



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 1885

(Patrons-- Byron, Avoli, Campbell, E. H. and Fowler)

LD #: 23101037

Date: 12/12/2022

Topic: Organized retail theft and punishment for second or third misdemeanor larceny

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
At least \$14,659,486 (299 beds)
- **Local Adult Correctional Facilities:**
At least \$3,030,450 (205 beds)
- **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 adds § 18.2-103.1 to define the crime of organized retail theft, making it a Class 3 felony for any person to (i) conspire or act in concert with another person to commit larceny of retail property from one or more retail mercantile establishments, with a value exceeding \$1,000 aggregated over a 90-day period, with the intent to sell such retail property and to take such retail property to be placed in the control of a retail property fence or other person; (ii) receive or possess such retail property while knowing or having reasonable grounds to believe the property was unlawfully obtained; or (iii) conspire or act in concert with two or more other persons as an organizer or manager to engage in a scheme for the transfer or sale of such retail property.

The proposal adds organized retail theft to 1) the list of offenses that are defined as predicate criminal acts for the purpose of criminal street gang provisions (§ 18.2-46.1), and 2) the list of offenses defined as racketeering activity (§ 18.2-513). Penalties for gang-related offenses range from a Class 1 misdemeanor to a Class 3 felony, while penalties for racketeering range from a Class 6 felony to a Class 2 felony. The proposal also increases the penalty for property damage of \$1,000 or more from a Class 6 felony to a Class 5 felony if the damage occurs during an organized retail theft (§ 18.2-137).

Finally, the proposal adds § 18.2-104.01 to re-establish enhanced penalties for second and third convictions of misdemeanor larceny. Under the proposal, a second conviction for misdemeanor larceny would be punishable by a jail term of 30 days to 12 months, while a third or subsequent misdemeanor larceny conviction would be punishable as a Class 6 felony. These penalties were in effect prior to July 1, 2021. Legislation adopted by the 2021 General Assembly eliminated these enhanced penalties from the *Code* as of July 1, 2021.

Currently, under § 18.2-23, any person who conspires with another to commit larceny or assists another in the performance of a larceny, where the aggregate value of the goods or merchandise involved is \$1,000

or more, is guilty of a felony punishable by imprisonment of 1 to 20 years. A violation of § 18.2-23 constitutes a separate and distinct felony.

Between 1980 and 2018, Virginia’s felony larceny threshold was \$200, meaning that thefts involving \$200 or more were subject to felony prosecution. The 2018 General Assembly passed legislation to increase the felony larceny threshold from \$200 to \$500. In 2020, the General Assembly further increased the threshold to \$1,000. Many offenses in the *Code of Virginia* are “deemed larceny” (punishable in the same manner as larceny) or were otherwise affected by changes in the felony larceny threshold. Therefore, many acts of larceny that would have been subject to felony prosecution in the past now are prosecuted as misdemeanors.

Analysis:

According to fiscal year (FY) 2020 and FY2021 Sentencing Guidelines data, when the specified penalties were last in effect, a felony conviction for petit larceny third offense (§ 18.2-104.01) was the primary (or most serious) offense in 2,376 sentencing events. More than half of the offenders (58.1%) were sentenced to a local-responsible (jail) term for which the median sentence was 3.0 months. Another 21.4% of the offenders received a state-responsible (prison) term with a median sentence of 1.3 years. The remaining 20.5% of offenders did not receive an active term of incarceration to serve after sentencing. In the vast majority of these sentencing events (92.7%), the offender did not have any other felony convictions accompanying the petit larceny third offense.

Based on FY2020 and FY2021 General District Court Case Management System (CMS) data, 1,732 offenders were convicted of a misdemeanor for petit larceny second offense. For the 58.7% of offenders who were given a jail term to serve, the median sentence was 20 days.

Existing data sources do not contain sufficient detail to estimate the number of additional convictions that may result from enactment of other aspects of the proposal. However, such individuals may be sentenced similarly to those convicted under the existing provisions (see table below).

Offenders Convicted of Select Felony Offenses, FY2017-FY2022

Primary Offense	Total Number of Cases	Percent Sentenced to Probation	Percent Sentenced to Jail	Median Jail Sentence	Percent Sentenced to Prison	Median Prison Sentence
Participation in criminal act for benefit of gang (§ 18.2-46.2) – Class 5 felony ¹	65	21.5%	13.8%	6.0 mos.	64.6%	2.8 yrs.
Participation in criminal act for benefit of gang w/juv. member (§ 18.2-46.2) – Class 4 felony ¹	12	8.3%	8.3%	6.0 mos.	83.3%	2.2 yrs.
Damage property or monument, >=\$1,000 (§ 18.2-137) – Class 6 felony ¹	541	40.5%	43.4%	6.0 mos.	16.1%	1.3 yrs.
Vandalism/damage property – all Class 4 & 5 felonies (Art. 7 of Ch. 5 of Title 18.2) ²	151	19.2%	35.1%	6.0 mos.	45.7%	3.0 yrs.
Conspire to commit or assist in larceny with agg. value >=\$1,000 (§ 18.2-23) – Felony 1-20 years ²	110	23.6%	55.5%	3.4 mos.	20.9%	1.5 yrs.
Racketeering, 1 st offense (§ 18.2-514) – Felony 5-40 years ²	89	2.2%	6.7%	4.0 mos.	91.0%	3.5 yrs.
Racketeering, 2 nd /sub. offense (§ 18.2-514) – Class 2 felony ²	0	N/A	N/A	N/A	N/A	N/A

Note: Analysis is based on cases in which the specified offense was the primary, or most serious, offense at sentencing.

¹Source: Virginia Criminal Sentencing Commission, Sentencing Guidelines Data System, FY2021-FY2022

²Source: Supreme Court of Virginia - Circuit Court Case Management System (CMS), FY2021-FY2022

Impact of Proposed Legislation:

State adult correctional facilities. The proposed legislation would re-establish the enhanced penalties for second and third misdemeanor larceny convictions that were eliminated from the *Code*, effective July 1, 2021. Some offenders who would be convicted of misdemeanors under current law could be convicted of a Class 6 felony for petit larceny third offense if they have the requisite number of prior offenses. Thus, some offenses currently punished as misdemeanors would once again become felonies under the proposal. Compared to current law, the proposal is expected to increase the future state-responsible (prison) bed space needs of the Commonwealth. The impact for this aspect of the proposal is estimated to be at least 299 beds statewide by FY2029.¹ The impacts of other aspects of the proposal (organized retail theft, gang activity, racketeering and property damage) cannot be estimated due to insufficient data and are not included here. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$14,659,486.

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

FY24	FY25	FY26	FY27	FY28	FY29
188	276	290	295	299	299

Local adult correctional facilities. In re-establishing the enhanced penalties for second and third misdemeanor larceny convictions, some offenders may be convicted a Class 6 felony rather than a misdemeanor, or they may be convicted of a misdemeanor that carries a 30-day statutory minimum. As a result, some offenders may receive longer jail sentences and other offenders may be given a state prison sentence rather than a local-responsible (jail) sentence. The net impact on local-responsible (jail) beds is estimated to be 205 beds by FY2029 (state costs: \$3,030,450; local costs: \$4,753,361). The impacts of other aspects of the proposal (organized retail theft, gang activity, racketeering and property damage) cannot be included due to insufficient data.

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

FY24	FY25	FY26	FY27	FY28	FY29
171	195	200	203	205	205

Adult community corrections resources. The proposal may increase the need for community corrections resources; however, the potential impact on community corrections programs cannot be quantified.

Virginia's Sentencing Guidelines. The Sentencing Guidelines covered the felony for petit larceny third offense prior to its repeal in 2021. If the proposal is enacted, the Commission would likely restore the previous Guidelines recommendations. The Commission would monitor sentencing patterns after enactment to determine if the Guidelines should be adjusted in order to provide judges with a more accurate benchmark of the typical, or average, case outcome. The Guidelines cover vandalism felonies under § 18.2-137 and two gang-related offenses under § 18.2-46.2. The Guidelines do not cover other gang offenses or racketeering offenses when the offense is the primary, or most serious, offense in a case. Convictions not covered by the Guidelines as a primary offense may augment the Guidelines recommendation (as additional offenses) if the most serious offense at sentencing is covered by the Guidelines.

¹ The estimated impact of 299 state-responsible (prison) beds is likely the maximum potential impact of the legislation. In August 2021, the Virginia Department of Corrections (DOC), utilizing a different methodology, developed an estimate of possible bed space savings associated with House Bill 2290 (2021 General Assembly, Special Session I), the bills which repealed the felony penalty for petit larceny third offense as of July 1, 2021; the DOC estimated a potential space savings of 188 beds associated with that legislation. Because the current proposal restores the felony penalty for petit larceny third offense, the DOC estimate of 188 prison beds could be used to represent a minimum potential increase in prison beds compared to current law. DOC's estimate at that time did not reflect the higher rates of earned credits that became available for most nonviolent felons on July 1, 2022 (§ 53.1-202.3).

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 \$14,659,486 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 2022.
2. New cases resulting in state-responsible sentences were based on forecasts approved by the Secretary of Public Safety's Committee on Inmate Forecasting in 2022.
3. Cost per prison bed was assumed to be \$48,958 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 FY2021 Jail Cost Report. The state cost was calculated from the revenue portion and the resulting sum was \$40.39 per day or \$14,752 per year. The local cost was calculated by using the daily expenditure cost of \$107.81 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 \$63.35 per day or \$23,139 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 offenders

1. To estimate the number of offenders who may be affected by the proposed re-establishment of enhanced penalties for second and third misdemeanor larceny convictions, the Commission examined FY2020 felony sentencing events in which petit larceny third offense was the primary, or most serious, offense. The Commission then excluded 1) individuals who were convicted of any other felony in the same sentencing event and 2) individuals who had any other felony sentencing event that resulted in a prison sentence during the 12 months prior or the 12 months immediately following the sentencing event identified for analysis. This step isolated offenders who were most likely to be affected by the proposal.
2. It was assumed that the number offenders convicted of a felony for petit larceny third offense in the future would be similar to the number of such offenders identified during FY2020.

Assumptions relating to sentencing and time served

1. The impact of the proposed legislation, which would be effective on July 1, 2023, is phased in to account for case processing time.
2. Offenders affected by the proposed re-establishment of enhanced penalties for second and third misdemeanor larceny convictions (convicted of misdemeanors under current law) were assumed to receive sentences similar to all offenders convicted of misdemeanor larceny during FY2020. This served as the baseline for estimating the impact of the proposed change.
3. Offenders affected by the proposal (who would be convicted of felonies rather than misdemeanors) were assumed to receive sentences in the future similar to offenders sentenced during FY2020 for a felony conviction for petit larceny third offense.
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 February 28, 2020. At that time, felons could earn a maximum of 4.5 days for every 30 days served. Beginning July 1, 2022, most nonviolent felons were eligible for higher rates of earned sentence credits (up to 15 days for every 30 days served). To estimate the earning rates for larceny offenders affected by the proposed legislation, the Sentencing Commission examined the percentage of larceny offenders earning in each of the four levels of sentence credits that existed on February 28, 2020, and then applied those percentages to the four levels of sentence credits available for nonviolent felons as of July 1, 2022. For larceny offenses sentenced during the forecast horizon, the overall average rate of sentence credits earned by these individuals was estimated to be 22.8%.