



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 1207

(Patron – McDougle)

LD#: 23104152

Date: 01/10/2023

Topic: Gang predicate offenses, etc.

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
At least \$ 4,543,251 (93 beds)
- **Local Adult Correctional Facilities:**
At least \$ 34,328 (2 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

Summary of Proposed Legislation:

The proposal amends § 18.2-46.1 to expand the definition of a “predicate criminal act” associated with gang activity beyond the crimes currently covered to include all felonies. Moreover, the proposal increases existing felony penalties and mandatory minimums for certain gang crimes specified under §§ 18.2-46.2, 18.2-46.3:1, and 18.2-46.3:3.

The proposal affects several gang-related offenses defined in the *Code of Virginia*. Under § 18.2-46.2, a criminal street gang member who knowingly participates in any predicate criminal act for the benefit of, or at the direction of, the gang is guilty of a Class 5 felony. If the offender is 18 years of age or older and knows that the gang includes a juvenile member, he is guilty of a Class 4 felony. In addition, § 18.2-46.3:3 provides enhanced penalties for violations of § 18.2-46.2 occurring (i) on or within 1,000 feet of school property; (ii) on a school bus; or (iii) on the property of a publicly owned or operated community center or recreation center. Under § 18.2-46.3:1, a third or subsequent conviction for a gang offense is elevated to a Class 3 felony.

All of the crimes in Article 2.1 (Crimes by Gangs) of Title 18.2 were created by the 2000 session of the General Assembly and enacted in July of the same year. Additions to the definition of a “predicate criminal act” and other revisions were made by the 2004, 2005, 2006, 2007, 2012, 2013, 2014, 2015, 2019, and 2021 General Assemblies.

Analysis:

According to the Circuit Court Case Management System for fiscal years 2021 and 2022, a felony conviction under § 18.2-46.2 for participating in a criminal act to benefit a gang that does not have a juvenile member was the primary, or most serious, offense for 24 offenders. Of these offenders, 16.7% were sentenced to probation without an active term of incarceration and 20.8% received a local-responsible (jail) term with a median sentence of six months. The remaining 62.5% of offenders received

a state-responsible (prison) term with a median sentence of four years. Another 29 offenders were convicted of this gang crime as an additional offense accompanying a more serious felony, such as first-degree murder or malicious wounding.

During the same period, five offenders were convicted under § 18.2-46.2 for participation in a criminal act to benefit a gang having a juvenile member (as the primary offense). Of these, one offender (20%) was sentenced to probation without an active term of incarceration, while the remaining four offenders (80%) received prison terms with a median prison sentence of four years. Another nine offenders were convicted of this gang crime as an additional offense to a more serious felony, such as first or second-degree murder.

One offender was convicted of a felony under § 18.2-46.3:3 during the two-year period for participation in a criminal act to benefit a gang having a juvenile member in a gang-free zone (as the primary offense). The offender received a local-responsible (jail) sentence of 10 months. No offender was convicted of this gang crime as an additional offense to a more serious felony.

There were no convictions under § 18.2-46.3:3 for participation in a criminal act to benefit a gang without a juvenile member in a gang-free zone (the act defined under §18.2-46.2), recruitment of persons for criminal street gang (several felonious acts defined under §18.2-46.3), or a third or subsequent gang offense under § 18.2-46.3:1.

Impact of Proposed Legislation:

State adult correctional facilities. The proposal expands the list of crimes that trigger felony penalties for gang participation delineated by § 18.2-46.2 and raises the existing penalties and mandatory minimum terms for several gang related crimes defined under §§ 18.2-46.2, 18.2-46.3:1, and 18.2-46.3:3. Therefore, it is expected to have an impact on the future state-responsible (prison) bed space needs of the Commonwealth. The impact is estimated to be at least 93 beds statewide by FY2029. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$4,543,251. This is a minimum estimate, as this figure does not include the impact the proposal may have on gang recruitment offenses under § 18.2-46.3 nor does it reflect the potential increase in sentences that may result from the higher penalties that are proposed; the data are insufficient to estimate the impact of those aspects of the proposal.

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

FY24	FY25	FY26	FY27	FY28	FY29
9	34	56	72	83	93

Local adult correctional facilities. The proposal is also expected to increase the future need for local-responsible (jail) beds. The net impact on local-responsible (jail) beds is estimated to be at least two beds by FY2029 (state costs: \$34,328; local costs: \$53,845).

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

Virginia's Sentencing Guidelines. Felony convictions under § 18.2-46.2 (participation in a criminal act to benefit a gang) are covered by the Sentencing Guidelines. Other gang-related offenses under Article 2.1 of Title 18.2 are not covered as the primary (or most serious) offense; however, a conviction under one of these provisions may augment the Guidelines recommendation (as an additional offense) if the

most serious offense at sentencing is covered by the 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 \$ 4,543,251 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 and Homeland Security's Committee on Offender Population Forecasting in 2022.
2. New cases resulting in state-responsible sentences were based on forecasts developed by the Secretary of Public Safety and Homeland Security's Committee on Offender Population Forecasting and approved 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.*

Assumptions relating to offenders

1. The increase in the number of offenders sentenced for a gang-related offense under Article 2.1 of Title 18.2 as a result of the proposal was estimated using conviction data for the current and proposed predicate crimes. According to FY2021 and FY2022 Circuit Court Case Management System (CMS) data, 15,438 offenders were sentenced for a felony crime currently listed as a predicate crime and 23,713 offenders were sentenced for a proposed felony predicate crime (not including the proposed misdemeanors). On the other hand, according to General District Court CMS data for the same period, 1,977 out of 10,329 offenders convicted of a misdemeanor currently listed as a predicate crime would be excluded from the list under § 18.2-46.1. Therefore, the net effect in the number of gang-related convictions associated with the proposed predicate crimes was assumed to be an increase by a factor of 1.344 ((23,713 convictions/15,438 convictions) – (1,977 convictions/10,329 convictions)).

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. 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 became eligible for higher rates of earned sentence credits (up to 15 days for every 30 days served). However, a maximum of 4.5 sentence credits may be earned on any sentence that is being served concurrent with or consecutive to a sentence for a violent offense listed in § 53.1-202.3. For this analysis, it was assumed that affected gang offenses would earn sentence credits at a maximum of 4.5 days for every 30 days served. Based on the average rates at which inmates in Department of Corrections' facilities were earning sentence credits as of February 28, 2020, affected offenders were assumed to earn credits equivalent to 8.07% of the total sentence.
3. It was assumed that prosecutors would charge all eligible offenders with a gang offense.
4. Offenders affected by the proposal were assumed to receive sentences similar to offenders currently convicted for a gang-related offense under Article 2.1 of Title 18.2.

Limitations

1. The analysis does not include cases from Alexandria as data from that jurisdiction are unavailable.
2. The projection is a minimum estimate because it does not include the impact the proposal may have on gang recruitment offenses under § 18.2-46.3 nor does it reflect the potential increase in sentences that may result from

the higher penalties that are proposed; the data are insufficient to estimate the impact of those aspects of the proposal.

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