



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2384 (Patron – Adams, L.R.)

LD#: 23104348

Date: 01/17/2023

Topic: Driving under the influence of marijuana

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000 *
- **Local Adult Correctional Facilities:**
Cannot be determined
- **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

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the Acts of Assembly of 2022, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

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 several sections of the *Code* related to operating a motor vehicle under the influence of marijuana. The proposal establishes a presumption of intoxication if a person operates a motor vehicle while having a blood concentration equal to or greater than .003 milligrams of delta-9 tetrahydrocannabinol (THC) per liter of blood. The proposed threshold for THC would also apply to § 29.1-738 (operating a boat while intoxicated) and § 46.2-341.24 (driving a commercial vehicle while intoxicated). The proposal would permit searches based on the odor of marijuana when an officer suspects an individual is operating a vehicle or boat while under the influence. A process to conduct a preliminary screen for the presence of drugs in the saliva, similar to the process used to measure a person's blood alcohol content, is established.

Currently, under §§ 18.2-266, 29.1-738, and 46.2-341.24, a person driving a motor vehicle, commercial vehicle, or boat is presumed to be under the influence if he has a blood concentration equal to or greater than 1) 0.08 percent by weight by volume of alcohol, 2) 0.02 milligrams of cocaine per liter of blood, 3) 0.1 milligrams of methamphetamine per liter of blood, 4) 0.01 milligrams of phencyclidine (PCP) per liter of blood, or 5) 0.1 milligrams of 3,4-methylenedioxy-methamphetamine (MDMA/ecstasy) per liter of blood. There is currently no presumption level specified for THC or marijuana.

Penalties for driving while intoxicated are provided in §§ 18.2-266, 18.2-270, 29.1-738, and 46.2-341.24 (see table below).

Offense	Statutory Penalty	Mandatory Minimum Penalty ¹
DWI, 1 st conviction (§§ 18.2-266/46.1-341.24)	Class 1 misdemeanor (0 to 12 mos.)	1 st DWI and BAC ² of .15 to .20: 5 days; 1 st DWI and BAC >/.20: 10 days
DWI, 2 nd conviction within 5 years (§§ 18.2-266/46.1-341.24)	1 month to 1 year	20 days; 2 nd DWI within 5 years and BAC .15-.20: additional 10 days; 2 nd DWI within 5 years and BAC >.20: additional 20 days
DWI, 2 nd conviction within 5 to 10 years (§§ 18.2-266/46.1-341.24)	1 month to 1 year	10 days; 2 nd DWI within 10 years and BAC .15-.20: additional 10 days; 2 nd DWI within 10 years and BAC >.20: additional 20 days
DWI, 3 rd conviction within 5 years (§§ 18.2-266/46.1-341.24)	Class 6 felony	6 months
DWI, 3 rd conviction within 5 to 10 years (§§ 18.2-266/46.1-341.24)	Class 6 felony	90 days
DWI, 4 th conviction (§§ 18.2-266/46.1-341.24)	Class 6 felony	1 year
Any DWI following prior felony DWI, involuntary manslaughter, or maiming resulting from DWI (§ 18.2-266)	Class 6 felony	1 year
DWI with child in vehicle (§§ 18.2-266/46.1-341.24)		Additional 5 days
Operate boat while intoxicated (§ 29.1-738)	Class 1 misdemeanor	None

¹ Mandatory minimum terms are cumulative and must be served consecutively but shall not exceed the statutory maximum penalty specified for the offense.

² BAC = Blood alcohol concentration.

Analysis:

Existing databases do not provide sufficient detail to identify the number of new convictions that may result from enactment of the proposal. Also, some individuals currently convicted of alcohol-related DWI who were also driving under the influence of THC/marijuana, in the future, may be convicted for driving while under the influence of THC/marijuana. While the number of new convictions cannot be estimated, such offenders may be sentenced similarly to those who have been convicted under existing provisions. See table below.

Offenders Convicted of Driving or Boating while Intoxicated, FY2021-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
DWI, 1 st conviction (§§ 18.2-266/46.1-341.24) – Class 1 misd. ¹	25,804	65.1%	34.9%	8 dys.	N/A	N/A

DWI, 2 nd conviction w/in 5 years (§§ 18.2-266/46.1-341.24) – Confinement 1 mo. to 1 yr. ¹	2,132	2.6%	97.4%	30 dys.	N/A	N/A
Primary Offense	Total Number of Cases	Percent Sentenced to Probation	Percent Sentenced to Jail	Median Jail Sentence	Percent Sentenced to Prison	Median Prison Sentence
DWI, 2 nd conviction w/in 5 to 10 years (§§ 18.2-266/46.1-341.24) – Confinement 1 mo. to 1 yr. ¹	1,502	2.5%	97.5%	20 dys.	N/A	N/A
DWI, 3 rd conviction w/in 5 years (§§ 18.2-266/46.1-341.24) – Class 6 felony ²	246	1.6%	78.9%	6.0 mos.	19.5%	1.0 yr.
DWI, 3 rd conviction w/in 5 to 10 years (§§ 18.2-266/46.1-341.24) – Class 6 felony ²	480	1.5%	82.1%	3.0 mos.	16.5%	1.0 yr.
DWI, 4 th w/in 10 years (§§ 18.2-266/46.1-341.24) – Class 6 felony ²	82	0.0%	9.8%	7.0 mos.	90.2%	1.4 yrs.
Any DWI following prior felony DWI, involuntary manslaughter, or maiming resulting from DWI (§ 18.2-266) – Class 6 felony ²	178	2.2%	2.8%	5.0 mos.	94.9%	1.4 yrs.
Operate boat while intoxicated (§ 29.1-738) – Class 1 misd. ¹	26	92.3%	7.7%	2.1 mos.	N/A	N/A

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

DWI includes driving under the influence of drugs.

¹Source: Supreme Court of Virginia's General District Court Case Management System, as analyzed by the Sentencing Commission

²Source: Supreme Court of Virginia's Circuit Court Case Management System, as analyzed by the Sentencing Commission

Impact of Proposed Legislation:

State adult correctional facilities. Establishing a procedure for testing for driving under the influence of drugs and defining a threshold for THC at which point a driver is presumed to be driving under the influence may result in additional convictions under §§ 18.2-266, 29.1-738, or 46.2-341.24, including felony convictions for the third or fourth DWI driving offense. In this way, the proposal may increase the future state-responsible (prison) bed space needs of the Commonwealth. Existing databases do not provide sufficient detail to estimate the number of new felony convictions that may result from enactment of the proposal; therefore, the magnitude of the impact on prison bed space needs cannot be estimated.

Local adult correctional facilities. The proposal result in additional misdemeanor and felony convictions under the affected statutes. Thus, the proposal may increase local-responsible (jail) bed space needs. The magnitude of the impact, however, cannot be determined.

Adult community corrections resources. Because the proposal could result in convictions and subsequent supervision requirements for an additional number of offenders, the proposal may increase the need for adult community corrections resources. Since the number of affected cases cannot be determined, the potential impact on community corrections cannot be quantified.

Virginia's Sentencing Guidelines. The Sentencing Guidelines cover most felony DWI violations involving alcohol. The Guidelines do not cover DWI violations for driving under the influence of marijuana or other drugs. No immediate adjustment to the Guidelines would be necessary under the proposal. If the proposal is enacted, the Sentencing Commission in the future could conduct detailed analyses of sentencing patterns to determine the feasibility of adding drug-related DWI felonies to the Guidelines system.

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 cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the Acts of Assembly of 2022, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

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