



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill 746

Floor Amendment in the Nature of Substitute

(Patrons prior to substitute – McDougle and DeSteph)

LD#: 25106130

Date: 01/27/2025

Topic: Manufacturing, distributing, etc., fentanyl resulting in death of minor

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000 *
- **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

* 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 2024, 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 § 18.2-33 to expand the definition of felony homicide. Under the proposed § 18.2-33 (B), a person would be guilty of felony homicide if the felonious act resulting in the killing of a minor involved the manufacture, sale, gift, or distribution of a controlled substance that contains a detectable amount of fentanyl to another person who is a minor and (i) such minor’s death results solely 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 fentanyl was distributed only as an accommodation.¹

The proposal also specifies that no person convicted pursuant to this proposed section for conduct described in § 18.2-33 (B) shall be subject to a prosecution for a violation of §§ 18.2-46.6 (D) or 18.2-248, 18.2-248.01, 18.2-250, or 18.2-256 for the same transaction or occurrence.

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

¹ Under current law, the felony offense defined in § 18.2-33 is ineligible for the enhanced sentence credits specified in § 53.1-202.3; therefore, individuals convicted of this offense must serve a minimum of 85% of the sentence ordered by the court. The proposed legislation does not change the earned sentence credits available to offenders convicted of this felony.

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 controlled substance that contains a detectable amount of fentanyl to be convicted of felony homicide if the recipient's (who is a minor) use of the drug was the proximate cause of the death, regardless of the time or place the death occurred in relation to the commission of the underlying felony.

Analysis:

According to the Office of the Chief Medical Examiner, 1,628 individuals died in the Commonwealth during 2019 as the result of drug overdoses. This figure increased to 2,669 in 2021 and 2,619 in 2022. The figure declined slightly in 2023 to 2,535 deaths. The projected number of deaths from drug overdoses in 2024 is 2,183.² The causes of death for these individuals included prescription drugs, over-the-counter drugs, illegal (street) drugs, alcohol, inhalants, and other poisons.

Existing data sources do not contain sufficient detail to identify the number of individuals who would be affected by the proposal.

Examination of Sentencing Commission data for FY2019 through FY2024 indicates that judges sentenced 24 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 5.0 years. The data further indicate that 13 of these cases involved fentanyl. Among these 13 offenders, the median prison sentence was 6.0 years. There may have been other cases during the six-year period in which the manufacture, distribution, etc., of fentanyl was associated with a death; however, additional cases could not be identified with the available data. Also, there is insufficient data to identify the cases that involve the death of an minor.

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 Court Management System (CMS) Circuit Court data for FY2019 through FY2024, 88 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 received a state-responsible (prison) term and the median sentence in such cases was 18.0 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 controlled substance that contains a detectable amount of fentanyl to be convicted of felony homicide (punishable by up to 40 years imprisonment) if the recipient is a minor and 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. Existing databases do not provide

² <https://www.vdh.virginia.gov/content/uploads/sites/18/2024/08/Quarterly-Drug-Death-Report-Q1-2024.pdf> (accessed October 24, 2024)

sufficient detail to estimate the number of new felony convictions likely to result from enactment of the proposal. Thus, the magnitude of the impact on prison beds cannot be determined.

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 homicide 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.

Virginia’s Sentencing Guidelines. Felony homicide convictions under § 18.2-33 are covered by the Sentencing Guidelines. Felony homicide is defined as a violent offense in § 17.1-805(C) for the purposes of the Guidelines. No immediate 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 cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the Acts of Assembly of 2024, 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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