

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2011

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: Senate Bill 57 (First Edition)

SHORT TITLE: Habitual Misdemeanor Larceny.

SPONSOR(S): Senator D. Berger

| | FISCAL IMPACT | | | | |
|--|--------------------------|--------------------------|----------------------------------|--------------------------|--------------------------|
| | Yes (X) | No () | No Estimate Available () | | |
| | <u>FY 2011-12</u> | <u>FY 2012-13</u> | <u>FY 2013-14</u> | <u>FY 2014-15</u> | <u>FY 2015-16</u> |
| GENERAL FUND | | | | | |
| Correction | | | | | |
| Recurring | - | \$1.9 m | \$4 m | \$4.1 m | \$4.2 m |
| Nonrecurring | \$13 m | - | - | - | - |
| Probation | - | - | \$0.56 m | \$0.58 m | \$0.59 m |
| Judicial | \$1.3 m | \$2.2 m | \$2.4 m | \$2.5 m | \$2.6 |
| TOTAL | | | | | |
| EXPENDITURES: | \$14.3 m | \$4.1 m | \$7 m | \$7.2 m | \$7.4 m |
| ADDITIONAL PRISON BEDS: | | | | | |
| (cumulative)* | 0 | 88 | 176 | 176+ | 176+ |
| POSITIONS: | | | | | |
| DOC | 0 | 39 | 77 | 77+ | 77+ |
| Judicial | 19 | 19 | 19 | 19 | 19 |
| PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch. | | | | | |
| EFFECTIVE DATE: December 1, 2011 | | | | | |
| *This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department. | | | | | |

BILL SUMMARY:

The proposed legislation enacts new Article 2D in G.S. Chapter 14, titled *Habitual Misdemeanor Larceny*. The act defines *convicted, misdemeanor larceny, and status offender* for purposes of the proposed Article. New G.S. 14-7.26 makes any person who is 18 years old or older and who has been convicted of or pled guilty to three or more prior misdemeanor larceny offenses in any federal or state court in the U.S. or a combination thereof, guilty of habitual misdemeanor larceny. The act also declares the person a habitual misdemeanor larceny status offender. The act specifies that the commission of a second or subsequent offense of misdemeanor larceny will not fall under the proposed Article 2D, unless the offense is committed after the commission of or guilty plea to the first or prior offense. The act further specifies that if a person is convicted of more than one offense of misdemeanor larceny in a single session of district court or in a single week of superior court or a court in another jurisdiction, then only one of the convictions may be used to establish habitual misdemeanor larceny.

New G.S. 14-7.27 provides that any person charged with misdemeanor larceny and charged as a status offender, under G.S. 14-7.26 must, upon conviction, be sentenced and punished as a status offender as specified in proposed Article 2D.

New G.S. 14-7.28 requires that a person be charged separately for the misdemeanor larceny offense and for the habitual misdemeanor larceny status offense, with corresponding separate indictments, in order to sustain a status offender conviction. The act details criteria for the indictment charging a person as a status offender.

New G.S. 14-7.29 allows a record of prior convictions of misdemeanor larceny offenses as admissible evidence, but only to prove that the person has been convicted of the former offenses. The act specifies requirements for evidence of prior convictions.

New G.S. 14-7.30 explains trial procedures and jury instructions.

New G.S. 14-7.31 provides that a status offender, as defined by proposed Article 2D, be sentenced as a Class H felon upon conviction or plea of guilty under indictment. The act prohibits convictions establishing a person as a status offender from being used to determine the prior record level. In addition, the act specifies sentence requirements and states that conviction as a status offender under proposed Article 2D will not constitute commission of a felony for the purpose of G.S. 14-7.6 (sentencing habitual felons).

The proposed legislation becomes effective December 1, 2011.

Source: Bill Digest S.B. 57 (02/09/2011).

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.

Department of Correction – Division of Prisons

The proposed bill creates a new Class H felony by enacting Article 2D, Habitual Misdemeanor Larceny, within Chapter 14 of the General Statutes. The act defines misdemeanor larceny as misdemeanor larceny pursuant to G.S. 14-72(a). The misdemeanor larceny offenses listed under G.S. 14-72(a) are the only offenses included in this analysis.

Convictions elevated from Class 1 misdemeanors to Class H felonies would, on average, carry a longer sentence, are more likely to be active, and, if active, would be served in State prisons rather than county jails. During FY 2009-10, there were 17,175 misdemeanor convictions under N.C.G.S. 14-72(a), which includes convictions for misdemeanor larceny (16,756), aid and abet misdemeanor larceny (97), attempted larceny (298), and misdemeanor larceny of motor vehicle (24). Of these convictions, 1,357 (8%) were for offenders 16-17 years of age at offense, 15,670 (91%) were for offenders 18 years of age or older at offense, and the remainder had missing values for age. Of those identified as 18 years of age or older at offense, 5,412 potentially would be eligible for conviction under the proposed statute: (1) 1,047 offenders in Prior Conviction Level II who had three or four prior convictions, and (2) all 4,365 offenders in Prior Conviction Level III.¹

Because this bill creates a new offense, the Sentencing Commission has no data to indicate what proportion of offenders would be convicted as Class H offenders under Article 2D of G.S. 14. Therefore, it is not known how many offenders might be sentenced under this bill. The Sentencing Commission provided various scenarios (5%, 10%, 50%, and 100%) to illustrate the potential impact of the proposed statute. The following table illustrates the range of potential impacts:

¹ Prior Conviction Level II requires one to four prior convictions. Only individuals with three or four prior convictions would be eligible for conviction of habitual misdemeanor larceny. Prior Conviction Level III requires five or more prior convictions. All individuals with Prior Conviction Level III would be eligible for conviction of habitual misdemeanor larceny. Under current law only one offense in a single session of District Court or a week of Superior Court may be counted when determining prior conviction level.

Additional Prison Beds Needed

| Number and Percentage of Convictions Raised to Class H Felonies as a Result of Bill | Additional Prison Beds Needed | |
|---|-------------------------------|---------------------|
| | <u>FY 2012-2013</u> | <u>FY 2013-2014</u> |
| 271 (5%) | 88 | 176 |
| 541 (10%) | 175 | 352 |
| 2,706 (50%) | 877 | 1,761 |
| 5,412 (100%) | 1,754 | 3,521 |

Since the Sentencing Commission cannot identify a specific number of offenders that would be convicted under this bill, the Fiscal Research Division used the lowest estimate of the number of offenders to estimate the cost of this bill. As such, prison bed and Department of Correction (DOC) cost estimates throughout this fiscal note are formulated assuming 271 (five percent) of 5,412 offenders would receive an enhanced sentence under this bill. To the extent that there are more convictions, this estimate may be understated.

Assuming 271 convictions have three or more prior convictions for misdemeanor larceny offenses and would be convicted as Class H felons under the proposed statute, the combination of active sentences and probation revocations would result in the need for 88 additional prison beds the first year and 176 additional prison beds the second year.

In FY 2009-10, 36 percent of Class H convictions resulted in active sentences, with an average estimated time served of 11 months. If, for example, three convictions moved from a Class 1 misdemeanor to a Class H felony, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year.

The chart below depicts the projected inmate population relative to available prison bed capacity system-wide. Capacity projections assume operation at Expanded Operating Capacity,² and represent the total number of beds in operation, or authorized for construction or operation as of December 2010.

Based on the most recent population projections and estimated bed capacity, there are no surplus prison beds available for the five-year fiscal note horizon or beyond. Therefore, the number of additional beds needed (row five) is always equal to the projected number of additional inmates resulting from a bill (row four). Rows four and five in the chart demonstrate the impact of SB 57. As shown, the five percent scenario estimates that this specific legislation will add at least 176 inmates to the prison system by the end of FY 2015-16.

² 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.

Estimated Bed Capacity June 2012-June 2016

| | June 30 <u>2012</u> | June 30 <u>2013</u> | June 30 <u>2014</u> | June 30 <u>2015</u> | June 30 <u>2016</u> |
|--|--------------------------------|--------------------------------|--------------------------------|--------------------------------|--------------------------------|
| 1. Projected No. of Inmates Under Current Structured Sentencing Act ³ | 41,987 | 42,013 | 42,267 | 42,562 | 42,898 |
| 2. Projected No. of Available Prison Beds (DOC Expanded Capacity) | 41,168 | 41,924 | 41,924 | 41,924 | 41,924 |
| 3. Projected No. of Beds Over/Under Inmate Population | (819) | (89) | (343) | (638) | (974) |
| 4. Projected No. of Additional Inmates Due to this Bill⁴ | N/A | 88 | 176 | 176+ | 176+ |
| 5. No. of Additional Beds Needed Each Fiscal Year Due to this Bill | N/A | 88 | 176 | 176+ | 176+ |

POSITIONS: Based on the five percent scenario, it is anticipated that by FY 2015-16, at least 77 positions would be needed to supervise the additional inmates housed under this bill. This position total includes security, program, and administrative personnel at a ratio of approximately one employee for every 2.3 inmates.

FISCAL IMPACT BEYOND FIVE YEARS: Fiscal notes examine a bill’s impact over a five-year horizon, through FY 2015-16. However, when information is available, Fiscal Research also attempts to quantify longer-term impacts. Accordingly, the chart below illustrates the projected number of available beds given current conditions; the projected number of additional inmates due to SB 57; and, the estimated number of new beds required each year through FY 2019-20.

Estimated Bed Capacity June 2017-June 2020

| | June 30 <u>2017</u> | June 30 <u>2018</u> | June 30 <u>2019</u> | June 30 <u>2020</u> |
|--|--------------------------------|--------------------------------|--------------------------------|--------------------------------|
| 1. Available Beds (Over/Under) Under Current Structured Sentencing | (1,296) | (1,740) | (2,284) | (2,916) |
| 2. Projected No. of Additional Inmates Resulting From S57 | 176+ | 176+ | 176+ | 176+ |
| 3. Estimated No. of New Beds Required Under S57 | 176+ | 176+ | 176+ | 176+ |

CONSTRUCTION: Construction costs for new prison beds, listed in the following chart, are derived from Department of Correction cost range estimates (FY 2010-11) for each custody level, and assume Expanded Operating Capacity (EOC). Figures represent the midpoints of each range.

³ 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 January 2011.

⁴ Criminal penalty bills effective December 1, 2011, should not affect prison population and bed needs until FY 2012-13 due to the lag time between offense charge and sentencing - six months on average. No delayed effect is presumed for the Court System.

Estimated Construction Cost per Custody Level, FY 2010-11

| <u>Custody Level</u> | <u>Minimum</u> | <u>Medium</u> | <u>Close</u> |
|----------------------|----------------|---------------|--------------|
| Cost EOC Per Bed | \$72,200 | \$78,100 | \$132,100 |

Construction costs are shown as non-recurring costs in the Fiscal Impact table (p.1). An annual inflation rate of 1.92% is applied to these costs. According to the Department of Correction, the majority of Class H offenders are held in minimum custody prisons. If the additional minimum custody level prisons are constructed in FY 2011-12, bed provision through construction could cost approximately \$13 million (176 additional beds x \$72,200 minimum custody level x 1.92%).

OPERATING: Operating costs are based on actual FY 2009-10 costs for each custody level, as provided by the Department of Correction. These costs include security, inmate programs, inmate costs (food, medical, etc.), and administrative overhead costs for the Department and the Division of Prisons. Fiscal Research applies an estimated inflation rate to these base costs.⁵ Operating costs are shown as recurring costs in the Fiscal Impact table (p.1).

Daily Inmate Operating Cost per Custody Level, FY 2009-10

| <u>Custody Level</u> | <u>Minimum</u> | <u>Medium</u> | <u>Close</u> | <u>Daily Average</u> |
|-----------------------|----------------|---------------|--------------|----------------------|
| Daily Cost Per Inmate | \$64.59 | \$76.22 | \$88.39 | \$74.34 |

The chart below depicts the projected operating costs to implement the proposed legislation:

Estimated Operating Costs

| | FY 2011-12 | FY 2012-13 | FY 2013-14 | FY 2014-15 | FY 2015-16 |
|------------------------------|-------------------|--------------------|--------------------|--------------------|--------------------|
| Minimum: \$64.59 | 0 | \$66.56 | \$68.55 | \$70.24 | \$71.99 |
| Number of New Inmates | 0 | 88 | 176 | 176 | 176 |
| 11 months (330 days) | 0 | 330 | 330 | 330 | 330 |
| Total Cost: | 0 | \$1,932,902 | \$3,981,384 | \$4,079,539 | \$4,181,179 |
| Inflation | 0.00% | 3.05% | 2.99% | 2.47% | 2.49% |

Department of Correction – Division of Community Corrections

For felony offense classes E through I and all misdemeanor classes, offenders may be given non-active (intermediate or community) sentences exclusively, or in conjunction with imprisonment (split-sentence). Intermediate sanctions include intensive supervision probation, special probation, house arrest with electronic monitoring, day reporting center, residential treatment facility, and drug treatment court. Community sanctions include supervised probation, unsupervised probation, community service, fines, and restitution. Offenders given intermediate or community sanctions requiring supervision are supervised by the Division of Community Corrections (DCC); DCC also oversees community service.⁶ General supervision of intermediate and community offenders by a

⁵ Estimates based on consumer price index projections provided by Moody's economy.com (January 2011)

⁶ DCC incurs costs of \$0.97 per day for each offender sentenced to the Community Service Work Program.

probation officer costs DCC \$3.44 per offender, per day; no cost is assumed for those receiving unsupervised probation, or who are ordered only to pay fines, fees, or restitution. Total costs to DCC are based on average supervision length and the percentage of offenders (per offense class) sentenced to intermediate sanctions and supervised probations.

In FY 2009-10, 36 percent of Class H offenders received active sentences with an average estimated time served of 11 months. Of those convicted of Class H offenses, 47 percent received intermediate sentences and 17 percent received community punishments. The average lengths of intermediate and community punishment imposed for this offense class were 30 and 28 months, respectively. Accordingly, potential costs to DCC could total \$561,516 in FY 2013-14, the first full fiscal year of applicability.⁷ To estimate the cost to Community Corrections, these percentages were applied to the estimated number of total convictions calculated using the five percent scenario. The results were then multiplied by the respective number of claims. Next, the per day cost was applied. For cost breakdown, see chart below:

**Impact on Community Corrections by Level of Punishment
(Assumes 271 Convictions in FY 2013-14)**

| Level of Punishment: | Intermediate | Community |
|--|------------------------|------------------------|
| Percentage (Number) of Total Convictions | 128 (47%) | 46 (17%) |
| Number of Days | 900 days (30 months) | 840 days (28 months) |
| Cost Per Day | \$3.65 per day=\$3,285 | \$3.65 per day=\$3,066 |
| Total Cost: | \$420,480 | \$141,036 |

**Estimated Five Year Impact on Community Corrections
(Adjusted for Inflation)**

| | FY 2011-12 | FY 2012-13 | FY 2013-14 | FY 2014-15 | FY 2015-16 |
|---------------------------|--------------|--------------|------------------|------------------|------------------|
| Cost Per Offender | \$3.44 | \$3.54 | \$3.65 | \$3.74 | \$3.83 |
| Intermediate (47%) | \$0 | \$0 | \$420,480 | \$430,848 | \$441,216 |
| Community (17%) | \$0 | \$0 | \$141,036 | \$144,514 | \$147,991 |
| Total Cost: | \$0 | \$0 | \$561,516 | \$575,362 | \$589,207 |
| Inflation | 0.00% | 3.05% | 2.99% | 2.47% | 2.49% |

⁷ Due to the effective date of December 1, 2011, and the typical lag time between charge and conviction (6 months), little impact is assumed for DCC in FY 2011-12. Though some offenders may come under DCC supervision during this time, this note assumes an even entry over the course of FY 2011-12.

Judicial Branch

The Administrative Office of the Courts (AOC) 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.

Under current G.S. 14-72(a), misdemeanor larceny is a Class 1 misdemeanor, except for attempted misdemeanor larceny, which is a Class 2 misdemeanor. Thus, some defendants currently charged with Class 1 or Class 2 misdemeanors could be charged with the Class H felony status offense under the bill for habitual misdemeanor larceny. Trials and pleas would demand more court time and preparation time due to the stiffer penalties under the bill, and would be handled primarily in superior court rather than district court. The enhanced penalty would require more vigorous defense and prosecution, and more time and cost in disposing of cases.

For calendar year 2010, AOC data show 40,879 defendants charged with Class 1 misdemeanor larceny offenses under G.S. 14-72(a) and attempted misdemeanor larceny (Class 2 misdemeanor) under G.S. 14-72. Using exact matches for first and last name and county of conviction, 70 defendants had three or more prior convictions for misdemeanor larceny offenses (not accompanied by any felony charge), and another 108 defendants had two prior convictions. If this bill had become law in 2010 and if all 70 defendants were convicted of the misdemeanor offense, they all could have been charged with the proposed Class H felony.

It is likely that due to data limitations these figures underestimate the number of defendants with prior convictions for misdemeanor or felony larceny. Therefore, rather than attempt to collapse cases to defendants and match defendants by name to estimate prior record histories, AOC provided the Fiscal Research Division with a scenario in which five percent (2,044) of 40,879 misdemeanor larceny charges are elevated to Class H felony charges under the proposed legislation. To the extent that there are more defendants with prior convictions, this estimate may be understated.

Fifty percent of (1,022) defendants were considered indigent and received appointed counsel, and one percent (20) of felony larceny charges are currently disposed by trial.

New felony charges would impact superior court judges, deputy clerks, assistant district attorneys, and other judge and district attorney support staff. As the Class H status offense in this bill will result in new charges in superior court, and since district court backlogs and personnel shortages would prevent any offsetting reduction in district court resources, additional positions would be needed to implement the proposed legislation.

A 2005 Office of Indigent Defense study of fee applications found that the average indigent defense cost for a Class H felony case was \$540 per indigent defendant, as compared to an average of \$225 for indigent misdemeanants. Therefore, the net cost for indigent defense would be \$315 per case.

Five Percent Scenario - Assumes 2,044 Defendants Charged with New Class H Felony

| Position Type | Positions | Position Cost | | FY 2011-12 | FY2012-13 | FY 2013-14 | FY 2014-15 | FY 2015-16 |
|---------------------------------|--------------|----------------------|---------|--------------------|--------------------|--------------------|--------------------|--------------------|
| | | R | NR | Total | Total | Total | Total | Total |
| Inflation | | | | | 8.87% | 8.68% | 6.64% | 5.24% |
| Superior Court Judge | 3 | \$183,654 | \$6,553 | \$341,054 | \$599,832 | \$651,898 | \$695,184 | \$731,611 |
| Deputy Clerk | 3 | \$45,652 | \$2,620 | \$87,751 | \$149,104 | \$162,046 | \$172,806 | \$181,861 |
| Court Reporter | 3 | \$68,625 | \$4,857 | \$134,665 | \$224,136 | \$243,591 | \$259,766 | \$273,377 |
| Assistant District Attorney | 5 | \$108,523 | \$3,739 | \$335,220 | \$590,745 | \$642,022 | \$684,652 | \$720,528 |
| Victim Witness Legal Assistant | 5 | \$57,481 | \$5,155 | \$193,428 | \$312,898 | \$340,057 | \$362,637 | \$381,639 |
| Subtotal Court Personnel | 19 | | | \$1,092,118 | \$1,876,715 | \$2,039,614 | \$2,175,044 | \$2,289,017 |
| | | | | | | | | |
| Other Costs** | Cases | Cost per Case | | | | | | |
| Jury Fees | 20 | \$920 | | \$14,490 | \$18,400 | \$18,400 | \$18,400 | \$18,400 |
| Indigent Defense (net increase) | \$1,022 | \$315 | | \$187,793 | \$321,930 | \$321,930 | \$321,930 | \$321,930 |
| | | | | | | | | |
| Total Costs | | | | \$1,294,401 | \$2,217,045 | \$2,379,944 | \$2,515,374 | \$2,629,347 |

*Estimated average trial length for Class H felonies is 3 days, based on 2009 survey data. Therefore three days of jury fees are estimated. Jury costs are based on an estimated jury pool of 30 for the first day and, for subsequent days, the 12-person jury plus 2 alternates. Jury compensation, set in G.S. 7A-312, is \$12 for the first day, \$20 for days 2 to 5, and \$40 for additional days. For criminal cases, jury costs come to \$360 for the first day, \$280 for the days two to five, and \$560 for the days over five.

**Positions were inflated based on the fiscal note inflation rate estimates for salaries and wages. The jury fees and indigent defense costs were not inflated, as these amounts are set in the General Statutes.

In addition to the increased work for the Class H felonies, AOC expects an increase in workload, including the possibility of more trials for charges before the second conviction or third. The stiffer penalties associated with the Class H felony could lead to a more vigorous defense of the second or third misdemeanor larceny charge, for example.

In FY 2009-10, a typical felony case took approximately 216 days to dispose in Superior Court. A typical misdemeanor case took approximately 91 days to dispose in District Court. Any increase in judicial caseload without accompanying resources could be expected to further delay the disposition of cases.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; and Office of State Construction.

TECHNICAL CONSIDERATIONS: None

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