

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2017

Legislative Incarceration Fiscal Note

BILL NUMBER: House Bill 138 (First Edition)

SHORT TITLE: Revise Gang Laws.

SPONSOR(S): Representatives McNeill, Faircloth, Hurley, and R. Turner

FISCAL IMPACT					
(\$ in millions)					
<input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> No Estimate Available					
	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21	FY 2021-22
State Impact					
General Fund Revenues:					
General Fund Expenditures					
State Positions:					
NET STATE IMPACT	Likely budget cost. See Assumptions & Methodology section for additional details.				
PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED:					
Administrative Office of the Courts; Indigent Defense Services; Department of Public Safety					
EFFECTIVE DATE: December 1, 2017					
TECHNICAL CONSIDERATIONS:					
None					

The proposed bill may have a fiscal impact because of the application of sentencing enhancements for criminal gang activity. However, since there is no data available to provide an estimate for how frequently these enhancements may be imposed, or similar offenses to use as a proxy for predicting the total number of offenses, the Fiscal Research Division cannot reasonably estimate the total additional costs that may be incurred. The following costs may be incurred for every one person charged and convicted of these crimes:

FISCAL IMPACT SUMMARY:

This bill will have a fiscal impact. The following costs are estimated:

- Administrative Office of the Courts: \$170 to \$3,270 per charge
- Indigent Defense Services: \$37 to \$355 per indigent defendant
- Department of Public Safety (DPS) - Prisons: \$457 per additional month of active sentence
- DPS - Community Corrections: \$148 per additional month of supervised probation or post-release supervision required

Please see the Assumptions and Methodology section for additional information.

BILL SUMMARY:

Section 1 of the bill repeals existing G.S. 14-50.16, Pattern of criminal street gang activity, which contained a Class H felony offense for conducting or participating in a pattern of criminal street gang activity; a Class H felony for acquiring or maintaining any interest in or control of any real or personal property through a pattern of criminal street gang activity; and a Class F felony for conducting or participating in a pattern of criminal street gang activity as an organizer, supervisor, or any other position of management with regard to the criminal street gang.

Section 4 creates new G.S. 14-50.16A, Criminal gang activity, which replaces and broadens the definition of “criminal gang” that appeared in G.S. 14-50.16. The new section refers to criminal or delinquent acts in general, as opposed to current law, which refers to felony acts, specifically. It also contains a longer list of commonalities – “a common name, identification, signs, symbols, tattoos, graffiti, attire, or other distinguishing characteristics, including common activities, customs, or behaviors,” (was, just a “common name, common identifying sign or signal”).

Section 5 creates a new section within Article 81B of Chapter 15A, Enhanced sentence for offenses committed by criminal gang members as a part of criminal gang activity, which provides for a one-class sentence enhancement if a person is convicted of any felony other than a Class A, B1, or B2 felony offense, and it was found that the offense was committed as part of a criminal gang activity as defined in new G.S. 14-50.16A(2). If the person is found to be a criminal gang leader or organizer the person shall be sentenced with a two-class sentence enhancement.

Section 9 amends existing G.S. 14-50.19, Threats to deter from gang withdraw, by increasing the offense of communicating a threat of injury to a person, or to damage the property of another, with the intent to deter a person from assisting another to withdraw from membership in a criminal gang from a Class H felony to a Class F felony.

Section 10 amends existing G.S. 14.50.20, Threats of punishment or retaliation, by increasing the offense of communicating a threat of injury to a person, or to damage the property of another, as punishment or retaliation against a person for having withdrawn from a criminal gang, from a Class H felony to a Class F felony.

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory Commission 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 (H.B. 642), 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.

Section 1 of the bill repeals the current criminal street gang activity law. Section 4 replaces that law with a new criminal gang activity law which expands the scope of the current law. The following table shows the number of charges and convictions under the current criminal street gang activity law in Calendar Year 2016.

Criminal Street Gang Activity Charges Calendar Year 2016		
Offense	Charge Class	Defendants
G.S. 14-50.16(a)(1)	Class H felony	19
G.S. 14-50.16(a)(2)	Class H felony	1
G.S. 14-50.16(a)	Class F felony	0

Section 5 of the bill provides for enhanced sentences for offenses committed by criminal gang members. Subsection (a) requires that a person convicted of a felony offense Class C through I that was committed as part of criminal gang activity be sentenced one class higher than the principal felony for which the person was convicted. Subsection (b) requires sentencing two classes higher than the principal felony if the person is found to be a criminal gang leader. No one can be convicted at a class higher than Class C under these enhancements. It is not known how many defendants will be subject to the new enhanced sentences. AOC provides estimates of the average cost to the court for a charge by offense class. Depending on the class level and the enhancement, Section 5 of the bill may require an additional \$170 to \$3,270 per charge. The following chart shows the cost to AOC for the current offense level and at each of the enhanced offense levels.

AOC Cost by Offense Class for Each Enhancement Level Included in the Bill FY 2015-16							
Offense Class	AOC Cost	1 Class Enhancement	AOC Cost	Difference	2 Class Enhancement	AOC Cost	Difference
Class C	\$5,287	NA	NA	NA	NA	NA	NA
Class D	\$4,320	Class C	\$5,287	\$967	Class C	\$5,287	\$967
Class E	\$2,017	Class D	\$4,320	\$2,303	Class C	\$5,287	\$3,270
Class F	\$1,137	Class E	\$2,017	\$880	Class D	\$4,320	\$3,183
Class G	\$938	Class F	\$1,137	\$199	Class E	\$2,017	\$1,079
Class H	\$625	Class G	\$938	\$313	Class F	\$1,137	\$512
Class I	\$455	Class H	\$625	\$170	Class G	\$938	\$483

Note: Offenders cannot be sentenced to a class higher than Class C, so no enhancement is shown for Class C felonies.

The Office of Indigent Defense Services (IDS) has provided 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. Depending on the class level and the enhancement,

Section 5 of the bill may require an additional \$37 to \$355 per defendant using IDS services. These estimates assume the appointment of a PAC attorney. In districts that have Public Defender offices, cases may be handled by those offices. In those instances, these costs may not be incurred. The following charts show the percent using IDS and the cost at the current offense level and at each of the enhanced offense levels.

IDS Cost by Offense Class for One Level Sentence Enhancement FY 2015-16						
Offense Class	% Using IDS	IDS Cost	1 Class Enhancement	% Using IDS	IDS Cost	Difference
Class C	82%	\$896	NA	NA	NA	NA
Class D	89%	\$795	Class C	82%	\$896	\$101
Class E	79%	\$541	Class D	89%	\$795	\$254
Class F	74%	\$504	Class E	79%	\$541	\$37
Class G	78%	\$466	Class F	74%	\$504	\$38
Class H	78%	\$361	Class G	78%	\$466	\$105
Class I	68%	\$322	Class H	78%	\$361	\$39

Note: Offenders cannot be sentenced to a class higher than Class C, so no enhancement is shown for Class C felonies.

IDS Cost by Offense Class for Two Level Sentence Enhancement FY 2015-16						
Offense Class	% Using IDS	IDS Cost	1 Class Enhancement	% Using IDS	IDS Cost	Difference
Class C	82%	\$896	NA	NA	NA	NA
Class D	89%	\$795	Class C	82%	\$896	\$101
Class E	79%	\$541	Class C	82%	\$896	\$355
Class F	74%	\$504	Class D	89%	\$795	\$291
Class G	78%	\$466	Class E	79%	\$541	\$75
Class H	78%	\$361	Class F	74%	\$504	\$143
Class I	68%	\$322	Class G	78%	\$466	\$144

Note: Offenders cannot be sentenced to a class higher than Class C, so no enhancement is shown for Class C felonies.

Section 9 of the bill increases the penalty for violation of G.S. 14-50.19, Threats to deter from gang withdrawal, from a Class H felony to a Class F felony. There were no charges for violation of this statute in CY 2016. For every person who would have been charged with a Class H felony who is instead charged with a Class F felony, the average cost to the court will be \$512 (\$1,137 for a Class F felony minus \$625 for a Class H felony).

In FY 2011-12, 78% of Class H felony defendants used IDS services. The weighted average cost of a Class H felony is \$361 per case for a PAC attorney. For the same year, 74% of Class F felony defendants used IDS services at a cost of \$504 per case. Therefore, the cost to IDS for the increased penalty in this section would be \$143 (\$504 for a Class F felony minus \$361 for a Class H felony). This estimate 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.

Section 10 of the bill increases the penalty for violation of G.S. 14-50.20, Threats of punishment or retaliation from a Class H felony to a Class F felony. There were no charges for violation of this statute in

CY 2016. For every person who would have been charged with a Class H felony who is instead charged with a Class F felony, the average cost to the court will be \$512 (\$1,137 for a Class F felony minus \$625 for a Class H felony).

In FY 2011-12, 78% of Class H felony defendants used IDS services. The weighted average cost of a Class H felony is \$361 per case for a PAC attorney. For the same year, 74% of Class F felony defendants used IDS services at a cost of \$504 per case. Therefore, the cost to IDS for the increased penalty in this section would be \$143 (\$504 for a Class F felony minus \$361 for a Class H felony). This estimate 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 2016.

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.

Population Projections and Bed Capacity					
Five Year Impact					
	June 30 2018	June 30 2019	June 30 2020	June 30 2021	June 30 2022
1. Inmates ²	36,906	37,116	36,814	36,821	37,010
2. Prison Beds (Expanded Capacity)	37,617	37,617	37,617	37,617	37,617
3. Beds Over/(Under) Inmate Population	711	501	803	796	607
4. Additional Inmates Due to this Bill³					
5. Additional Beds Required					

Although no additional beds will be required for this bill, additional spending will be required to house new prisoners or to house prisoners longer as a result of the increased penalty. Per diem expenditures for each inmate are approximately \$15.02, or \$457 per month. The table below shows the monthly rate for each year of the five year projection, adjusted for inflation.

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 2017.

³ Criminal penalty bills effective December 1, 2017 should not affect prison population and bed needs until FY 2018-19 due to the lag time between offense charge and sentencing - six months on average. No delayed effect is presumed for the Court System.

Monthly Incarceration Cost Adjusted for Inflation Five Year Projection						
	FY 2016-17	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21	FY 2021-22
Inflation Rate		2.76%	2.90%	2.98%	2.65%	1.89%
Monthly Cost	\$457	\$470	\$483	\$498	\$511	\$520
<i>Inflation Rates based on consumer price index projections provided by Moody's economy.com (January 2017)</i>						

It is not known how many offenders would qualify for the enhancements included in Section 5 of the proposed bill. Currently, G.S. 14-50.25 requires the presiding judge to determine whether an offense involved criminal street gang activity. The Administrative Office of the Courts' database includes a field to capture this information. In FY 2015-16 there were 29 felony convictions that were identified in the database as involving criminal street gang activity. However, while the court's determination of criminal street gang activity is required to be recorded on the judgment form, it is not known whether this information is captured consistently across the state in the automated database. As a result the Sentencing Commission did not use this information for this analysis.

A potential pool of eligible felony convictions can be identified based on the proposed definition of "criminal gang activity." In FY 2015-16 there were 29,037 felony convictions, with 26,542 (91%) having convictions for Class C through Class I felonies under the statutes used in defining "criminal gang activity." Table 1 provides the number of convictions in the potential pool by offense class and includes information about the sentence imposed for these convictions. Overall, 37% of the potential pool received an active sentence with an average minimum sentence imposed of 24 months.

Felony Convictions for Statutes Used in Defining Criminal Gang Activity FY 2015-16			
Offense Class	Convictions	% Active	Minimum Active Sentence (Months)
Class C	585	98%	79
Class D	968	98%	65
Class E	1,581	61%	32
Class F	2,303	49%	26
Class G	3,636	40%	16
Class H	11,268	35%	11
Class I	6,201	15	8
Total/Average	26,542	37%	24

Note: Table includes felony convictions under the Structured Sentencing Act and drug trafficking convictions that have convictions for Class C through Class I convictions under the statutes used in defining "criminal gang activity." Convictions with discrepant data are included in the table.

Source: NC Sentencing and Policy Advisory Commission, FY 2016 Structured Sentencing Simulation Data

The impact of the proposed sentence enhancements in Subsection (a) and Subsection (b) on the prison population cannot be determined because it is not known how many convictions in the potential pool would receive the sentence enhancements under the proposed bill. The impact could be substantial, but would depend on the number and offense class of convictions to which the sentence enhancements are applied. As shown in the table above, active rates and minimum sentences imposed increase as offense seriousness increases. Impact on the prison population would occur as a result of higher active rates and longer sentence

lengths imposed for convictions to which the one class or two class sentence enhancements are applied. Additional impact would occur for offenders with more than one conviction due to the consecutive sentence requirement.

Section 9 increases the penalty for violation of G.S. 14-50.19, Threats to deter from gang withdrawal, from a Class H felony to a Class F felony. Section 10 also increases a Class H felony to a Class F felony for violations of G.S. 14-50.20, Threats of punishment or retaliation. There have been no convictions under either of these statutes since they went into effect in 2008. Impact on the prison population will occur if Class H felony convictions become Class F felony convictions under the proposed sections because of the higher rate of active sentences (50% for Class F compared to 35% for Class H) and longer average estimated time served (17 months for Class F compared to 11 months for Class H).

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.

The following table shows the estimated annual impact if, for example, there were four convictions (threshold) or 20 convictions (example) 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 and 20 Convictions Increased Penalty from Class H Felony to Class F Felony					
Convictions	Year 1	Year 2	Year 3	Year 4	Year 5
4 (Threshold)	1	2	2	2	2
20	3	8	9	9	9

The cost to add one additional inmate to the prison system is \$15.02 per day, or \$457 per month, which includes the cost of food, clothing, and health care. In FY 2015-16, 50% of Class F felony offenders received active sentences averaging 17 months. For every one Class F felony offender receiving an active sentence, the cost to the prison section will be \$7,259 (\$457 monthly cost times 17 months).

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 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.

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 \$148 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 probations.

Section 5 of this bill provides for sentencing enhancements of one or two levels if a person is convicted of a Class C through Class I felony and the offense was committed as part of criminal gang activity (one level up) or by a criminal gang leader (two levels up). It is not known how often these enhancements will be applied. The following tables show the level of post-release supervision (PRS) and the average number of months of supervised probation that may be required for each offense level and the increase generated by each of the enhancements.

PRS and Average Sentence Length (ASL) for Supervised Probation by Offense Class One Level Enhancement							
Offense Class	PRS Required	ASL Supervised Probation	One Level Enhancement	PRS Required	ASL Supervised Probation	PRS Difference	ASL Difference
Class C	12	NA	NA	NA	NA	NA	NA
Class D	12	40	Class C	12	NA	0	NA
Class E	12	33	Class D	12	40	0	7
Class F	9	32	Class E	12	33	3	1
Class G	9	29	Class F	9	32	0	3
Class H	9	27	Class G	9	29	0	2
Class I	9	23	Class H	9	27	0	4

*Note: Note: Offenders cannot be sentenced to a class higher than Class C, so no enhancement is shown for Class C felonies.
100% of Class C convictions receive an active sentence, so no Average Sentence Length for Supervised Probation is provided for Class C convictions.*

PRS and Average Sentence Length (ASL) for Supervised Probation by Offense Class Two Level Enhancement							
Offense Class	PRS Required	ASL Supervised Probation	One Level Enhancement	PRS Required	ASL Supervised Probation	PRS Difference	ASL Difference
Class C	12	NA	NA	NA	NA	NA	NA
Class D	12	40	Class C	12	NA	0	NA
Class E	12	33	Class C	12	NA	0	NA
Class F	9	32	Class D	12	40	3	8
Class G	9	29	Class E	12	33	3	4
Class H	9	27	Class F	9	32	0	5
Class I	9	23	Class G	9	29	0	6

*Note: Note: Offenders cannot be sentenced to a class higher than Class C, so no enhancement is shown for Class C felonies.
100% of Class C convictions receive an active sentence, so no Average Sentence Length for Supervised Probation is provided for Class C convictions.*

Sections 9 and 10 increase penalties for violations of G.S. 14-50.19 and G.S. 14-50.20 from Class H felonies to Class F felonies. There have been no convictions for violations of either of these statutes since they went into effect in 2008. Active sentences for both Class F and Class H felonies require nine months of post-release supervision. In FY 2015-16, 50% of Class F felony offenders received active sentences; 35% of Class H felony offenders received active sentences. The average length of probation imposed for a Class F felony was 32 months. For a Class H felony it was 27 months. The cost of 32 months of probation is \$4,736 (\$148 per month times 32 months). The cost of 27 months of probation is \$3,996 (\$148 per month times 27 months). The difference in cost between the two classes is \$740 (\$4,736 Class F cost minus \$3,996 Class H cost).

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

TECHNICAL CONSIDERATIONS: None

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DATE: March 13, 2017



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