currently receive a state-responsible (prison) term.

Adult community corrections resources. The impact on community corrections resources cannot be determined. Affected offenders can currently be convicted of a drug offense; however, the proposal may result in longer terms of incarceration for some offenders who would also be convicted of felony murder if the proposal were enacted. This would delay the need for services as these individuals would serve longer in prison or jail prior to being released to the community.

Virginia’s sentencing guidelines. Felony homicide convictions under § 18.2-33 are covered by the sentencing 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.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$184,195 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 analysis 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 2020.
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 2020.
3. Cost per prison bed was assumed to be \$38,688 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.*

Assumptions relating to offenders

1. It was assumed that prosecutors would charge all identified eligible offenders with felony homicide (§ 18.2-33) as proposed.

Assumptions relating to sentencing and time served

1. The impact of the proposed legislation, which would be effective on July 1, 2021, is phased in to account for case processing time.

² 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.

2. Offenders affected by the proposal were assumed to receive sentences similar to offenders currently convicted of felony homicide (§ 18.2-33).
3. 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 February 28, 2020. For Schedule I or II drug distribution offenses, this rate was 8.9%. For second-degree/felony murder, this rate was 7.9%.

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