



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill 746

Amendment in the Nature of a Substitute

(Patrons prior to substitute – McDougle and DeSteph)

LD#: 25106999

Date: 02/11/2025

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

Fiscal Impact Summary:

<ul style="list-style-type: none"> • State Adult Correctional Facilities: At least \$64,996 (1 bed)* • Local Adult Correctional Facilities: None (\$0) • Adult Community Corrections Programs: Cannot be determined 	<ul style="list-style-type: none"> • Juvenile Direct Care: Cannot be determined** • Juvenile Detention Facilities: Cannot be determined** <p>** Provided by the Department of Juvenile Justice</p>
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* 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 adds § 18.2-36.3 to the *Code of Virginia* relating to involuntary manslaughter involving certain drugs. Under the proposal, any person who, as a result of manufacturing, selling, or distributing a controlled substance that contains a detectable amount of fentanyl, unintentionally causes the death of another person is guilty of involuntary manslaughter if (i) such death results from use of the controlled substance and (ii) such controlled substance is the proximate cause of the death. Involuntary manslaughter is a Class 5 felony, which is punishable by imprisonment of 1 to 10 years.¹

The proposal also specifies that if such person proves that he gave or distributed a controlled substance that contains a detectable amount of fentanyl only as an accommodation to another individual who was not an inmate, such person shall not be guilty of involuntary manslaughter but may be prosecuted for a violation of §§ 18.2-248(D) or 18.2-248(E3) (sale as accommodation of Schedule I/II drugs or III/IV drugs).

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 controlled substance that contains a detectable amount of fentanyl to be convicted of involuntary manslaughter if the recipient’s 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.

¹ The proposed Class 5 felony of involuntary manslaughter offense would be eligible for the enhanced sentence credits specified in § 53.1-202.3, whereby offenders will serve a minimum of 67% of the sentence ordered by the court.

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.

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.

According to the same data, 234 individuals were convicted of involuntary manslaughter under § 18.2-36. This was the primary, or most serious, offense in 215 of the cases. Further analysis revealed that 15 of these offenders were also convicted of at least one drug offense. Most (13 out of 15) received a state prison term and the median sentence in such cases was 5.0 years. The remaining two offenders received a local-responsible (jail) term.

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 involuntary manslaughter (punishable by up to 10 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 involuntary manslaughter 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 one bed statewide by FY2031. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$64,996. The proposal may have additional impacts beyond the six-year forecast window required by § 30-19.1:4.

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

FY26	FY27	FY28	FY29	FY30	FY31
0	0	0	1	1	1

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

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

result in longer terms of incarceration for some offenders who would also be convicted of involuntary manslaughter 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. A conviction under the proposed § 18.2-36.3 would not be covered by the Guidelines as the most serious offense. A conviction for this crime, however, could augment the Guidelines recommendation (as an additional offense) if the most serious offense at sentencing is covered by the Guidelines. The proposed felony would not be defined as violent under § 17.1-805(C) for the purposes of the Guidelines. No immediate adjustment to the Guidelines would be necessary under the proposal. If the proposal is enacted, the Sentencing Commission in the future would conduct analyses to determine the feasibility of adding the new felony 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 is at least \$64,996 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 2024.
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 2024.
3. Cost per prison bed was assumed to be \$54,915 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 involuntary manslaughter (§ 18.2-36) as proposed.
2. Analysis is based on offenders convicted under § 18.2-248(C) for manufacturing, distributing, etc., of fentanyl in whose cases the judge cited a death as the reason for sentencing above the Guidelines recommendation.
3. There may have been other cases in which the manufacture, distribution, etc., of fentanyl was associated with a death; however, additional cases could not be identified in the data due to missing information related to drug type.

Assumptions relating to sentencing and time served

1. The impact of the proposed legislation, which would be effective on July 1, 2025, 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 involuntary manslaughter (§ 18.2-36) who were also convicted of at least one drug offense in the same sentencing event.
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 August 30, 2024. 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, see § 53.1-202.3). For offenders convicted of the sale, distribution, etc. of Schedule I/II drugs (including fentanyl) and sentenced during the forecast horizon, the overall average rate of sentence credits earned by these individuals was estimated to be 28.4%. For felons

convicted of an involuntary manslaughter under § 18.2-36 and sentenced during the forecast horizon, the overall average rate of sentence credits earned by these individuals was estimated to be 27.5%.

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