

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 198

(The President, *et al.*) (By Request - Administration)

Judicial Proceedings

Criminal Gang Offenses - Penalties, Procedure, and Elements

This emergency Administration bill makes several changes to Title 9, Subtitle 8 of the Criminal Law Article (criminal gang statutes). The bill (1) amends statutory definitions; (2) increases specified incarceration penalties; (3) limits the juvenile court's jurisdiction; and (4) specifies that assets divested from gangs as a result of local investigations and prosecutions must go to local jurisdictions and may only be spent on specified services and law enforcement-related efforts.

Fiscal Summary

State Effect: Minimal increase in general fund revenues from fines imposed in District Court cases. Minimal increase in general fund expenditures for incarcerations due to the bill's penalty provisions and expanded application of incarceration penalties. Minimal increase in special fund revenues from divested assets; special fund expenditures increase correspondingly for substance abuse programs.

Local Effect: Minimal increase in local revenues from fines imposed in circuit court cases. Minimal increase in local incarceration expenditures. Minimal increase in local revenues from divested assets, offset by increased local expenditures for substance abuse and law enforcement-related programs.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment.

Analysis

Bill Summary:

Juvenile Court Jurisdiction

The bill establishes that a juvenile court does not have jurisdiction over a child who is at least age 16 and is alleged to have committed a criminal gang offense under the criminal gang statutes.

“Pattern of Criminal Gang Activity”

The bill repeals the definition of “pattern of criminal gang activity” from the criminal gang statute and alters associated references accordingly.

“Criminal Gang”

The bill alters the definition of “criminal gang” to mean a group or association of three or more persons whose members (1) constitute an ongoing entity; (2) have as one of their primary objectives or activities the commission of one or more underlying crimes, including acts by juveniles that would be underlying crimes if committed by adults; and (3) have in common an overt or covert organizational or command structure.

“Underlying Crime”

The bill adds violations of the following prohibitions in the Criminal Law Article to the definition of “underlying crime” in the criminal gang statutes: § 9-102 (subornation of perjury); § 9-202(a) (bribery of juror); § 9-306 (obstruction of justice); §9-307 (destruction of evidence); § 9-412 (contraband – in general); § 9-413 (contraband – for escape); § 9-414 (contraband – weapon); § 9-416 (contraband – controlled dangerous substance); and § 9-417 (contraband – telecommunications-related). The bill also expands the definition of “underlying crime” to include a crime under the laws of another state or the United States that would be considered an underlying crime in this State and the attempted commission of, conspiracy to commit, or solicitation of one of the enumerated underlying crimes.

Criminal Gang Activity (General), § 9-802 of the Criminal Law Article

The bill increases the maximum incarceration penalty for this offense from two years to five years. The bill also specifies that a sentence imposed for this offense must be consecutive to any other sentence imposed under any other provision of law.

Criminal Gang Activity (Schools), § 9-803 of the Criminal Law Article

The bill increases the maximum incarceration penalty for this offense from 4 years to 10 years. The bill also specifies that a sentence imposed for this offense must be consecutive to any other sentence imposed under any other provision of law.

Participation in a Criminal Gang, § 9-804 of the Criminal Law Article

The bill repeals the element of this offense requiring that a person participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity.

Addiction Treatment Divestiture Fund

The bill alters the deposit of assets divested under the criminal gang statutes and derived from specified criminal activity. Currently, these assets must be deposited into the Addiction Treatment Divestiture Fund in the Maryland Department of Health (MDH). Under the bill, divested assets are deposited into the fund only if the *State* investigated and prosecuted the gang offense. However, if a *local jurisdiction* investigated and prosecuted the gang offense, the divested assets are to go to the local jurisdiction to be used to (1) support alternatives to incarceration, reentry programs, and addiction treatment services for persons with substance-related disorders; (2) combat criminal gangs through education, training, and resources; or (3) provide assistance to victims of gang-related crimes. If more than one jurisdiction participated in an investigation of a prosecution, any divested assets must be divided in the manner agreed on by the jurisdictions and used as required.

Venue

The bill adds underlying crimes to the venue provisions of the criminal gang statutes. Under the bill, for purposes of venue, a violation of the criminal gang statutes *and any underlying crime* is considered to have been committed in any county (1) in which the act was performed in furtherance of a violation of the criminal gang statutes; (2) that is the principal place of operations of the criminal gang in the State; (3) in which the defendant had control of or possession of proceeds from a criminal gang violation; or (4) in which the defendant resides.

Current Law: Title 9, Subtitle 8 of the Criminal Law Article prohibits a variety of activities related to criminal gangs. The offenses vary based on the level of an individual's involvement in a gang, the nature of the gang activity, or the location of the gang activity.

Definitions

A “criminal gang” is defined as a group or association of three or more persons whose members (1) individually or collectively engage in a pattern of criminal gang activity; (2) have as one of their primary objectives or activities the commission of one or more underlying crimes, including acts by juveniles that would be underlying crimes if committed by adults; and (3) have in common an overt or covert organizational or command structure.

Statute defines a “pattern of criminal gang activity” as the commission of, attempted commission of, conspiracy to commit, or solicitation of two or more underlying crimes or acts by a juvenile that would be an underlying crime if committed by an adult, provided the crimes or acts were not part of the same incident.

The following offenses are underlying crimes under the criminal gang statutes:

- a crime of violence as defined under § 14-101 of the Criminal Law Article;
- a violation of § 3-203 (second-degree assault), § 4-203 (wearing, carrying, or transporting a handgun), § 9-302 (inducing false testimony or avoidance of subpoena), § 9-303 (retaliation for testimony), § 9-305 (intimidating or corrupting juror), § 11-303 (human trafficking), § 11-304 (receiving earnings of prostitute), or § 11-306(a)(2), (3), or (4) (house of prostitution) of the Criminal Law Article;
- a felony violation of § 3-701 (extortion), § 4-503 (manufacture or possession of destructive device), § 5-602 (distribution of a controlled dangerous substance), § 5-603 (manufacturing a controlled dangerous substance or equipment), § 5-604(b) (creating or possessing a counterfeit substance), § 5-606 (false prescription), § 6-103 (second-degree arson), § 6-202 (first-degree burglary), § 6-203 (second-degree burglary), § 6-204 (third-degree burglary), § 7-104 (theft), or § 7-105 (unauthorized use of a motor vehicle) of the Criminal Law Article; or
- a felony violation of § 5-133 of the Public Safety Article.

Criminal Gang Activity (General), § 9-802 of the Criminal Law Article

A person may not threaten an individual, or a friend or family member of an individual, with physical violence with the intent to coerce, induce, or solicit the individual to participate in or prevent the individual from leaving a criminal gang. A violator is guilty of a misdemeanor and subject to maximum penalties of imprisonment for two years and/or a fine of \$10,000.

Criminal Gang Activity (Schools), § 9-803 of the Criminal Law Article

A person may not make the types of threats listed above or use physical violence to engage in the prohibited activities listed above in a school vehicle or within 1,000 feet of a school. A violator is guilty of a misdemeanor and subject to maximum penalties of imprisonment for four years and/or a \$20,000 fine. A conviction under § 9-803 may not merge with a conviction under § 9-802.

Participation in a Criminal Gang, § 9-804 of the Criminal Law Article

A person may not (1) participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity and (2) knowingly and willfully direct or participate in an underlying crime, or act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of, or in association with a criminal gang. Also, criminal gang or an individual belonging to a criminal gang may not:

- receive proceeds known to have been derived directly or indirectly from an underlying crime; or
- use or invest, directly or indirectly, an aggregate of \$10,000 or more of the proceeds from an underlying crime in (1) the acquisition of a title to, right to, interest in, or equity in real property or (2) the establishment or operation of any enterprise.

A criminal gang is also prohibited from acquiring or maintaining, directly or indirectly, any interest in or control of any enterprise or real property through an underlying crime. A person may not conspire to violate specified prohibitions.

In general, a violator is guilty of a felony, punishable by imprisonment for up to 15 years and/or a \$1,000,000 maximum fine. However, if the offense resulted in the death of a victim, a violator is subject to an increased penalty of imprisonment for up to 25 years and/or a \$5,000,000 maximum fine.

A sentence for a first offense that did not result in the death of a victim may be separate from and consecutive to or concurrent with a sentence imposed for any act establishing the gang violation. However, a sentence imposed for an offense that resulted in the death of a victim or a second or subsequent offense that did not result in the death of a victim must be separate from and consecutive to a sentence imposed for any act establishing the gang violation. The State must file a specified notice at least 30 days before trial in order for a consecutive sentence for a second or subsequent offense to be mandatory.

In addition to any penalties for this offense, on conviction the court may:

- order a person or criminal gang to be divested of any interest in an enterprise or real property;
- order the dissolution or reorganization of an enterprise; and
- order the suspension or revocation of any license, permit, or prior approval granted to the enterprise or person by a unit of the State or political subdivision of the State.

If the divested assets are derived from the commission of, attempted commission of, conspiracy to commit, or solicitation of specified crimes related to controlled dangerous substances, either in whole or in part, the assets must be held in the Addiction Treatment Divestiture Fund in MDH. With respect to violations of § 9-804, the Attorney General, at the request of the Governor or the State's Attorney for a county in which a violation or an act establishing a violation of this section occurs, may aid in the investigation of the violation or act and prosecute the violation or act. Under these circumstances, the Attorney General has all the powers and duties of a State's Attorney, including the use of the grand jury in the county, to prosecute the violation.

If violations of § 9-804 are alleged to have been committed in more than one county, the respective State's Attorney of each county, or the Attorney General, may join the causes of action in a single complaint with the consent of each State's Attorney having jurisdiction over an offense sought to be joined. The grand jury may issue subpoenas, summon witnesses, and otherwise conduct an investigation of the alleged criminal gang's activities and offenses in other counties, so long as at least one criminal gang activity of a criminal gang allegedly occurred in the county in which a grand jury is sitting.

Venue for Violations of the Criminal Gang Statutes

For purposes of venue, any violation of the criminal gang statutes is considered to have been committed in any county (1) in which any act was performed in furtherance of a violation of the criminal gang offenses statutes; (2) that is the principal place of the operations of the criminal gang in the State; (3) in which an offender had control or possession of proceeds of a violation of the criminal gang offenses statutes or of records or other material or objects that were used in furtherance of a violation; or (4) in which an offender resides.

Addiction Treatment Divestiture Fund

The Addiction Treatment Divestiture Fund in MDH is a special fund to support addiction treatment services to persons with substance-related disorders. The fund, which is administered by the Secretary of Health, consists of (1) revenue distributed to the fund from divested assets connected to specified offenses under § 9-804 of the Criminal Law SB 198/ Page 6

Article; (2) money appropriated in the State budget to the fund; and (3) any other money from any other source accepted for benefit of the fund. Interest earnings are retained by the fund. Expenditures from the fund may be made only in accordance with the State budget.

Background: According to the *2013 Maryland Gang Threat Assessment* completed by the Maryland Coordination and Analysis Center within the Governor's Office of Crime Control and Prevention, Maryland communities are experiencing an overall increase in the presence of gangs, gang members, and gang activities. The assessment identifies the following challenges to gang enforcement by law enforcement: (1) the lack of a mandated central repository for gang-related investigative information in the State; (2) the difficulty in investigating and identifying gang members; and (3) limited funding and manpower for a specialized unit.

Chapter 515 of 2016, also known as the Justice Reinvestment Act, made several changes to the criminal gang statutes, including (1) increased penalties for gang offenses; (2) an expansion of prohibitions on gang activities; and (3) authorization for a court, following a conviction for a specified gang offense, to order a divestiture of property under specified circumstances. Chapter 515 of 2016 also established an Addiction Treatment Divestiture Fund within MDH to support addiction treatment services to persons with substance-related disorders. Among other things, the fund consists of revenues from divested assets connected to specified gang offenses. These provisions took effect on October 1, 2017.

In an executive order dated December 5, 2017, Governor Lawrence J. Hogan, Jr. announced the creation of the Governor's Council on Gangs and Violent Criminal Networks. The council's membership consists of various stakeholders, including State's Attorneys, police chiefs, the Secretary of State Police, and the Secretary of Public Safety and Correctional Services. According to the order, the council's mission is to (1) provide leadership, policy oversight, and coordination of data collection and data-sharing strategies related to violent crime and victimization, including establishing performance measures for data-sharing and reporting results and (2) use data-sharing and collaboration to support and assist programs and entities engaged in efforts to identify and dismantle gangs and violent criminal networks, with the goal of providing information to prosecutors for the development of gang- and racketeering-related charges. The Governor simultaneously announced the creation of the Maryland Criminal Intelligence Network. This data-sharing initiative aims to assist law enforcement and prosecutors in eliminating criminal enterprises by connecting local entities with 36 federal, State, and local task forces.

State Revenues: General fund revenues increase minimally from fines imposed in District Court cases. Special fund revenues for the Addiction Treatment Divestiture Fund within MDH increase minimally to the extent that the bill results in increased divested assets from

gangs in cases investigated and prosecuted by the State. The extent to which this will occur cannot be reliably determined at this time. However, given the low number of prosecutions that have occurred, and the difficulty in acquiring assets from gangs, the Department of Legislative Services advises that any special fund revenue increase from the bill's changes is likely minimal. Also, the fund is in its infancy and was established under Chapter 515 of 2016 (Justice Reinvestment Act), in provisions that took effect on October 1, 2017. According to MDH, the fund's balance is \$0.

Given that the fund was only recently established and has not yet received any funds, this analysis does not account for the bill's alteration of the distribution of divested assets by deviating assets originally earmarked for the Addiction Treatment Divestiture Fund to a local jurisdiction if the local jurisdiction investigates and prosecutes the associated criminal gang case.

State Expenditures: General fund expenditures for the Department of Public Safety and Correctional Services (DPSCS) increase minimally as a result of the bill's alteration of existing incarceration penalties and expanded application of existing incarceration penalties due to more people being committed to State correctional facilities, people being committed for longer periods of time, and increased payments to counties for reimbursement of inmate costs. The number of additional people convicted as a result of the bill is expected to be minimal. Special fund expenditures from the Addiction Treatment Divestiture Fund increase correspondingly to the increase in special fund revenues to the fund.

DPSCS Incarceration Expenditures

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 \$3,800 per month. Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility.

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.

The bill may result in increased prosecutions for criminal gang offenses by (1) relaxing requirements that must be met to prove a defendant's connection to a gang by substituting "ongoing entity" for the current "pattern of gang activity" standard; (2) expanding the list of underlying crimes; and (3) repealing the requirement that a person have participated in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity.

The biggest potential source for an increase in prosecutions under the bill is the adoption of an "ongoing entity" standard for a criminal gang. Under current law, prosecutors must explain and establish the structure and existence of a criminal gang, the defendant's connection to the gang, and any underlying crimes. While the term "ongoing entity" is less specific than the current "pattern of gang activity" standard, the term "ongoing entity" is not defined in statute and will have to be defined through future case law. Thus, any increase in prosecutions is dependent on judicial interpretation of this term. Regardless, it is unlikely that the bill generates a significant number of additional cases given (1) the historically low number of criminal gang cases filed and pursued in the State's courts and (2) the complicated nature of larger gang prosecutions.

The Judiciary advises that the following violations (charges) were filed in the courts during fiscal 2017:

- § 9-802: 2 violations in the District Court and 0 violations in the circuit courts; and
- § 9-803: 2 violations in the District Court and 0 violations in the circuit courts.

The Judiciary did not provide information on the number of violations of § 9-804 filed in the courts during fiscal 2017 in time for inclusion in this fiscal and policy note.

The Maryland State Commission on Criminal Sentencing Policy (MSCCSP) advises that based on a review of the Maryland Sentencing Guidelines Database, MSCCSP received the following information on individuals sentenced in the State's circuit courts during fiscal 2017:

- 0 individuals sentenced under § 9-802;
- 0 individuals sentenced under § 9-803;
- 4 individuals sentenced under then § 9-804(c)(1)(i) (now § 9-804 (f)(1)(i)); and
- 3 individuals sentenced under then § 9-804(c)(1)(ii) (now § 9-804(f)(1)(ii)).

MSCCSP receives its information from worksheets submitted by the courts. MSCCSP advises that it received sentencing worksheets for 89% of guidelines-eligible cases in fiscal 2017.

The Division of Correction (DOC) advises that its Offender Case Management System contains information dating back to 2007 and indicates that DOC has not conducted intake on any individuals sentenced under § 9-802 or § 9-803.

The bill increases the maximum incarceration penalty for violations of §§ 9-802 and 9-803 of the Criminal Law Article and specifies that a sentence imposed for those offenses must be consecutive to any other sentence imposed. However, given the low number of violations filed and individuals sentenced for those offenses, those provisions of the bill are unlikely to have a significant effect on State incarceration expenditures.

The bill also expands the list of offenses considered “underlying crimes” to include crimes often associated with prison gangs. **Exhibit 1** contains information on the number of District Court violations, circuit court violations, and DOC intakes for the additional underlying crimes during fiscal 2017. However, it should be noted that not all of these violations and intakes may be gang-related and not all of them would necessarily contribute to a prosecution for a gang offense. Many of these violations and intakes may be the result of actions by individuals acting independently.

Exhibit 1
District Court Violations, Circuit Court Violations, and DOC Intakes for Offense
Added to the Definition of “Underlying Crime” Under the Bill
Fiscal 2017

<u>Charge</u>	<u>District Court Violations</u>	<u>Circuit Court Violations</u>	<u>DOC Intakes</u>
Criminal Law Article, § 9-102	0	1	0
Criminal Law Article, § 9-202	0	0	0
Criminal Law Article, § 9-306	86	113	5
Criminal Law Article, § 9-307	110	43	0
Criminal Law Article, § 9-412	662	314	20
Criminal Law Article, § 9-413	1	1	0
Criminal Law Article, § 9-414	172	80	5
Criminal Law Article, § 9-416	237	122	4
Criminal Law Article, § 9-417	55	24	2

Source: Maryland Judiciary; Department of Public Safety and Correctional Services

Addiction Treatment Divestiture Fund

Depending on the bill's impact on divested assets deposited into the Addiction Treatment Divestiture Fund (as discussed above), special fund expenditures by MDH for addiction treatment services to persons with substance-related disorders increase.

Juvenile Court Jurisdiction

The bill's alteration of the juvenile court's jurisdiction does not have a material effect on State finances. According to the Department of Juvenile Services, five youth were referred to the juvenile court for gang offenses during fiscal 2017. Two of the youth were charged with felony offenses under § 9-804, one youth was charged with a misdemeanor under § 9-802, and two had misdemeanor charges under § 9-803.

Venue

The venue provisions in the bill are procedural and can be implemented with existing budgeted resources. The Office of the Attorney General (OAG) advises that the bill's provisions clarify that if a gang offense and underlying crime involve different jurisdictions, both offenses can be tried in the same jurisdiction, rather than a prosecuting entity having to prove the gang offense (including any underlying crimes) in one county and conduct a separate trial on the underlying crimes in another county. According to OAG, this has not been a problem in the past.

Local Revenues: Local revenues increase minimally from fines imposed in circuit court cases. Local revenues also increase minimally to the extent the bill results in additional divested assets. The extent to which this may occur cannot be reliably estimated at this time. For example, Baltimore County advises that the bill could result in an increase in county revenues from divested assets, but that it cannot reliably estimate any such increase due to uncertainty about the size and scale of future potential prosecutions under the statute.

The Montgomery County Police Department advises that while the bill's provisions pertaining to local divested assets has the potential to generate revenue for the department, gang-related crimes have historically not involved any substantial assets that have been or would be subject to seizure. The department also notes the authority under other statutes to seize assets in drug-related crimes. Thus, the department advises that the bill is not expected to generate any substantial fiscal impact for the department.

Local Expenditures: Local expenditures increase minimally to the extent the bill increases the number and/or duration of incarcerations in local detention facilities. 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. However, it should be noted that the bill's impact on incarcerations is most likely to be felt at the State level.

Depending on the bill's effect on divested assets, local expenditures increase minimally for services and programs that are specified under the bill as approved uses of divested assets.

While the overall impact on local governments cannot be reliably estimated at this time, a survey of local jurisdictions indicates that the bill is not likely to have a significant impact on local jurisdictions.

- The Maryland State's Attorneys' Association advises that the bill's effect on prosecutors is unknown at this time.
- Anne Arundel County advises that the bill does not have a fiscal impact on the county.
- Baltimore County advises that its State's Attorney does not anticipate a significant fiscal impact from the bill, and that incarceration penalties are more likely to impact State correctional facilities than the county's facilities.
- Charles County advises that the bill should not have a fiscal impact on the county.
- Frederick County advises that the bill has little or no fiscal impact based on the anticipated number of cases charged in the county under the bill.
- The Montgomery County Sheriff's Office does not foresee a significant fiscal impact on the office from the bill.

The City of Havre de Grace advises, however, that the city needs additional resources to address procedural requirements.

Additional Information

Prior Introductions: None.

Cross File: HB 102 (The Speaker, *et al.*) (By Request - Administration) - Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Public Safety and Correctional Services; Maryland State Commission on Criminal Sentencing Policy; Department of State Police; Department of Juvenile Services; Governor's Office of Crime Control and Prevention; Office of the Attorney General; Office of the Governor; Maryland State's Attorneys' Association; Office of the Public Defender; Anne Arundel, Baltimore, Charles, Frederick, and Montgomery counties; cities of Frederick and Havre de Grace; Department of Legislative Services

Fiscal Note History: First Reader - January 29, 2018
md/kdm

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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: **Criminal Gang Offenses – Penalties, Procedure, and Elements**

BILL NUMBER: SB0198/HB0102

PREPARED BY: Melissa Ross

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS