



NORTH CAROLINA GENERAL ASSEMBLY

Session 2019

Legislative Incarceration Fiscal Note

Short Title: Strengthen Criminal Gang Laws.
Bill Number: House Bill 633 (Second Edition)
Sponsor(s): Representatives Davis, Faircloth, McNeill, and Richardson

SUMMARY TABLE

FISCAL IMPACT OF H.B. 633, V.2 (\$ in millions)

	<u>FY 2019-20</u>	<u>FY 2020-21</u>	<u>FY 2021-22</u>	<u>FY 2022-23</u>	<u>FY 2023-24</u>
State Impact					
General Fund Revenue	-	-	-	-	-
<u>Less Expenditures</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>
General Fund Impact	Refer to Fiscal Impact Summary and Analysis sections				

NET STATE IMPACT	Refer to Fiscal Impact Summary and Analysis sections
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FISCAL IMPACT SUMMARY

The proposed bill is likely to have a fiscal impact because it both creates a number of new offenses and applies enhanced sentencing to certain existing offenses. For most of the bill’s criminal charges, Fiscal Research cannot reasonably estimate the total additional costs that may be incurred due to a lack of historical data for these offenses and a lack of similar offenses to use as a proxy for predicting the total number of offenses.

However, the bill would also increase the penalty for possession of a firearm by a felon from a Class G to a Class F. Since this offense does have historical data available, Fiscal Research is able to provide an estimate of some of the costs of this bill. These costs are arrived at by multiplying the number of cases/convictions from the most recent fiscal year times the difference in average costs for Class F and Class G offenses. The costs listed in the table above and in the following list assume that the most recent year’s charge data for this offense will hold true moving forward, are a minimum of the potential costs associated with this bill, and only account for Section 3.(c)’s change to G.S. 14-415.1.(a).(3):

- Administrative Office of the Courts: \$1,473,972 (\$226 per case times 6,522 defendants)
- Indigent Defense Services: \$658,722 (\$101 per case times 6,522 defendants)
- Department of Public Safety (DPS) - Prisons: \$3,376,859

- DPS - Community Corrections: No change for post-release supervision minimum cost; decrease of \$605,760 for supervised probation sentences

These expenses result in a total minimum cost for this bill of \$4,903,793.

In addition to the offense above, the following sections of the bill may have a fiscal impact:

- Section 1 lowers the threshold for what constitutes gang activity and creates a new Class A1 misdemeanor for violating a civil injunction against gang members
- Section 2.(a) expands the definition of “criminal gang” by repealing language that mandates a group of individuals must engage in criminal activity as one of their “primary activities”
- Sections 2.(b) and (2c) reclassify the soliciting of persons 16 and 17 years old to participate in criminal gang activity from a Class H felony to a Class F felony
- Section 3.(a) amends the existing sentence enhancement for offenses committed as a part of criminal gang activity to include those who possessed or used a firearm during commission of the crime. Violators would be subject to a sentencing enhancement of two classes higher than the principal felony for which the person was convicted, although this enhancement would not apply to those who commit Class A, B1, or B2 felonies
- Section 3.(b) creates three new felony offenses for possessing a firearm or weapon of mass death and destruction (WMD) during the commission of any felony. Specifically, the section makes it a Class D felony if the person discharges the weapon during the commission or attempted commission of the felony; a Class F felony if the person brandishes the weapon; and a Class H felony for possessing the weapon
- Section 3.(b) also makes it a Class G felony for a person to sell, deliver, transfer, or give a firearm or WMD to a person the transferor knows or reasonably should know is participating in criminal gang activity
- Section 3.(c) increases the offense class for possession of a firearm by a felon from a Class G to a Class F felony for a first offense, creates a Class D felony for a subsequent violation, and creates a Class D felony for violating this section while participating in gang activity

Some of these sections, such as Section 2.(a)’s expansion of the definition of criminal gangs, are likely to have a fiscal impact despite not being tied directly to a specific charge or class of offense. Other sections, such as Section 3.(a)’s increased sentence enhancement, are likely to have a large impact on prison expenses. The Sentencing and Policy Commission (SPAC) notes that previous analyses indicated that at least 90% of felony convictions (an estimated 27,101 of the 30,112 felony convictions in FY 2018) can be identified as being in the potential pool for the existing one class enhancement under subsection 3.(a) based on the definition of “criminal gang activity.” However, it is not known how many offenders received the one class sentence enhancement under the existing statute. It is also not known how many offenders possessed or used a firearm during the commission of the crime and would receive the two class sentence enhancement under the proposed amendment.

Because these enhancements and expanded definitions could apply to an unknown number of crimes committed in the State, and because there is no data available to show how commonly or strictly these sentence enhancements might be applied, Fiscal Research cannot predict the impact on the criminal justice system. The cost of a case with an enhanced sentence are a result of the

changes made by this bill would be the average cost of an offense two classes higher than the crime committed (up to a class C) minus the average cost of the underlying crime. To provide context, the following costs may be incurred for every one person charged and convicted of criminal offenses:

Bill Section: Penalty Class	Administrative Office of the Courts (AOC)	Office of Indigent Defense Services (IDS)	Department of Public Safety (DPS) - Prisons	DPS - Community Corrections
Class C Felony	\$6,001 per disposition	\$958 per disposition	\$43,578 per active sentence	\$1,920 minimum for post-release supervision
Class D Felony	\$4,905 per disposition	\$1,283 per disposition	\$34,432 per active sentence	\$1,920 minimum for post-release supervision
Class E Felony	\$2,290 per disposition	\$586 per disposition	\$15,064 per active sentence	\$1,920 minimum for post-release supervision
Class F Felony	\$1,291 per disposition	\$569 per disposition	\$10,222 per active sentence	\$1,440 minimum for post-release supervision
Class G Felony	\$1,065 per disposition	\$468 per disposition	\$7,950 per active sentence	\$1,440 minimum for post-release supervision
Class H Felony	\$709 per disposition	\$392 per disposition	\$5,918 per active sentence	\$1,440 minimum for post-release supervision
Class I Felony	\$516 per disposition	\$333 per disposition	\$3,766 per active sentence	\$1,920 minimum for post-release supervision
Class A1 Misdemeanor	\$404 per disposition	\$201 per disposition	No cost	\$2,560 per supervised probation sentence
Class 1 Misdemeanor	\$233 per disposition	\$202 per disposition	No cost	\$2,400 per supervised probation sentence
Class 2 Misdemeanor	\$124 per disposition	\$201 per disposition	No cost	\$2,240 per supervised probation sentence
Class 3 Misdemeanor	\$44 per disposition	\$200 per disposition	No cost	\$2,080 per supervised probation sentence

FISCAL ANALYSIS

General

SPAC prepares prison population projections for each bill containing a criminal penalty. The Commission assumes for such bills that expanding existing or creating new criminal offenses produces no deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume deterrent effects for any criminal penalty bill.

S.L. 2011-192, the Justice Reinvestment Act (JRA), made changes to North Carolina's court system, corrections system (both to prisons and probation), and to post-release supervision. All active sentences for felony offenses now result in a minimum of twelve months of post-release supervision (PRS) for B1-E level offenses and a minimum of nine months of PRS for F-I level offenses.

JRA also created the Statewide Misdemeanant Confinement Program (SMCP) for housing misdemeanants with sentences between 90 and 180 days in county jails (misdemeanants with shorter sentences were already the responsibility of the counties). County participation in the program is voluntary. The SMCP pays participating counties for misdemeanants' housing, transportation, and medical costs. In 2014, the program was expanded to include all misdemeanants with sentences longer than 90 days. The Sentencing and Policy Advisory Commission does not track county jail capacity, so it is not possible to estimate the impact of new or increased misdemeanor penalties on county jails.

Judicial Branch

The Administrative Office of the Courts provides Fiscal Research with a fiscal impact analysis for most criminal penalty bills. For such bills, fiscal impact is typically based on the assumption that court time will increase due to anticipated increases in trials and corresponding increases in workload for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

As outlined above, the bill creates new offenses, expands the pool of possible offenses, and applies new sentencing enhancements to an unknown number of offenses. The costs to the Courts for each of these possible offenses have been outlined in the table in the Fiscal Summary section of this Note.

The Office of Indigent Defense Services (IDS) provides Fiscal Research with the frequency and cost of indigent defense services for each level of crime, including the cost differentials for district and superior court with and without a trial and the percentage of cases handled in each category. Fiscal Research used this data to calculate a weighted average of IDS costs.

As outlined above, the bill creates new offenses, expands the pool of possible offenses, and applies new sentencing enhancements to an unknown number of offenses. The costs to IDS for each of these possible offenses have been outlined in the table in the Fiscal Summary section of this Note. These estimates assumes the appointment of a PAC attorney. In districts that have Public Defender offices, cases may be handled by those offices. In those instances, this cost may not be incurred.



Department of Public Safety – Prisons

The chart below depicts the projected inmate population relative to available prison bed capacity system-wide. Capacity projections assume operation at Expanded Operating Capacity,¹ and represent the total number of beds in operation, or authorized for construction or operation as of December 2018.

Based on the most recent population projections and estimated bed capacity, there are surplus prison beds available for the five-year fiscal note horizon and beyond. Therefore, no additional beds will be required unless the projected number of additional inmates resulting from a bill (row four) exceeds the projected number of beds under the inmate population (row three). Rows four and five in the chart demonstrate the impact of the bill. The data in this table only reflects the impact of the increase of the penalty for possession of a firearm by a felon from a Class G to a Class F felony, as that charge is the only one in this bill for which the Sentencing Commission has historical data:

Population Projections and Bed Capacity Five Year Impact					
	June 30 2020	June 30 2021	June 30 2022	June 30 2023	June 30 2024
1. Inmates ²	36,452	36,867	37,231	37,433	37,702
2. Prison Beds (Expanded Capacity)	38,225	38,225	38,225	38,225	38,225
3. Beds Over/(Under) Inmate Population	1,773	1,358	994	792	523
4. Minimum Additional Inmates Due to this Bill³	187	387	618	624	631
5. Additional Beds Required	0	0	0	0	108

Since the bill creates new offenses, expands the pool of possible offenses, and applies new sentencing enhancements to an unknown number of offenses, the Sentencing Commission does not have historical data for most of the offenses in this bill from which to estimate the impact of this bill on the prison population. A threshold analysis is provided when it is not known how many offenders might be convicted and sentenced as a result of the proposed change. For each offense class, the threshold estimate is the number of convictions that result in the need for one prison bed in the first year.

¹ Expanded Operating Capacity (EOC) is: 1) the number of single cells housing one inmate, 2) the number of single cells housing two inmates, and 3) the number of beds in dormitories, allowing between 35 (130% of Standard Operating Capacity) and 50 (SOC) square feet per inmate.

² The Sentencing and Policy Advisory Commission prepares inmate population projections annually. These projections are derived from: historical information on incarceration and release rates under Structured Sentencing; crime rate forecasts by a technical advisory group; probation and offender revocation rates; and the decline (parole and max-outs) of the stock prison population sentenced under prior sentencing acts. Projections were updated in February 2019.

³ Criminal penalty bills effective December 1, 2019 should not affect prison population and bed needs until FY 2020-21 due to the lag time between offense charge and sentencing - six months on average. No delayed effect is presumed for the Court System.

Section 2 reclassifies the soliciting of persons 16 and 17 years old to participate in criminal gang activity from a Class H felony to a Class F felony. In FY 2018, there were 6 convictions under G.S. 14-50.17(a); however, it is not known how many of the people solicited were 16 or 17 years old. Impact on the prison population will occur if Class H convictions become Class F convictions under the proposed change because of the higher rate of active sentences (51% for Class F compared to 34% for Class H) and longer average estimated time served (19 months for Class F compared to 11 months for Class H). The following table shows the estimated annual impact if, for example, there were 4 convictions (threshold), 20 convictions (example), or 6 convictions (see data above) per year that would be reclassified from Class H to Class F. The five-year estimate takes into account the combination of active sentences and probation and post-release supervision violations resulting in confinement, as well as estimated growth rates in convictions.

Estimated Prison Bed Impact Using Threshold Convictions, 20 Convictions, and Previous Year Data Class H to Class F Felony					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
4 (Threshold)	1	2	3	3	3
20	4	8	11	11	11
6	1	3	4	4	4

Section 3.(b) creates a new Class D felony. In FY 2017-18, 99% of Class D felony convictions resulted in active sentences, with an average estimated time served of 64 months. Twelve months of post-release supervision is required upon release from prison following an active sentence or revocation of probation. The following table shows the estimated annual impact if there was one conviction (the threshold) or 20 convictions for this proposed offense per year. The five year estimate takes into account the combination of active sentences and probation and post-release supervision violations resulting in confinement, as well as growth rates adopted by the Sentencing Commission’s Forecasting Technical Advisory Group.

Estimated Prison Bed Impact Using Threshold Convictions and 20 Convictions Class D Felony					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
1 (Threshold)	1	2	3	4	5
20	20	41	61	82	102

Section 3.(b) also creates a new Class F felony. In FY 2017-18, 51% of Class F felony convictions resulted in active sentences, with an average estimated time served of 19 months. Nine months of post-release supervision is required upon release from prison following an active sentence or revocation of probation. The following table shows the estimated annual impact if there were two convictions (the threshold) or 20 convictions for this proposed offense per year. The five year estimate takes into account the combination of active sentences and probation and post-release supervision violations resulting in confinement, as well as growth rates adopted by the Sentencing Commission’s Forecasting Technical Advisory Group.

Estimated Prison Bed Impact Using Threshold Convictions and 20 Convictions Class F Felony					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
2 (Threshold)	1	2	3	3	3
20	11	19	22	22	22

Section 3.(b) also creates a new Class H felony. In FY 2017-18, 34% of Class H felony convictions resulted in active sentences, with an average estimated time served of 11 months. Nine months of post-release supervision is required upon release from prison following an active sentence or revocation of probation. The following table shows the estimated annual impact if there were four convictions (the threshold) or 20 convictions for this proposed offense per year. The five year estimate takes into account the combination of active sentences and probation and post-release supervision violations resulting in confinement, as well as growth rates adopted by the Sentencing Commission's Forecasting Technical Advisory Group.

Estimated Prison Bed Impact Using Threshold Convictions and 20 Convictions Class H Felony					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
4 (Threshold)	1	2	2	2	2
20	7	11	11	11	11

Section 3.(b) also creates a new Class G felony. In FY 2017-18, 40% of Class G felony convictions resulted in active sentences, with an average estimated time served of 15 months. Nine months of post-release supervision is required upon release from prison following an active sentence or revocation of probation. The following table shows the estimated annual impact if there were three convictions (the threshold) or 20 convictions for this proposed offense per year. The five year estimate takes into account the combination of active sentences and probation and post-release supervision violations resulting in confinement, as well as growth rates adopted by the Sentencing Commission's Forecasting Technical Advisory Group.

Estimated Prison Bed Impact Using Threshold Convictions and 20 Convictions Class G Felony					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
3 (Threshold)	1	2	2	2	2
20	9	15	15	15	15

Section 3.(c) increases the punishment for the offense of possession of a firearm by a felon if the individual was involved in criminal gang activity to a Class D felony, to a Class D felony if it is a second or subsequent offense, and a Class F felony in other cases. Currently, possession of a firearm by a felon is a Class G felony (G.S. 14-415.1). In FY 2018, there were 1,701 convictions for possession of a firearm by a felon.

No data are available to determine how many of the 1,701 convictions for possession of a firearm by a felon in FY 2018 were for offenders who were participating in criminal gang activity at the time of the violation. As a result, it is not known how many of the 1,701 convictions would become Class D felony convictions under the proposed bill. Impact on the prison population will occur if Class G convictions become Class D convictions under the proposed statute because of the higher rate of active sentences (mandatory active for Class D compared to 40% for Class G) and longer average estimated time served (64 months for Class D compared to 15 months for Class G). The following table shows the estimated annual impact if, for example, there were 3 convictions (threshold), 20 convictions (example), or 170 convictions (10% of the 1,701 convictions above) per year that would be reclassified from Class G to Class D. The five-year estimate takes into account the combination of active sentences and probation and post-release supervision violations resulting in confinement, as well as estimated growth rates in convictions. In addition, there will be some impact on post-release supervision caseloads since Class D requires an additional three months of supervision.

Estimated Prison Bed Impact Using Threshold Convictions, 20 Convictions, and 10% of Previous Year Data					
Class G to Class D felony, Gang Activity Felony Firearm Possession					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
3 (Threshold)	2	4	7	10	13
20	11	26	46	67	87
170	100	218	391	565	741

No data are available to determine how many of the 1,701 convictions for possession of a firearm by a felon in FY 2018 were for offenders whose violation is a second or subsequent violation. As a result, it is not known how many of the 1,701 convictions would become Class D felony convictions under the proposed bill. The Administrative Office of the Courts' database does not contain a consolidated accounting of the specific offenses that comprise an offender's criminal history. Of the 1,701 convictions, 1,037 were for offenders with 6 or more prior record points, possibly indicating the presence of at least one prior felony conviction (2 points for a Class H or I felony) and a prior conviction for a Class G felony (4 points). Impact on the prison population will occur if Class G convictions become Class D convictions under the proposed statute because of the higher rate of active sentences (mandatory active for Class D compared to 40% for Class G) and longer average estimated time served (64 months for Class D compared to 15 months for Class G). The following table shows the estimated annual impact if, for example, there were 3 convictions (threshold), 20 convictions (example), or 104 convictions (10% of the 1,037 convictions above) per year that would be reclassified from Class G to Class D.

Estimated Prison Bed Impact Using Threshold Convictions, 20 Convictions, and 10% of Previous Year Data					
Class G to Class D felony, Second Offense Felony Firearm Possession					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
3 (Threshold)	2	4	7	10	13
20	11	26	46	67	87
104	61	133	340	346	453

Under subsection (a)(3), convictions for possession of a firearm by a felon that would not be raised to Class D under subsection (a)(1) or (a)(2) would be reclassified to Class F under the proposed bill. In FY 2018, there were 1,701 convictions for this offense. Impact on the prison population will occur if Class G convictions become Class F convictions under the proposed statute because of the higher rate of active sentences (51% for Class F compared to 40% for Class G) and longer average estimated time served (19 months for Class F compared to 15 months for Class G). The following table shows the estimated annual impact if 1,701 convictions per year (based on the data above) would be reclassified from Class G to Class F.

Estimated Prison Bed Impact Using Prior Year Data					
Class F Felony					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
1,701	187	387	618	624	631

In addition to the capital costs that may be associated with additional bed needs, there are also per diem costs for housing inmates. The cost to add one additional inmate to the prison system is \$17.69 per day, or \$538 per month, which includes the cost of food, clothing, and health care. This cost is then multiplied by the average length of active sentence for a given class of offense. These costs have been calculated in the table in the Fiscal Summary section of this Note.

Regarding the offense listed in subsection (a)(3) of Section 3, in FY 2017-18, 40% of Class G felony offenders received active sentences averaging 15 months. For every one Class G felony offender receiving an active sentence, the cost to the prison section will be \$8,070 (\$538 monthly cost times 15 months). In FY 2017-18, 51% of Class F felony offenders received active sentences averaging 19 months. For every one Class F felony offender receiving an active sentence, the cost to the prison section will be \$10,222 (\$538 monthly cost times 19 months). The cost of increasing the offense from Class G to Class F is therefore \$2,152 per conviction. Assuming the previous year’s data of 1,701 convictions remains true, the cost of this section of the bill to the prison system is therefore \$1,464,221 (\$2,152 times (40% of 1,701)) plus \$1,912,638 (\$10,222 times (11% of 1,701)), for a total of \$3,376,859.

Department of Public Safety – Community Corrections

All active sentences for felony offenses now result in a minimum of twelve months of post-release supervision (PRS) for B1-E level offenses and a minimum of nine months of PRS for F-I level offenses. Additionally, for felony offense classes E through I, offenders may be given non-active (intermediate or community) sentences exclusively, or in conjunction with imprisonment (split-sentence). Sanctions include electronic house arrest, community service, substance abuse treatment, participation in educational or vocational skills development, payment of court costs, fines, and restitution, and short-term jail sentences not exceeding six days per month. All misdemeanor offenders may face the same non-active sentences as felons.

JRA essentially eliminated the distinction between “community” and “intermediate” supervision. Under structured sentencing, the two types of supervision were each defined by a set of specific sanctions. Under JRA, both community and intermediate probation may now include electronic

monitoring, short-term periods of confinement, substance abuse assessment, monitoring, and treatment, participation in educational programs or vocational skills development. Whether a probationer is subject to more stringent conditions is determined by the results of a risk-needs assessment administered by the Department of Public Safety.

All types of post-release supervision are supervised by the Community Corrections Section (CCS); CCS also oversees community service. Supervision by a probation officer costs \$160 per offender per month; no cost is assumed for those receiving unsupervised probation or who are only ordered to pay fines, fees, or restitution. Total costs are based on average supervision length and the percentage of offenders (per offense class) sentenced to active sentences requiring post-release supervision and supervised probation.

As outlined above, the bill creates new offenses, expands the pool of possible offenses, and applies new sentencing enhancements to an unknown number of offenses. The minimum costs to Community Corrections for each of these possible offenses have been outlined in the table in the Fiscal Summary section of this Note. Costs may be higher for offenders sentenced to supervised probation for felony offenses rather than as part of their post-release supervision.

Regarding the offense listed in subsection (a)(3) of Section 3, because all active sentences for Class F through I felonies result in nine months of post-release supervision (PRS), there will be no additional cost due to these offenses moving from Class F to Class G. The cost of nine months of supervision is \$1,440 per offender (\$160 per month times 9 months).⁴

However, while there may be an increased cost for every offender sentenced to probation, as Class F felony cases average 31 months of supervised probation compared to 29 months for Class G felonies, there may be savings for the Community Corrections section due to the lower number of probation sentences for Class F offenders. The average longer supervised probation sentence would result in an average increased cost of \$320 per offender (\$160 per month times 2 months). As established above, 49% of Class F felony cases receive supervised probation sentences compared to 60% of Class G felony cases. If the previous year's data of 1,701 convictions holds for this charge, the cost of the new provision will be (49% times 1,701) times (\$160 times 31), which is \$4,131,680. The current cost for this charge is approximately (60% times 1,701) times (\$160 times 29), which is \$4,737,440. This results in a potential savings for Community Corrections of \$605,760.

TECHNICAL CONSIDERATIONS

N/A.

DATA SOURCES

⁴ Due to the effective date of December 1, 2018 and the typical lag time between charge and conviction (6 months), little impact is assumed for CCS in FY 2018-19. Though some offenders may come under CCS supervision during this time, this note assumes an even entry over the course of FY 2019-20.



Department of Public Safety; Administrative Office of the Courts; North Carolina Sentencing and Policy Advisory Commission; Office of Indigent Defense Services.

LEGISLATIVE FISCAL NOTE – PURPOSE AND LIMITATIONS

This document is an official fiscal analysis prepared pursuant to Chapter 120 of the General Statutes and rules adopted by the Senate and House of Representatives. The estimates in this analysis are based on the data, assumptions, and methodology described in the Fiscal Analysis section of this document. This document only addresses sections of the bill that have projected direct fiscal impacts on State or local governments and does not address sections that have no projected fiscal impacts.

CONTACT INFORMATION

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