



Impact Analysis on Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 1356 Amendment in the Nature of a Substitute (Patron Prior to Substitute – Anderson)

LD#: 22105388

Date: 02/01/2022

Topic: Manufacturing, selling, distributing, etc., fentanyl

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 552 of the Acts of Assembly of 2021, 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 address 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 §§ 18.2-248 and 18.2-248.01 of the *Code of Virginia* to establish additional criminal penalties for offenders who sell, give, or distribute fentanyl and expand the existing penalties for transporting fentanyl into the Commonwealth.

The proposal would specify criminal offenses involving the certain amount of fentanyl and establish related penalties as follows:

- Any person who knowingly sells, gives, or distributes two milligrams or more of fentanyl to another person in violation of § 18.2-248 without such person's knowledge that the substance sold, given, or distributed contains fentanyl is guilty of attempted murder of the second degree pursuant to §§ 18.2-26 and 18.2-32 (2-10 years in prison).
- If sale, gift, or distribution of two milligrams or more of fentanyl to another person in violation of § 18.2-248 without such person's knowledge that the substance sold, given, or distributed contains fentanyl results in the death of such other person from his use of the substance containing fentanyl, the person who sold, gave, or distributed the fentanyl to such person is guilty of murder of the second degree pursuant to § 18.2-32 (5-40 years in prison).
- Any person who transports into the Commonwealth by any means with intent to sell or distribute 100 milligrams or more of fentanyl as described in Schedule II of the Drug Control Act is subject to the criminal penalties specified under § 18.2-248.01.

Currently, under § 18.2-248.01, transporting one ounce or more of any Schedule I or II drug into the Commonwealth is a felony punishable by imprisonment of 5 to 40 years with a mandatory minimum term of three years, while a second or subsequent conviction requires a 10-year mandatory minimum term.

Furthermore, under §18.2-32, felony homicide, constituting a second-degree murder, is punishable by imprisonment of 5 to 40 years. Pursuant to §18.2-26, an attempted second-degree felony murder is classified as a Class 4 felony, punishable by imprisonment of 2 to 10 years.

Pharmaceutical fentanyl is a synthetic opioid, approved for treating severe pain; it is 50 to 100 times more potent than morphine.¹ Illicitly manufactured fentanyl is available on the drug market in different forms, including liquid and powder.² Powdered fentanyl looks just like many other drugs. It is commonly mixed with drugs like heroin, cocaine, and methamphetamine and made into pills that are made to resemble other prescription opioids.

Analysis:

Criminal justice data systems in the Commonwealth have not systematically captured the type or quantity of drug(s) associated with violations of § 18.2-248(C). In 2017, the Commission modified the Sentencing Guidelines cover sheet and began to collect the specific type of drug in cases in which a drug offense is the primary (or most serious) offense in the sentencing event. The cover sheet now includes check boxes for recording drugs such as: cocaine, codeine, fentanyl, heroin, hydrocodone, methadone, oxycodone and methamphetamine. The FY2020-FY2021 Sentencing Guidelines data indicate that, among cases in which the manufacture, sale, distribution, etc., of Schedule I or II drug is the most serious offense, approximately 7% of the cases involved fentanyl. These data do not capture the quantity of drug. Therefore, data are insufficient to estimate the number of offenders who will be subject to the proposed criminal penalties specified for certain quantities of fentanyl.

According to the Office of the Chief Medical Examiner, 1,486 individuals died in the Commonwealth during 2018 as the result of drugs. This figure increased to 1,627 in 2019. 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 FY2014 through FY2021 indicates that judges sentenced 27 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 with a median sentence of five years. There may have been other cases during the eight-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 murder of the second degree under the proposed changes to § 18.2-248 may be sentenced similarly to offenders sentenced under existing provisions. According to the Sentencing Guidelines Database for fiscal year (FY) 2020 and FY2021, 98 individuals were convicted of second-degree murder under § 18.2-32. The second-degree murder was the primary, or most serious, offense in 86 cases. Of these, two of the offenders (2.3%) received probation or were sentenced to the time served by the offender while awaiting trial. The remaining 84 offenders (97.7%) were sentenced to a state-responsible (prison) term for which the median sentence was 20 years. These data do not indicate that the deaths were associated with the use of drugs. Sentencing Guidelines data reveals that among those convicted of the second-degree murder, none of the individuals were also charged with a felony drug offense.

¹ <https://www.cdc.gov/opioids/basics/fentanyl.html>

² <https://www.cdc.gov/stopoverdose/fentanyl/index.html>

The table below also provides sentencing information for offenders currently convicted under § 18.2-248.01 (for transporting into Commonwealth -1oz or more Schedule I/II other than Cocaine).

Offenders Convicted of Transporting into Commonwealth – 1oz. or more of Schedule I/II other than Cocaine (as the Most Serious Offense), FY2020-FY2021

Offense	Number of Sentencing Events	Percent Sentenced to Probation	Percent Sentenced to Jail	Median Jail Sentence	Percent Sentenced to Prison	Median Prison Sentence
Transport in the Commonwealth, 1 oz. or more of a Schedule I or II drug other than Cocaine (§ 18.2-248.01)	14	0%	0%	N/A	100%	3.0 yrs.
Transport in the Commonwealth, 1 oz. or more of a Schedule I or II drug other than Cocaine (§ 18.2-248.01) <i>2nd/subsequent conviction</i> (§ 18.2-248.01)	0	N/A	N/A	N/A	N/A	N/A

Notes: The analysis is based on cases in which the specified offense was the primary, or most serious, offense in the sentencing event.
Source: Supreme Court of Virginia - Circuit Court Case Management System (CMS), FY2020-FY2021

Impact of Proposed Legislation:

State adult correctional facilities. By establishing new criminal penalties and expanding the existing penalties involving certain amounts of fentanyl, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. Since the number of individuals who may be subject to such penalties cannot be determined with available data, the magnitude of the impact on prison beds cannot be quantified.

Local adult correctional facilities. The proposal may impact the local-responsible (jail) bed space needs, but the magnitude of the impact cannot be determined.

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 increase the need for 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 violations under § 18.2-248.01 related to the transport of Schedule I or II drugs into the Commonwealth are not covered by the Sentencing Guidelines. However, the second-degree murder convictions under § 18.2-32 are covered by the Sentencing Guidelines. No immediate adjustment to the Guidelines would be necessary under the proposal. However, if the proposal is enacted, the Sentencing Commission in the future would conduct detailed analyses of sentencing patterns to determine if revisions to the Guidelines were necessary.

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 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 552 of the Acts of Assembly of 2021, 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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