



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 881 (Patron – McDougle)

LD#: 23101467

Date: 12/07/2022

Topic: Felony homicide

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
At least \$255,020 (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 resulting in the killing of another involved the manufacture, sale, gift, or distribution of a Schedule I or II controlled substance to another and (i) such other person's death results from the use of the controlled substance and (ii) the controlled substance is the proximate cause of his death. Felony homicide, constituting a second-degree murder, is punishable by imprisonment of 5 to 40 years. The proposal provides a reduced penalty (Class 5 felony) under certain conditions if the drug was distributed only as an accommodation.

The proposal is precipitated by a Virginia Court of Appeals decision relating to felony murder convictions in cases involving drug overdoses. In 2013, the Virginia Court of Appeals 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, 1,627 individuals died in the Commonwealth during 2019 as the result of drug overdoses. This figure increased to 2,309 in 2020 and 2,667 in 2021.¹ The causes of death for these individuals included prescription drugs, over-the-counter drugs, illegal (street) drugs, alcohol, inhalants, and other poisons.

Examination of Sentencing Commission data for FY2017 through FY2022 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 for which the median sentence was five years. There may have been other cases during the six-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 FY2017 through FY2022, 73 individuals were convicted of felony murder under § 18.2-33 (as the primary, or most serious offense, at sentencing). All but one of these offenders were sentenced to a state-responsible (prison) term for which the median sentence was 20.5 years. These data do not indicate if any of the deaths were associated with the use of drugs; however, three of the individuals were also convicted of selling a Schedule I or II drug as an additional offense.

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. If passed, the new law 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 will likely 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 FY2029. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$255,020. The proposal may have additional impact beyond the six-year forecast window required by § 30-19.1:4.

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

FY24	FY25	FY26	FY27	FY28	FY29
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 prior to being released to the community.

¹ <https://www.vdh.virginia.gov/content/uploads/sites/18/2022/07/Quarterly-Drug-Death-Report-FINAL-Q1-2022.pdf> (accessed October 6, 2022)

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 \$255,020 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 developed by the Secretary of Public Safety and Homeland Security's Committee on Inmate 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. It was assumed that prosecutors would charge all identified eligible offenders with felony homicide (§ 18.2-33) as proposed.
2. Analysis is based on offenders convicted under § 18.2-248(C) for manufacturing, distributing, etc., a Schedule I/II drug in whose cases the judge cited a death as the reason for sentencing above the Guidelines recommendation.

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 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. 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 sale, distribution, etc. of Schedule I/II drug offenders affected by the proposed legislation, the Sentencing Commission examined the percentage of 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 these offenders as of July 1, 2022. For offenders sentenced during the forecast horizon, the overall average rate of sentence credits earned by these individuals was estimated to be 23.5%. For second-degree/felony murder, this rate was 7.9%.

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