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FISCAL AND POLICY NOTE
First Reader

Senate Bill 852 (Senator Hough, *et al.*)
Judicial Proceedings

Crimes - Penalties and Procedures (Violent Firearms Offender Act of 2021)

This emergency bill (1) alters provisions and penalties pertaining to several firearms-related offenses; (2) expands the definition of a “crime of violence” under § 14-101 of the Criminal Law Article; (3) requires the Commissioner of Correction to provide to each inmate a reentry kit containing specified items and information prior to release from a State correctional facility; (4) expands the list of cases in which the State may appeal from specified evidentiary decisions; (5) prohibits a District Court commissioner from authorizing the pretrial release of specified defendants; and (6) specifies that a violation of a condition of probation, parole, or mandatory supervision involving the use or possession of a firearm is not a technical violation.

Fiscal Summary

State Effect: General fund expenditures increase by \$400,000 in FY 2021 and by \$1.6 million annually thereafter for reentry kits; potential significant *additional* increase in general fund expenditures due to the bill’s penalty provisions, as discussed below. Minimal decrease in general fund revenues from fines imposed in the District Court, which may be partially offset by collected fines, as discussed below.

Local Effect: Minimal increase in local revenues from fines imposed in circuit court cases. Minimal decrease in local incarceration expenditures, offset in part by increased pretrial detention expenditures.

Small Business Effect: None.

Analysis

Bill Summary/Current Law:

Offense-related Provisions

Section 4-204 of the Criminal Law Article prohibits the use of a firearm in a crime of violence (as defined under § 5-101 of the Public Safety Article) or a felony. The bill (1) specifies that the term “use a firearm” does not include the mere possession of a firearm and (2) reclassifies the offense from a misdemeanor to a felony.

Section 4-306 of the Criminal Law Article prohibits the use of an assault weapon, rapid fire trigger activator, or a magazine that has a capacity of more than 10 rounds of ammunition in the commission of a felony or crime of violence (as defined under § 5-101 of the Public Safety Article). The bill (1) specifies that “use of a firearm” does not include the mere possession of a firearm and (2) reclassifies the offense from a misdemeanor to a felony.

Section 4-404 of the Criminal Law Article prohibits a person from using or possessing a machine gun in the commission or attempted commission of a crime of violence (as defined under § 4-401 of the Criminal Law Article). The bill expands the application of this prohibition to the commission or attempted commission of a felony.

Under current law, a person who steals a firearm is subject to the general theft statute, which imposes various penalties based on the value of the stolen property or services. The bill excludes theft of a firearm from the general theft statute and establishes that a person convicted of theft of a firearm, including an antique firearm or a replica of an antique firearm, is guilty of a felony and subject to imprisonment for up to five years and/or a \$10,000 maximum fine. A violator must restore the firearm to the owner or pay the owner the value of the firearm.

Section 5-133(b) of the Public Safety Article prohibits the possession of a regulated firearm by specified individuals. The bill increases the maximum incarceration penalty for a second or subsequent violation of this prohibition from 5 to 10 years. A person convicted under this provision is not prohibited from participating in specified drug treatment due to length of sentence. A court may not impose the subsequent offender penalty unless the State’s Attorney serves notice on the defendant or the defendant’s counsel before the acceptance of a plea of guilty or *nolo contendere* or at least 15 days before trial that (1) the State will seek the subsequent offender penalty and (2) lists the alleged prior convictions.

Section 5-134(b) of the Public Safety Article prohibits a dealer or other person from selling, renting, loaning, or transferring a regulated firearm under specified circumstances.

Each violation is a separate crime. The bill establishes a separate (but similar) prohibition related to the sale, rental, or transfer of a regulated firearm, punishable by a newly established penalty. Under the bill, a dealer or other person may not sell, rent, loan, or transfer a regulated firearm to a purchaser, lessee, borrower or transferee if the dealer or other person has actual knowledge that the purchaser, lessee, borrower, or transferee intends to use the regulated firearm to commit a crime or cause harm to the purchaser, lessee, transferee, or recipient, or another person. Violators are guilty of a felony, punishable by imprisonment for up to 10 years. Each violation is a separate crime. A defendant charged with this offense must also be charged under the existing prohibition (a misdemeanor punishable by imprisonment for up to 5 years and/or a \$10,000 maximum fine). A person convicted of this offense is not prohibited from participating in specified drug treatment due to length of sentence.

Technical Violations of Probation, Parole, or Mandatory Supervision

Under current law, a “technical violation” of a condition of probation, parole, or mandatory supervision is a violation that does not involve (1) an arrest or a summons issued by a District Court commissioner on a statement of charges filed by a law enforcement officer; (2) a violation of a criminal prohibition other than a minor traffic offense; (3) a violation of a no-contact or stay-away order; or (4) absconding. The bill specifies that a violation involving the use or possession of a firearm is not a technical violation.

Reentry Kits

The bill requires the Commissioner of Correction to provide an inmate, before release from a State correctional facility, with a reentry kit including:

- at least one-week of supplies for basic human needs, including toiletries and clothing;
- the identification card required to be issued under § 9-609.1 of the Correctional Services Article;
- contact information for entities that specialize in providing reentry services, housing assistance, substance use disorder treatment, and mental health services;
- contact information for the Maryland Health Benefit Exchange, if the inmate is not eligible for Medicaid benefits; and
- public transportation information.

If the inmate is eligible for Medicaid benefits, the Commission of Correction must provide assistance in obtaining Medicaid benefits.

Right of Appeal – Firearms Crimes

Under current law, in a case involving a crime of violence, as defined in § 14-101 of the Criminal Law Article, and in cases involving specified controlled dangerous substances offenses, the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the U.S. Constitution, the Maryland Constitution, or the Maryland Declaration of Rights. The appeal must be made before jeopardy attaches to the defendant. However, in all cases, the appeal must be taken no more than 15 days after the decision has been rendered and must be diligently prosecuted.

The bill adds several firearms-related offenses to the list of criminal cases in which this appeal is available and adds these offenses to the cases for which, pending the prosecution and determination of such an appeal, the court may release the defendant on any terms or conditions the court considers appropriate or may order the defendant to remain in custody.

Pretrial Release of Criminal Defendants by a District Court Commissioner

In most cases, pretrial release determinations are made at a defendant's initial appearance before a District Court commissioner. Under current law, a commissioner may not, however, authorize the release of certain defendants, including a defendant charged with one of a list of specified crimes if the defendant has previously been convicted of a crime of violence under § 14-101 of the Criminal Law Article or any of the specified crimes. The bill extends application of this prohibition to a defendant on pretrial release for a crime of violence or one of the specified crimes.

Pursuant to existing statute, pretrial release of such defendants may be authorized only by a judge. When such a defendant is presented to a judge under the Maryland Rules, a judge may order the pretrial release of such a defendant on suitable bail, on any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community, or on both bail and other such conditions. However, a judge must order the continued detention of such a defendant if neither bail nor any other conditions will reasonably ensure that the defendant will not be a flight risk or pose a danger to another person or the community. There is a rebuttable presumption that such a defendant will flee and pose a danger to another person or the community.

For a comprehensive list of defendants ineligible for pretrial release by a District Court commissioner, see **Appendix – Defendants Ineligible for Pretrial Release by a District Court Commissioner**.

Crimes of Violence under § 14-101 of the Criminal Law Article

Individuals convicted of a crime of violence under § 14-101 of the Criminal Law Article are eligible for various additional criminal penalties and earn diminution credits at a lower rate than other offenders.

Section 14-101(a) of the Criminal Law Article defines a “crime of violence” as (1) abduction; (2) arson in the first degree; (3) kidnapping; (4) manslaughter, except involuntary manslaughter; (5) mayhem; (6) maiming; (7) murder; (8) rape; (9) robbery; (10) carjacking (including armed carjacking); (11) first- and second-degree sexual offenses; (12) use of a firearm in the commission of a felony or other crime of violence, except possession with intent to distribute a controlled dangerous substance; (13) child abuse in the first degree; (14) sexual abuse of a minor younger than age 13 under specified circumstances; (15) home invasion; (16) felony sex trafficking and forced marriage; (17) an attempt to commit crimes (1) through (16); (18) continuing course of certain sexual conduct with a child; (19) assault in the first degree; and (20) assault with intent to murder, rape, rob, or commit a sexual offense in the first or second degree.

Prior to October 1, 2018, using a handgun in the commission of a crime of violence or felony was a crime a violence. Chapter 143 of 2018 altered the definition of a “crime of violence” by (1) replacing use of a “handgun” in the commission of a crime of violence or felony with use of a “firearm” in the commission of a crime of violence or felony and (2) creating an exception for using a firearm in the commission of possession with intent to distribute a controlled dangerous substance under § 5-602(2) of the Criminal Law Article. By removing this exception, the bill adds use of a firearm in the commission of possession with the intent to distribute a controlled dangerous substance to the definition of a crime of violence.

State Revenues: General fund revenues decrease minimally from fines imposed in District Court cases that are shifted to the circuit courts as a result of the bill’s reclassification of offenses or prohibited activities from misdemeanors to felonies, some of which carry monetary penalties. This decrease in revenues may be partially offset to the extent that additional fines are collected by individuals convicted in the District Court for theft of a firearm. The bill increases the monetary penalty associated with theft of a firearm; the District Court has concurrent jurisdiction with the circuit courts over felony violations of § 7-104 of the Criminal Law Article.

State Expenditures: General fund expenditures for the Department of Public Safety and Correctional Services (DPSCS) increase by approximately \$400,000 in fiscal 2021 and by \$1.6 million each year thereafter for reentry kits. General fund incarceration expenditures increase in the out-years, perhaps significantly, due to the bill’s penalty provisions, as discussed below. General fund expenditures increase further due to the expansion of the

application of existing incarceration penalties, the shifting of individuals from local detention facilities to State correctional facilities, and restrictions on pretrial release. The Maryland Health Benefit Exchange can handle additional call volume and correspondence generated by the bill with existing budgeted resources.

Reentry Kits

DPSCS advises that the department released 5,332 individuals (4,932 male and 400 females) back into the community during fiscal 2020. Based on these release statistics and estimated costs for kits for male and female inmates (which differ in contents), the annual cost associated with reentry kits is approximately \$400,000 in fiscal 2021 (reflecting three months of costs due to the bill's emergency status) and \$1.6 million each fiscal year thereafter, assuming that DPSCS' annual release statistics remain constant. DPSCS advises that estimated costs associated with reentry kits do not include the standing inventory of release clothing and toiletries that must be established at each facility.

Offense-related Provisions

General fund incarceration expenditures increase in the out-years, perhaps significantly, due to the bill's penalty provisions, as discussed below. General fund expenditures increase further due to the expansion of the application of existing incarceration penalties, the shifting of individuals from local detention facilities to State correctional facilities, and restrictions on pretrial release.

Exhibit 1 contains information on the number of violations filed in the courts and the number of sentences imposed in the circuit courts during fiscal 2020 for offenses whose penalties are altered under the bill. Fiscal 2020 statistics may have been affected by the COVID-19 pandemic. DPSCS was not able to provide sentencing data or intake data for these offenses.

Exhibit 1
Offenses Altered under the Bill
Fiscal 2020

<u>Charge</u>	District Court Violations <u>Filed</u>¹	Circuit Court Violations <u>Filed</u>¹	MSCCSP Circuit Court Convictions <u>(Individuals/Counts)</u>²
Criminal Law Article, § 4-204 (Use of a Firearm in the Commission of a Crime)	2,137	2,229	211 indiv./242 counts
Criminal Law Article, § 4-306 (Assault Weapons and Detachable Magazines)	16	18	1 indiv./16 counts
Criminal Law Article, § 4-404 (Using a Machine Gun to Commit Specified Crimes)	0	0	0
Public Safety Article, § 5-133(b) (Possession of Regulated Firearms by Specified Persons)	4,123 ³	4,114 ⁴	308 indiv./322 counts
Public Safety Article, § 5-134 (Restrictions on Sale, Rental, or Transfer of Regulated Firearms)	N/A	N/A	0

MSCCSP: Maryland State Commission on Criminal Sentencing Policy

Fiscal 2020 statistics may have been affected by the COVID-19 pandemic.

¹ A violation is a charged filed with the court. It is not a conviction, and one person may be associated with multiple violations.

² Reflects data from the Maryland State Sentencing Guidelines Database for sentencing information received by MSCCSP for individuals sentenced in the State's circuit courts.

³ Violation data appears to apply to violations filed under all provisions of § 5-133, not just § 5-133(b).

Sources: Maryland Judiciary; Maryland State Commission on Criminal Sentencing Policy

The bill reclassifies specified offenses and activities from misdemeanors to felonies. Changing crimes from misdemeanors to felonies means that (1) such cases are likely to be filed in the circuit courts rather than the District Court and (2) some persons may eventually serve longer incarcerations due to more stringent penalty provisions, applicable to some offenses for prior felony convictions. Accordingly, it is assumed that this bill shifts an

unknown number of cases from the District Court to the circuit courts. It is not known whether such a prospective shift may spur more plea bargains and affect actual sentencing practices for this offense.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,900 per month. Excluding overhead, the average cost of housing a new State inmate (including health care costs) is about \$1,075 per month. Excluding all health care (which is a fixed cost under the current contract), the average variable costs total \$222 per month.

Increased Incarceration Penalties

Section 5-133(b) of the Public Safety Article (Prohibited Possession of a Firearm): The bill increases the maximum incarceration penalty for a subsequent offender from 5 to 10 years. DPSCS was not able to provide information on how many individuals convicted under Section 5-133 entered DOC facilities during fiscal 2020 or how many were subsequent offenders. The impact of this provision depends on the sentences imposed and actual time served by offenders sentenced under this provision of the bill.

However, *for illustrative purposes*, assuming that 100 of the more than 300 individuals convicted of this offense in the circuit courts during fiscal 2020 were sentenced to incarceration as subsequent offenders for this offense, the bill may add as much as 500 years of additional time to this group of offenders. Assuming the variable inmate costs of \$222 per month excluding health care, State costs could increase by more than \$1.3 million for each annual cohort of defendants sentenced for this crime. Any impact from these extended incarcerations will likely be realized in the out-years, as individuals conclude sentences that may have been imposed under existing statute and commence serving sentences imposed under the bill.

Theft of a Firearm: The bill shifts some individuals from local detention facilities to State correctional facilities. For example, the bill alters the penalties applicable to theft of a firearm. While the penalties for theft vary based on the value of the stolen property, statute does not distinguish based on the type of property stolen. Assuming that stolen firearms typically have a value of less than \$1,500, the offense is currently a misdemeanor, punishable by imprisonment for up to 90 days or 6 months/one year and/or a \$500 maximum fine. The offense created by the bill is a felony, punishable by imprisonment for up to five years and/or a fine of up to \$10,000.

Crimes of Violence – Use of a Firearm in the Commission of Possession with Intent to Distribute a Controlled Dangerous Substance

The bill's addition of a use of a firearm in the commission of possession with intent to distribute a controlled dangerous substance may result in a minimal increase in general fund expenditures in the out-years. DPSCS advises that, in fiscal 2019, it conducted intake on nine inmates that had offenses under § 4-204 of the Criminal Law Article (use of a firearm in the commission of a felony or a crime of violence (as defined under § 5-101 of the Public Safety Article)) and possession with the intent to distribute a controlled dangerous substance under § 5-602(2) of the Criminal Law Article. Only one of these inmates benefitted from the exception repealed by the bill.

Pretrial Detentions

The bill restricts the ability of a District Court commissioner to authorize the pretrial release of an individual charged with a crime of violence or specified offenses if, at the time, the individual was on pretrial release for a crime of violence or one of the specified offenses. As a result, the bill may increase general fund expenditures for pretrial detentions in Baltimore City. While the bill prohibits a District Court commissioner from authorizing the pretrial release of these individuals, these individuals may still be released by a judge. The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Data is not readily available on the number of individuals who meet the bill's criteria and were released by a District Court commissioner. If these individuals were released by a District Court commissioner, then, under the bill, they will spend additional time in custody pending a judicial bail review hearing on the next business day of the court, at which they may be released by a judge. If these individuals were released after a bail review hearing before a judge, then the bill has no effect on this population, assuming that judges are still inclined to release these defendants before trial.

The Office of the Public Defender (OPD) advises that the bill's restrictions on pretrial release requires the hiring of additional staff to address increased pretrial litigation. OPD did not provide any additional information. The Department of Legislative Services advises that OPD already provides legal representation at judicial bail reviews and some of the individuals affected by those provisions in the bill may already be OPD clients at judicial bail reviews; therefore, the bill itself is not expected to affect bail review dockets to the point that additional OPD staff is required.

Appeals by the State

While the bill expands the opportunity for the State to appeal decisions by the court to exclude evidence, given the number of factors involved in a successful prosecution, these provisions are not likely to have a direct effect on State finances.

Local Revenues: Local revenues increase minimally from fines imposed in cases shifted from the District Court to the circuit courts under the bill. The magnitude of the increase in local revenues depends on the number of convictions and fines actually collected from defendants.

Local Expenditures: Local expenditures decrease minimally due to individuals shifting from local detention facilities to State correctional facilities, offset in part by increased pretrial detention expenditures.

Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. *Per diem* operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years.

Additional Information

Prior Introductions: SB 35 of 2020 passed the Senate with amendments and was referred to the House Judiciary Committee, but no further action taken.

Designated Cross File: None.

Information Source(s): Harford, Montgomery, and Talbot counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Health Benefit Exchange; Department of Legislative Services

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rh/aad

Analysis by: Shirleen M. E. Pilgrim

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

Appendix – Defendants Ineligible for Pretrial Release by a District Court Commissioner

Please refer to § 5-202 of the Criminal Procedure Article for complete information on defendants who are not eligible for pretrial release by a District Court commissioner.

In General

In most cases, pretrial release determinations are made at the defendant's initial appearance before a District Court commissioner. A commissioner may not, however, authorize the release of certain defendants, including defendants who are registered sex offenders in the State, defendants who commissioners know are required to register as sex offenders, or defendants required to register as sex offenders by another jurisdiction/court/government and defendants charged:

- with a crime punishable by life imprisonment;
- with escaping from a correctional facility or any other place of confinement in the State;
- as a drug kingpin;
- with a crime of violence (as defined under § 14-101 of the Criminal Law Article), if the defendant has been previously convicted of a crime of violence under the laws of this State, has been convicted under the laws of another state of a crime classified as a crime of violence in Maryland or has been convicted of specified weapons-related offenses; and
- with violating the provisions of a domestic violence protective order (temporary or otherwise) ordering the defendant to refrain from abusing or threatening to abuse a person eligible for relief (applies to orders issued by a court in Maryland, by another state, or by a Native American tribe).

Repeat Offender – Defendant Charged with a Specified Crime Who Has a Prior Conviction for a Specified Crime

A District Court commissioner may not authorize the pretrial release of a defendant charged with one of the following crimes ***if the defendant has previously been convicted of a crime of violence or one of the following crimes:***

- wearing, carrying, or transporting a handgun under § 4-203 of the Criminal Law Article;

- use of a handgun or an antique firearm in commission of a crime under § 4-204 of the Criminal Law Article;
- violating prohibitions relating to assault weapons under § 4-303 of the Criminal Law Article;
- use of a machine gun in a crime of violence under § 4-404 of the Criminal Law Article;
- use of a machine gun for an aggressive purpose under § 4-405 of the Criminal Law Article;
- use of a weapon as a separate crime under § 5-621 of the Criminal Law Article;
- possession of a regulated firearm under § 5-133 of the Public Safety Article;
- transporting a regulated firearm for unlawful sale or trafficking under § 5-140 of the Public Safety Article; or
- possession of a rifle or shotgun by a person with a mental disorder under § 5-205 of the Public Safety Article.

Repeat Offender – Defendant Charged with Committing a Specified Crime While Released on Bail or Personal Recognizance on a Prior Charge of Committing a Specified Crime

A District Court commissioner also may not authorize the pretrial release of a defendant charged with committing one of the following crimes ***while the defendant was released on bail or personal recognizance for a pending prior charge of committing one of the following crimes:***

- aiding, counseling, or procuring arson in the first degree;
- arson in the second degree or attempting, aiding, counseling, or procuring arson in the second degree;
- burglary in the first, second, or third degree;
- child abuse or sexual abuse of a minor;
- manufacture or possession of a destructive device;
- various offenses related to controlled dangerous substances (CDS), except for possessing or administering CDS;
- manslaughter by vehicle or vessel; and
- a crime of violence.