

## **Department of Planning and Budget**

### **2021 Fiscal Impact Statement**

**1. Bill Number:** HB2331 E

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

**2. Patron:** Mullin

**3. Committee:** Courts of Justice

**4. Title:** Elimination of mandatory minimum sentences; modification of sentence to mandatory minimum terms.

**5. Summary:** The engrossed bill amends mandatory minimum sentences for the following felony charges:

- § 3.2-4212. (Penalties and other remedies). Under current law, prohibits anyone from (i) selling or distributing cigarettes or (ii) acquiring, holding, owning, possessing, transporting, importing, or causing to be imported cigarettes that the person knows or should know are intended for distribution or sale in the Commonwealth in violation of § 3.2-4207 (Prohibition against stamping or sale or import of cigarettes not in the Directory). A violation of this section involving less than 3,000 packages of cigarettes is a Class 1 misdemeanor. A violation of this section involving 3,000 or more packages of cigarettes is a Class 1 misdemeanor, and, upon conviction, the sentence of such person must include a mandatory minimum term of confinement of 90 days. The bill makes a violation of this section punishable as a Class 1 misdemeanor regardless of the number of packages of cigarettes involved.
- § 4.1-302. (Illegal sale of alcoholic beverages in general; penalty). Under current law, any person who is not licensed sells any alcoholic beverages except as permitted by law, is guilty of a Class 1 misdemeanor. In the event of a second or subsequent conviction, a jail sentence of no less than thirty days must be imposed and can in no case be suspended. The bill removes the mandatory penalty for a second or subsequent conviction.
- § 18.2-186.4. (Use of a person's identity with the intent to coerce, intimidate, or harass; penalty). Currently, it is unlawful for any person, with the intent to coerce, intimidate, or harass another person, to publish the person's name or photograph along with identifying information including: social security number; driver's license number; bank account numbers; credit or debit card numbers; personal identification numbers (PIN); electronic identification codes; automated or electronic signatures; or passwords as pursuant to § 18.2-186.3 (Identity theft; penalty; restitution; victim assistance), or identification of the person's primary residence address. Any person who violates this section is guilty of a Class 1 misdemeanor; any person who violates this section knowing or having reason to know that person is a law-enforcement officer, as defined in § 9.1-101, is guilty of a Class 6 felony. The Class 6 felony charge carries a mandatory minimum term of

confinement of six months. The bill eliminates the mandatory minimum sentence associated with the Class 6 felony charge.

- § 18.2-248. (Manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance prohibited; penalties). The bill eliminates the following mandatory sentences for drug-related crimes, which are required under current law:
  - Three-year mandatory minimum term of imprisonment, to be served consecutively with any other sentence, for a subsequent offense involving a Schedule I or II controlled substance;
  - Five-year mandatory minimum term of imprisonment, to be served consecutively with any other sentence, for any person who manufactures, sells, gives, distributes or possesses with the intent to manufacture, sell, give, or distribute certain amounts of substances containing heroin, cocaine, ecgonine, or methamphetamine;
  - Three-year mandatory minimum term of imprisonment, to be served consecutively with any other sentence, for a third or subsequent offense of manufacturing of methamphetamine, its salts, isomers, or salts of its isomers or less than 200 grams of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers
  - Twenty-year mandatory minimum term of imprisonment, imposed under certain circumstances for any person who manufactures, sells, gives, distributes or possesses with the intent to manufacture, sell, give or distribute 100 grams or more of methamphetamine, its salts, isomers, or salts of its isomers or 200 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;
  - Twenty-year mandatory minimum or mandatory life term of imprisonment, imposed on any person who was the principal or one of several principal administrators, organizers or leaders of a continuing criminal enterprise, depending on the amount of substances containing heroin, cocaine, ecgonine, or methamphetamine, and the mandatory 40-year sentence imposed if the court finds that the defendant substantially cooperated with law-enforcement authorities.
- § 18.2-248.01. (Transporting controlled substances into the Commonwealth; penalty). Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.) it is currently unlawful for any person to transport into the Commonwealth by any means with intent to sell or distribute one ounce or more of cocaine, coca leaves or any salt, compound, derivative or preparation thereof as described in Schedule II of the Drug Control Act, one ounce or more of any other Schedule I or II controlled substance, or five or more pounds of marijuana. A violation of this section constitutes a separate and distinct felony. Upon conviction, the person must be sentenced to not less than five years nor more than 40 years imprisonment, three years of which must be a mandatory minimum term of imprisonment, and a fine not to exceed \$1,000,000. A second or subsequent conviction is punishable by a mandatory minimum term of imprisonment of 10 years, which must be served consecutively with any other sentence. The bill eliminates the mandatory minimum sentences associated with these offenses and establishes that a second or subsequent conviction is punishable by a term of imprisonment of not less than 10 years but no more than 40 years.
- § 18.2-248.03. (Manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute methamphetamine; penalty). Current law provides that

any person who manufactures, sells, gives, distributes, or possesses with intent to manufacture, sell, give, or distribute 28 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers is guilty of a felony punishable by a fine of not more than \$500,000 and imprisonment for not less than five nor more than 40 years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence. Additionally, any person who manufactures, sells, gives, distributes, or possesses with intent to manufacture, sell, give, or distribute 227 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers is guilty of a felony punishable by a fine of not more than \$1 million and imprisonment for not less than five years nor more than life, five years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence. The bill eliminates the mandatory minimum sentences.

- § 18.2-248.1. (Penalties for sale, gift, distribution or possession with intent to sell, give or distribute marijuana). Current law imposes a five-year mandatory minimum term of imprisonment, to be served consecutively with any other sentence, for any third or subsequent felony offense of this section.
- § 18.2-248.5. (Illegal stimulants and steroids; penalty). Current law imposes a five-year mandatory minimum term of imprisonment to be served consecutively with any other sentence for any third or subsequent felony offense of this section.
- § 18.2-255. (Distribution of certain drugs to persons under 18 prohibited; penalty). Except as authorized in the Drug Control Act, Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, it is currently unlawful for any person who is at least 18 years of age to knowingly or intentionally (i) distribute any drug classified in Schedule I, II, III or IV or marijuana to any person under 18 years of age who is at least three years his junior or (ii) cause any person under 18 years of age to assist in such distribution of any drug classified in Schedule I, II, III or IV or marijuana. Violation of this provision is punishable by imprisonment in a state correctional facility for a period of not less than 10 nor more than 50 years, and fine of not more than \$100,000. Five years of the sentence imposed for a conviction under this section involving a Schedule I or II controlled substance or one ounce or more of marijuana must be a mandatory minimum sentence. Two years of the sentence imposed for a conviction under this section involving less than one ounce of marijuana must be a mandatory minimum sentence. The bill eliminates the mandatory minimum sentences.
- § 18.2-255.2. (Prohibiting the sale or manufacture of drugs on or near certain properties; penalty). Current law provides that a violation of this section constitutes a separate and distinct felony and that a second or subsequent conviction for an offense involving a controlled substance classified in Schedule I, II, or III of the Drug Control Act (§ 54.1-3400 et seq.) or more than one-half ounce of marijuana must be punished by a mandatory minimum term of imprisonment of one year to be served consecutively with any other sentence. The bill eliminates the mandatory minimum sentence.
- § 46.2-357. (Operation of motor vehicle or self-propelled machinery or equipment by habitual offender prohibited; penalty; enforcement of section). It is currently unlawful for any person determined or adjudicated as an habitual offender to drive any motor vehicle or self-propelled machinery or equipment on the highways of the Commonwealth while the revocation of the person's driving privilege remains in effect. Under § 46.2-391 (Revocation of license for multiple convictions of driving while intoxicated; exception; petition for

restoration of privilege), it is unlawful for offenders to drive a motor vehicle or any self-propelled machinery or equipment while his license is revoked or restricted under certain circumstances. Violation of either section is punishable as a Class 1 misdemeanor with a mandatory minimum term of confinement in jail of 10 days if such driving does not of itself endanger the life, limb, or property of another. If such driving of itself endangers the life, limb, or property of another or takes place while the habitual offender is in violation of certain offenses related to driving while intoxicated and the person has previously been convicted of such offenses, the person is guilty of a felony punishable by imprisonment for not less than one year nor more than five years, one year of which must be a mandatory minimum term of confinement or, in the discretion of the jury or the court trying the case without a jury, by mandatory minimum confinement in jail for a period of 12 months. For both the misdemeanor and felony charges, current law allows the sentence, or any part thereof, to be suspended in cases where such operation is required in situations of apparent extreme emergency to save life or limb. The bill eliminates the mandatory sentences for both the misdemeanor and felony charges in these sections and eliminates the allowance for the suspended sentence.

The bill creates § 19.2-303.03 (Modification of sentence to mandatory minimum term of confinement for certain felony offenses). This proposal establishes the following:

- A person who (i) was convicted of a felony violation of any of the offenses described above, except § 3.2-4212 and § 4.1-302, which pertain to the illegal sale of cigarettes and alcohol respectively, when the violation was committed prior to July 1, 2021; (ii) was sentenced to a mandatory minimum term of confinement for such conviction; and (iii) remains incarcerated in a state or local correctional facility or secure facility, as defined in § 16.1-228, serving the sentence for such conviction or for a combination of any convictions requiring at least one mandatory minimum term of confinement, may petition for a sentence modification. The bill allows the circuit court that entered the original judgment or order to, at any time before the mandatory minimum term of confinement has been completely served, suspend the unserved portion of any such sentence, place the person on probation for such time as the court determines, or otherwise modify the sentence imposed. The bill requires, however that any modification of any term of confinement must not exceed the original term of confinement imposed by the court.
- Any person eligible for modification of a mandatory minimum sentence may file a petition for the assistance of counsel and a statement of indigency with the court on a form provided by the Supreme Court of Virginia. The court may summarily dismiss the petition if the person is not eligible for modification of a mandatory minimum sentence based on the criteria set forth or if the court finds that the person is not entitled to representation by counsel under the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10, which govern the appointment of attorney for the accused. If the petition is not summarily dismissed and the court finds that the person is entitled to representation by counsel subject to the provisions of Article 3, the court must appoint counsel to represent the petitioner.

- The petition for modification of a mandatory minimum term of confinement must be filed with the circuit court that entered the original judgment or order on a form provided by the Supreme Court of Virginia by the petitioner or by counsel for the petitioner. The bill includes specific data that must be included on the form.
- The Commonwealth must be made party to the proceeding. The petitioner must provide a copy of the petition by delivery or by first-class mail, postage prepaid, to the attorney for the Commonwealth of the city or county in which the petition is filed. The attorney for the Commonwealth may file an objection or answer to the petition within 30 days after it is received from the petitioner. Upon the motion of the attorney for the Commonwealth and for good cause shown, the court may allow the attorney for the Commonwealth up to an additional 30 days to respond to the petition.
- If the person is not eligible for modification of a mandatory minimum sentence, the court must dismiss the petition. If the person is eligible for modification of a mandatory minimum sentence, the court must review any court records in the possession of the circuit court clerk related to such petition, including any additional information presented by the petitioner, presentence investigation report, discretionary sentencing guidelines, objection or answer by the attorney for the Commonwealth, and Victim Impact Statement.
- Upon review of the petition and court records, the court may dismiss the petition without a hearing. If the court dismisses the petition without a hearing, the court must file with the record of the case a written explanation for such dismissal and must provide a copy of such written explanation to the petitioner and to the attorney for the Commonwealth.
- Unless the court dismisses the petition, the court is required conduct a hearing after reasonable notice to both the petitioner and the attorney for the Commonwealth. The attorney for the Commonwealth must make reasonable efforts to notify any victim, as defined in § 19.2-11.01, of such hearing. At such hearing, the court may dismiss the petition or, upon good cause shown by the petitioner, at any time before the mandatory minimum term of confinement has been completely served, suspend the unserved portion of any such sentence, place the person on probation for such time as the court determines, or otherwise modify the sentence imposed. Any modification of any term of confinement must not exceed the original term of confinement imposed by the court.
- If a hearing is conducted, the court must permit any victim to testify following the provisions of § 19.2-295.3 (Admission of victim impact testimony).
- Following the entry of an order to modify a sentence, the clerk of the circuit court must forward a copy of such order to the Virginia Criminal Sentencing Commission, the Department of State Police, and the state or local correctional facility or secure facility where the petitioner is incarcerated within five days.

- Upon entry of an order to dismiss a petition or to modify a sentence pursuant to this section, the court is not be required to review or conduct a hearing on any subsequent petition filed by the same petitioner for the same offense.
- The decision of a circuit court to dismiss a petition or to modify a sentence pursuant to this section does not form the basis for relief in any habeas corpus or appellate proceeding, unless such decision was contrary to law.
- No fee shall be charged for filing a petition for the assistance of counsel and a statement of indigency or for modification of a mandatory minimum term of confinement.
- Any petition seeking a modification of a mandatory minimum term of confinement pursuant to this section shall be filed by July 1, 2024. Any petition filed after July 1, 2024, must be dismissed by the court.

An enactment clause requires the Office of the Executive Secretary of the Supreme Court of Virginia (OES) to develop form petitions in accordance with the provisions of § 19.2-303.03 of the Code of Virginia, as created by this act, and make such form petitions available on the Virginia Judicial System website by July 1, 2021.

A third enactment clause requires that the Department of Corrections, the Department of Juvenile Justice, or the superintendent or sheriff of any state or local correctional facility or secure facility, respectively, must provide a copy of the form petition developed by the OES to any person incarcerated in such state or local correctional facility or secure facility as of July 1, 2021 and who is serving a mandatory minimum sentence for a felony violation of the offenses amended in this bill, with the exception of § 3.2-4212 and § 4.1-302, by July 31, 2021.

**6. Budget Amendment Necessary:** Indeterminate

**7. Fiscal Impact Estimates:** Preliminary. See item 8 below.

**8. Fiscal Implications:** This bill eliminates mandatory minimum sentences imposed for the crimes enumerated above and allows for modification of mandatory minimum sentences that have already been imposed. According to the Virginia Criminal Sentencing Commission (VCSC), when the sentencing guidelines recommend a sentence that is less than the mandatory minimum penalty required by law, the guidelines preparer must enter the mandatory minimum penalty for any part of the guidelines range (be it the low, midpoint, or high) that falls below the mandatory minimum sentence. If the legislation is enacted, guidelines preparers would cease making any such adjustments to the recommended range. Also, a few guideline worksheets contain specific factors pertaining to mandatory minimum penalties (e.g., Section A of the Drug/Schedule I/II guidelines). If the legislation is enacted, those factors would no longer be scored.

VCSC staff analyzed FY 2016-FY 2020 felony sentencing events and found that 11.5 percent of felony sentencing events included at least one offense requiring a mandatory minimum sentence (the mandatory minimum offense could have been a felony or a misdemeanor) and

that, of the felony sentencing events with at least one mandatory minimum offense, 33.7 percent had the guidelines recommended range adjusted (i.e., some part of the guidelines range was lower than the required mandatory minimum and was therefore replaced with the mandatory minimum).

This bill allows any person eligible for modification of a mandatory minimum sentence under the provisions of this bill to file a petition for modification by July 1, 2024. The court can ultimately determine to dismiss the case or conduct a hearing. If a hearing is conducted, the court has the authority to modify the original sentence.

The court's decision could impact inmates who have already been transferred into a Virginia Department of Corrections (DOC) facility. According to DOC, as of June 30, 2019, there were 9,491 inmates that had a sentence combining both mandatory minimum and non-mandatory sentences and only 1,499 with sentences that contained only mandatory minimum components. The DOC does not have start and end-date data for those sentences that have the combination of mandatory minimums/non-mandatory. Therefore, it is unclear how the balance of any mandatory minimum sentence being served will be calculated. The DOC provides, as an example, the situation where an inmate has a Use of Firearms (UOF) charge, serving a three year mandatory minimum sentence. If the inmate has other active sentences to serve, which are being served after the UOF charge due to order of the sentences, he may have already satisfied the UOF. The order sentences are served is based on a number of factors including the date of judgement, the type of sentence and the sequence number. Until DOC can review these sentences, it is not feasible at this time to estimate the number of prisoners that would be impacted as a result of this legislation.

According to DOC's calculation, in FY 2020, the DOC spent an average of \$33,994 per inmate housed in a DOC facility and the Commonwealth currently pays localities \$12.00 per day for each state-responsible offender held in a jail. Actual bed-space savings would depend 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.

Local-responsible sentences may also be impacted by this bill. The Commonwealth currently pays the localities \$4.00 a day for each misdemeanor or otherwise local-responsible prisoner held in a jail. It also funds a large portion of the jails' operating costs, e.g. correctional officers. The state's share of these costs varies from locality to locality. However, according to the Compensation Board's most recent Jail Cost Report (November 2020), the estimated total state support for local jails averaged \$34.59 per inmate, per day in FY 2019.

Eligible offenders may also petition for assistance of counsel and a statement of indigency with the court. If the court does not dismiss the motion due to ineligibility, and the court finds that the person is entitled to representation by counsel, such counsel would be appointed by the court. The bill does not specify the compensation limit that would be applicable for counsel appointed to represent such petitioners. According to the OES, any estimate of the cost should be premised on the assumption that the statutory cap on

compensation for court appointed counsel for the underlying conviction which resulted in the mandatory minimum sentence would be applicable for this representation, as is the case with representation for probation violation proceedings pursuant to § 19.2-163. As the number of individuals who may petition for resentencing is unknown, the cost to the Criminal Fund for court-appointed counsel in cases where the petitioner would not be represented by a public defender or privately retained counsel is indeterminate.

According to the Office of Attorney General, this bill is not expected to have a fiscal impact on agency operations.

- 9. Specific Agency or Political Subdivisions Affected:** Courts, Department of Corrections, Department of Juvenile Justice, local and regional jails, Commonwealth Attorneys, Public Defenders Offices, Virginia Criminal Sentencing Commission

- 10. Technical Amendment Necessary:** No

- 11. Other Comments:** None