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S.B. 25
(1_134_0221-4)
134th General Assembly

Fiscal Note & Local Impact Statement

[Click here for S.B. 25's Bill Analysis](#)

Version: In Senate Judiciary

Primary Sponsor: Sen. Gavarone

Local Impact Statement Procedure Required: No

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Highlights

- Based on research of the Department of Rehabilitation and Correction (DRC), LBO estimates that, within five years of the bill's effective date, DRC's GRF-funded incarceration costs will have increased by \$1.7 million to \$5.8 million or more annually. The magnitude of that annual cost increase is dependent upon the number of offenders sentenced under the bill's penalty enhancements.
- The number of violations of the new offense of defrauding an alcohol, drug, or urine screening test for county and municipal criminal justice systems to adjudicate is likely to be relatively small with any additional costs being minimal at most annually and potentially absorbed by utilizing existing staff and resources. Revenue in the form of court costs, fees, and fines may offset those costs to some degree.
- County criminal justice systems should be able to utilize existing staffing levels and appropriated funds to absorb any additional work created by penalty-enhanced felony drug trafficking cases.
- There may be a minimal at most annual gain in locally collected state court costs credited to the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020).

Detailed Analysis

Drug trafficking at or near an addiction service provider

The bill enhances the penalties for most drug trafficking offenses when (1) committed on the premises of, or within 500 feet of, a substance addiction services provider's facility, if the offender knows or should have known that the offense is being committed within that vicinity,

or (2) the offender sells, offers to sell, delivers, or distributes a controlled substance to a person whom the offender knows is receiving treatment from a substance addiction services provider. Offenses with enhanced penalties include trafficking in cocaine, L.S.D., heroin, hashish, schedule I and II controlled substances (excluding marijuana), controlled substance analogs, and fentanyl-related compounds.

Felony drug trafficking offenses

The bill enhances penalties for felony-level offenses of aggravated trafficking and trafficking, each with sentencing variations based on the type and amount of the controlled substances involved. Table 1 below shows the number of offenders committed annually to prison for felony trafficking in drugs, as reported by the Department of Rehabilitation and Correction (DRC) for FY 2016-FY 2020. On average, 9.8% of the commitments in each year were for drug trafficking with potentially elevated penalties under the bill. The subset of violations committed in the vicinity of a substance addiction service provider or a recovering addict is not information tracked in DRC's inmate databases.

Table 1. Number of Prison Commitments for Felony Drug Trafficking Offenses, FY 2016-FY 2020					
Offense	2016	2017	2018	2019	2020
Trafficking in Drugs	1,948	1,792	1,719	1,831	1,400
Total Commitments	20,109	19,340	18,249	17,126	13,913

The principal fiscal effect of these penalty enhancements is likely to be a steady increase over a period of several years in the GRF funding that DRC expends annually on institutional operations. The magnitude of that annual increase will be dependent upon the number of offenders committing certain drug trafficking offenses in the vicinity of a substance addiction services provider or a recovering addict. In effect, by extending prison stays beyond what the amount of time served otherwise would have been under current law, the bill will trigger a "stacking effect." This term refers to the increase in the prison population that occurs as certain offenders currently serving time stay in prison longer while the number of new offenders entering the prison system does not decrease. This "stacking" process will stabilize when the number of offenders who begin serving their additional time as part of the penalty enhancements in the bill is about the same as the number leaving prison after serving their additional time.

Additionally, some number of offenders may be sentenced to prison under the bill that otherwise may have been sanctioned locally at county expense. As an example, trafficking in cocaine in an amount greater than or equal to 10 grams but less than 20 grams is a third degree felony under current law and according to sentencing guidelines there is a presumption of prison time. Under the bill, this offense elevates to a second degree felony with a mandatory minimum

prison term of 2, 3, 4, 5, 6, 7, or 8 years. On average, a second degree felony drug offender serves about 1.6 years longer than a third degree felony drug offender does.¹

Table 2 below shows the average time served by all drug offenders released from prison in calendar year (CY) 2016, as reported by DRC. The average time served for all felony drug offenders was 1.6 years.

Table 2. Average Time Served, CY 2016	
Drug Offense Level	Average Time Served in Years
Felony 1	5.65
Felony 2	3.49
Felony 3	1.84
Felony 4	1.14
Felony 5	0.69
All drug offenses	1.62

Generally, the bill elevates drug trafficking offenses by one degree, which using the time-served data, suggests the following potential outcomes:

- Elevating an offense from a fifth degree felony (0.69 years average time served) to a fourth degree felony (1.14 years average time served) increases the average time served by 5.4 months.
- Elevating an offense from a fourth degree felony (1.14 years average time served) to a third degree felony (1.84 years average time served) increases the average time served by 8.4 months.
- Elevating an offense from a third degree felony (1.84 years average time served) to a second degree felony (3.49 years average time served) increases the average time served by 19.8 months.
- Elevating an offense from a second degree felony (3.49 years average time served) to a first degree felony (5.65 years average time served) increases the average time served by 25.9 months.

Under the bill, the average time served for the lowest level offenders increases by approximately 5.4 months, or 164 days, and the average time served for those moving from a

¹ Average time served data do not reflect the felony sentencing law changes implemented by the Reagan Tokes Act, S.B. 201 of the 132nd General Assembly, which apply to crimes committed on or after March 22, 2019, and include both a minimum term defined in statute and maximum term equal to the minimum term plus 50% of the minimum term for qualifying offenses.

second to a first degree felony increases by 25.9 months, or 788 days. Using the annual daily cost per inmate for FY 2020, the increases in time served potentially cost the state between \$13,730 (\$83.72 average daily cost x 164 days) and \$65,971 (\$83.72 average daily cost x 788 days) per inmate for the increased length of stay based on average time served.

Based on its research into selected inmate files, DRC expects the bill to create the need for between 109 and 380 additional beds annually overall, with half of that increase realized within the first five years following its effective date. LBO estimates the annual cost of these additional beds five years following enactment at \$1.7 million (55 beds x \$83.72 average daily cost x 365 days) to \$5.8 million (190 beds x \$83.72 average daily cost x 365 days).

DRC's research and the subsequent LBO cost estimate is based on drug trafficking offenses when committed on the premises of, or within 1,000 feet (rather than 500 feet under the current version of the bill) of, a substance addiction services provider's facility, if the offender recklessly disregards that the offense is being committed within that vicinity and does not include the penalty enhancement when the offender sells, offers to sell, delivers, or distributes a controlled substance to a person whom the offender knows is receiving treatment from a substance addiction services provider. These provisions were added to the bill after DRC conducted its study and updated research is unavailable. That said, the current version of the bill is likely to generate higher state incarceration costs, as it expands the potential circumstances in which the enhanced penalties are applicable.

The bill will not generate new felony drug cases, but may require county criminal justice systems to expend additional time and effort on such cases. This is because the penalty enhancements may prolong the adjudication of certain matters, as the prison sanction and "knows that the person is receiving or received that treatment" conduct standard are more problematic for the defense and prosecution, respectively. County criminal justice systems should be able to absorb any associated costs utilizing existing staffing levels and appropriated funds.

Defrauding an alcohol, drug, or urine screening test

The bill enacts prohibitions under the new offense of "defrauding an alcohol, drug, or urine screening test," that pertain to a specified conduct "knowingly" intended to defraud such a test. A violation of any of the prohibitions generally is a second degree misdemeanor, but is a first degree misdemeanor on a second or subsequent offense. When an offender violates the prohibition by defrauding a test administered as a condition of community control, the violation is a third degree felony.

The bill specifies a person can be prosecuted under any of the bill's prohibitions, or under a related existing offense,² or under both the bill's prohibitions and an existing offense, but the person may be convicted of only one. The table below summarizes the possible fine and term of incarceration for a second degree misdemeanor, a first degree misdemeanor, and a third degree felony under current law, which are unchanged by the bill.

² The bill specifies the related existing offenses as: (1) tampering with evidence, a third degree felony, and (2) obstructing official business, generally a second degree misdemeanor.

Table 3. Fines And Sentences for Certain Offenses Generally

Classification	Fine	Possible Term of Incarceration
Misdemeanor 2 nd degree	Up to \$750	Jail, not more than 90 days
Misdemeanor 1 st degree	Up to \$1,000	Jail, not more than 180 days
Felony 3 rd degree	Up to \$10,000	9, 12, 18, 24, 30, or 36 months definite prison term

The bill requires a person to report knowledge or suspicion of certain specified violations to law enforcement authorities. The bill does not provide any penalty or sanction for failing to report that knowledge or suspicion.

Data is not available on the use of synthetic or other urine to defraud a test, nor on the number of violations in states that have previously passed similar legislation.³ That said, as described in more detail below, the number of violations resulting in a criminal case is expected to be relatively small. Any additional costs for county or municipal criminal justice systems to prosecute, adjudicate, and sanction offenders is likely to be minimal at most annually, and potentially absorbed by utilizing existing staff and resources. Money collected from violators (fines, court costs, and fees) may offset those costs to some degree. The state may also gain a minimal at most amount of court cost revenue annually. In the case of a misdemeanor, the state collects a \$29 court cost from the violator divided as follows: \$20 to the Indigent Defense Support Fund (Fund 5DY0) and \$9 to the Victims of Crime/Reparations Fund (Fund 4020).

There are at least four populations generally affected by the bill's prohibitions, as described below: (1) businesses, (2) individuals undergoing tests for employment, (3) individuals undergoing tests by order of a court, and (4) individuals selling or distributing urine to individuals undergoing tests.

- Businesses generally are likely to comply rather than face criminal prosecution, and continue to manufacture, market, sell, and distribute their products explicitly for other purposes. Additionally, the bill creates a rebuttable presumption that a bulk manufacturer of synthetic urine⁴ does not know or have reasonable cause to believe that the synthetic urine will be used for an illegal purpose.
- Those undergoing a test for employment are not likely to be discovered in defrauding conduct, as testing is unlikely to detect synthetic/another person's urine, and the administrator of the test is not required to be present for collection of the sample.

³ Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin.

⁴ As defined by the bill, a bulk manufacturer of synthetic urine is a business that manufactures or causes the manufacture of at least 15,000 gallons of synthetic urine on an annual basis.

Therefore, while violations will occur, they will not be easily discovered, and, therefore, minimally reported.

- For individuals undergoing drug tests by order of a court, while they are more likely to be discovered, and therefore charged with a violation, the use of synthetic urine can be charged as tampering with evidence, a third degree felony under current law, and is already subject to other consequences of violating their terms of release into the community.
- Those individuals selling or distributing their own urine or the urine of another are more likely to be discovered and subsequently charged with a violation in the circumstance described in the preceding dot point and can be charged with obstructing official business, a second degree misdemeanor under current law, or other similar offenses.