

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 461
Judiciary

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

Crimes - Criminal Gangs - Prohibitions and Funding

This Administration bill makes several changes to the criminal gang statute, including (1) enhancing penalties for gang offenses; (2) expanding existing prohibitions on gang activities; and (3) authorizing a court, following a conviction for a specified gang offense, to order a divestiture of property under specified circumstances. The bill also establishes an Addiction Treatment Divestiture Fund within the Department of Health and Mental Hygiene (DHMH) to support addiction treatment services to persons with substance-related disorders. Among other things, the fund consists of revenues from the divested assets connected to specified gang offenses that accrue under the bill.

Fiscal Summary

State Effect: Minimal increase in general fund revenues from fines imposed in the District Court. Potential significant increase in special fund revenues for DHMH from divested assets, with a corresponding increase in special fund expenditures for addiction treatment services. Minimal increase in general fund expenditures due to the bill's incarceration penalties. Enforcement can be handled with existing resources.

Local Effect: Potential significant increase in local revenues from fines imposed in circuit court cases. Local health departments may benefit from additional funding for substance abuse treatment programs. Enforcement can be handled with existing resources.

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

Analysis

Bill Summary:

Definitions: The bill defines an “enterprise” to include (1) a sole proprietorship, partnership, corporation, business trust, or other legal entity or (2) any group of individuals associated in fact although not a legal entity.

The bill also expands the definition of “underlying crime” under the gang statute to include a felony violation of § 5-604(b) of the Criminal Law Article (creating or possessing a counterfeit substance) and § 5-606 of the Criminal Law Article (false prescription).

Criminal Gang Activity (General), § 9-802 of the Criminal Law Article: The bill increases the maximum fine for this offense from \$1,000 to \$10,000.

Criminal Gang Activity (Schools), § 9-803 of the Criminal Law Article: The bill increases the maximum fine for this offense from \$4,000 to \$20,000.

Participation in a Criminal Gang, § 9-804 of the Criminal Law Article: The bill increases the general penalty for this offense from imprisonment for up to 10 years and/or a \$100,000 maximum fine to imprisonment for up to 15 years and/or a \$1 million maximum fine. The bill also increases the enhanced penalty when the offense results in the death of a victim from imprisonment for up to 20 years and/or a \$100,000 maximum fine to imprisonment for up to 25 years and/or a \$5 million maximum fine.

The bill also expands this offense by prohibiting a criminal gang or an individual belonging to a criminal gang from:

- receiving proceeds known to have been derived directly or indirectly from an underlying crime; or
- using or investing, 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.

The bill prohibits a criminal gang 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 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 § 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), or § 5-606 (false prescription), either in whole or in part, the assets must be held in the Addiction Treatment Divestiture Fund established under the bill and described in more detail below.

At the request of the Governor, the Attorney General may aid in the investigations of violations of § 9-804 of the Criminal Law Article and prosecute these violations.

Criminal Gang (Managerial/Upper Level Activities), § 9-805 of the Criminal Law Article: The bill expands this offense by adding promoting or sponsoring a gang to the list of prohibited activities. The bill also increases the maximum fine for this offense from \$100,000 to \$1.0 million.

Venue for Violations of the Criminal Gang Statutes: For purposes of venue, any violation of Title 9, Subtitle 8 of the Criminal Law Article (criminal gang offenses 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 bill establishes an Addiction Treatment Divestiture Fund in DHMH as a special fund to support addiction treatment services to persons with substance-related disorders. The fund, which is administered by the Secretary of Health and Mental Hygiene, consists of (1) revenue distributed to the fund from divested assets connected to specified offenses under § 9-804 of the Criminal Law 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.

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), § 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.

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 handgun in the commission of a felony or other crime of violence; (13) child abuse in the first degree; (14) sexual abuse of a minor younger than age 13 under specified circumstances; (15) an attempt to commit crimes (1) through (14); (16) continuing course of conduct with a child; (17) assault in the first degree; or (18) assault with intent to murder, rape, rob, or commit a sexual offense in the first or second degree.

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 \$1,000.

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 \$4,000 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.

In general, a violator is guilty of a felony, punishable by imprisonment for up to 10 years and/or a \$100,000 maximum fine. However, if the offense resulted in the death of a victim, a violator is subject to an enhanced penalty of imprisonment for up to 20 years and/or a \$100,000 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.

With respect to violations of § 9-804, the Attorney General, at the request of 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.

Criminal Gang (Managerial/Upper Level Activities), § 9-805 of the Criminal Law Article: A person is prohibited from organizing, supervising, financing, or managing a criminal gang. A violator is guilty of a felony, punishable by imprisonment for up to 20 years and/or a \$100,000 maximum fine. A sentence imposed for this offense must be separate from and consecutive to a sentence for any crime based on the act establishing a violation of this prohibition.

Background: According to the *2013 Maryland Gang Threat Assessment* 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. According to the assessment, the following are 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.

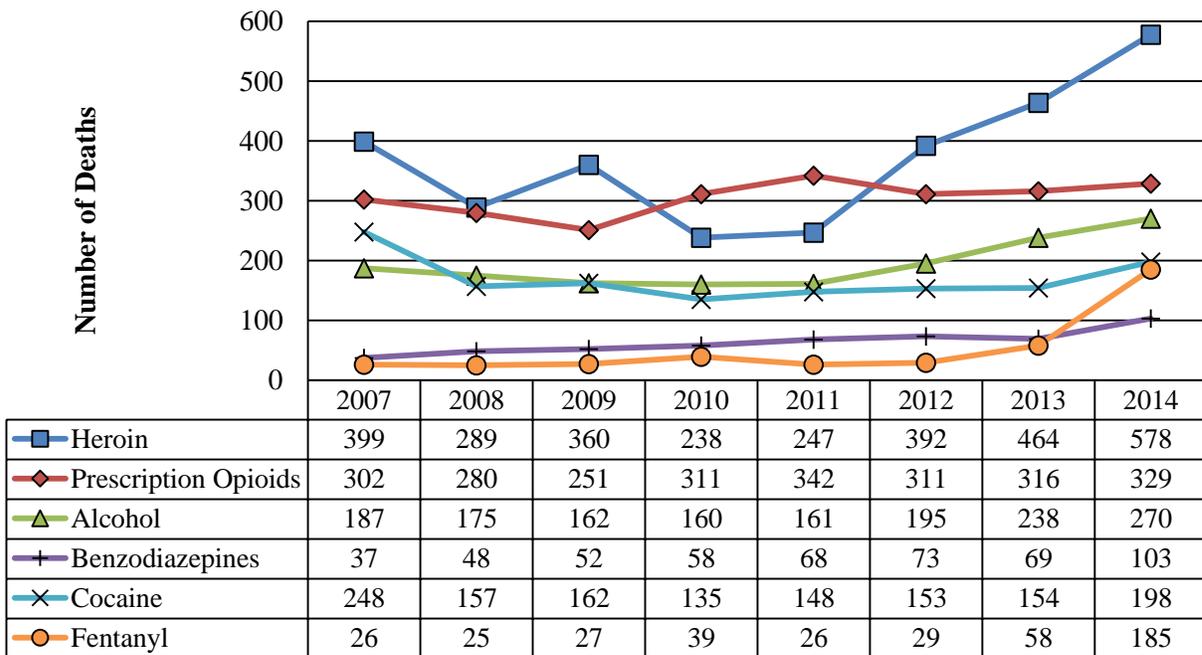
The federal Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted in 1970 in an effort to fight the infiltration of organized crime into businesses engaged in interstate commerce and was traditionally used against the Mafia. Noting the growing organizational structure of gangs, federal prosecutors are increasingly opting to prosecute gang members under RICO. To obtain a RICO conviction, prosecutors must prove that the crimes committed by the gang members were part of an organized criminal enterprise. A prosecutor in a RICO case may introduce evidence of a gang's activity regardless of the defendant's level of involvement in the alleged activities. According to the American Bar Association, approximately 33 states, Puerto Rico, and the U.S. Virgin Islands have state-level laws based on RICO.

In February 2015, Governor Hogan established, by executive order, the Heroin and Opioid Emergency Task Force. The task force was chaired by the Lieutenant Governor and consisted of appointees of the President of the Senate, the Speaker of the House, and the Attorney General, as well as seven members of the public. The task force issued its final report in December 2015, which included a recommendation for legislation to amend State law to include provisions modeled after the federal RICO statute. According to the task force's final report, a Maryland law modeled on the federal RICO statute could be an effective tool in fighting drug rings because it "...allows prosecutors to hold contributing

members of the criminal enterprise responsible for the results of the enterprise rather than the small individual acts of the actors.”

DHMH’s 2015 report, *Drug and Alcohol-Related Intoxication Deaths in Maryland*, indicated that drug- and alcohol-related intoxication deaths in Maryland totaled 1,039 in 2014, a 21% increase since 2013, and a 60% increase since 2010. Of all intoxication deaths, 887 deaths (86%) were opioid-related, including deaths related to heroin, prescription opioids, and nonpharmaceutical fentanyl. Opioid-related deaths increased by 76% between 2010 and 2014. Heroin-related deaths more than doubled between 2010 and 2014, and they increased by 25% between 2013 and 2014. Preliminary data from DHMH show that the number of intoxication deaths continued to increase in 2015, with 889 deaths from January through September 2015 compared to 767 deaths during the same period in 2014 (a 16% increase). **Exhibit 1** shows trends in drug- and alcohol-related intoxication deaths in Maryland from 2007 through 2014.

Exhibit 1
Drug- and Alcohol-related Intoxication Deaths by Selected Substances
2007-2014



Source: Department of Health and Mental Hygiene

A violation is a charge/count filed with a court; it is not a conviction, and one defendant may represent multiple violations. According to the Judiciary, the following violations
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relating to gang activity were filed in the courts during fiscal 2015: § 9-802 (0 District Court, 0 circuit courts); § 9-803 (0 District Court, 0 circuit courts); § 9-804 (3 District Court, 23 circuit courts); and § 9-805 (0 District Court, 0 circuit courts). There were no convictions in the District Court for these offenses, and data is only available for 13 of the 23 violations filed in the circuit courts. There were two convictions of those 13 violations; both were for violations of § 9-804. Fines were not imposed in either of those cases.

The bill adds a felony violation of § 5-604(b) of the Criminal Law Article (creating or possessing a counterfeit substance) and § 5-606 of the Criminal Law Article (false prescription) to the list of underlying crimes. According to the Judiciary, during fiscal 2015, there were 11 violations of § 5-604 (6 District Court, 5 circuit courts), and 51 violations of § 5-606 (1 District Court, 50 circuit courts).

According to information received by the Maryland State Commission on Criminal Sentencing Policy (MSCCSP), 16 people were sentenced for 16 total counts of violating § 9-804(c)(1)(i) of the Criminal Law Article (Participation in a Criminal Gang Not Resulting the Death of a Victim) in the State's circuit courts during fiscal 2015. The sentences imposed for these 16 counts ranged from 4 years to 10 years, with an average sentence of 7.2 years, including suspended time. Excluding suspended time, the average sentence imposed for the 16 counts was 2.3 years and ranged from 7 days to 5 years. MSCCSP did not receive information on individuals being sentenced in the State's circuit courts during fiscal 2015 for any of the other gang offenses affected by the bill. In fiscal 2014, 2 people were sentenced for 2 counts of the above-referenced offense. Excluding suspended time, 1 imposed sentence was for 5 years and the other sentence was for 10 years.

MSCCSP receives its information from sentencing guidelines worksheets voluntarily submitted by circuit court judges and other sources. MSCCSP advises that because it is tasked with analyzing incarceration penalties, it receives no information or incomplete information about fines imposed as part of a sentence in circuit court cases.

The Department of Public Safety and Correctional Services (DPSCS) advises that in fiscal 2015, it received four offenders sentenced for the felony of participation in or association with a gang (§ 9-804). The average sentence for these offenders was four years.

State Revenues: Special fund revenues for DHMH increase, perhaps significantly, from assets divested under the bill's provisions. The bill requires revenues from divested assets in cases involving a conviction under § 9-804 derived from specified controlled dangerous substances crimes to be deposited in the Addiction Treatment Divestiture Fund. The magnitude of the increase in special fund revenues depends on the frequency with which courts order divestiture of assets and the value of the assets divested, which will vary by year and cannot be reliably determined at this time.

DHMH advises that, given the number of factors involved (incidents of gang activity, successful prosecutions, etc.), it cannot reliably estimate the revenues that may be collected under the bill for the Addiction Treatment Divestiture Fund.

General fund revenues increase minimally from fines imposed in District Court cases. In general, the District Court has jurisdiction over misdemeanor cases and the circuit courts have jurisdiction over felony cases. Fines imposed in District Court cases are general fund revenues. The bill increases the fines for misdemeanors under § 9-802 and § 9-803. Given the number of convictions for these offenses, and the indications from available data that significant fines are not imposed in these cases, the bill's increase of the fines in these misdemeanor cases likely results in a minimal increase in general fund revenues.

State Expenditures: Special fund expenditures for DHMH from the Addiction Treatment Divestiture Fund for addiction treatment services to persons with substance-related disorders increase, perhaps significantly, depending on the revenues collected from divested assets, as described above, and any budget appropriations or other revenues deposited into the fund. DHMH can administer the new fund with existing staff.

General fund incarceration expenditures for DPSCS increase minimally due to the bill's penalty provisions and expansion of criminal offenses. The bill increases the standard and enhanced incarceration penalties under § 9-804 of the Criminal Law Article (participation in a criminal gang). Based on the statistics from DPSCS and MSCCSP featured above, very few individuals are convicted of this offense, and the number of individuals convicted or sentenced appears to vary from year to year. Using the information from MSCCSP, all of the individuals sentenced for this offense in fiscal 2015 were subject to the standard 10-year incarceration penalty. The bill increases the standard incarceration penalty from 10 years to 15 years.

For illustrative purposes only, according to DPSCS, the average sentence for individuals who entered State correctional facilities for participation in or association with a criminal gang under § 9-804 was 4 years, or 40% of the maximum sentence. Assuming that these inmates serve 70% of their sentences before being released on mandatory supervision release (MSR), the average time served is 2.8 years. Applying these figures to the bill's proposed 15-year maximum penalty results in an average sentence of 6 years without MSR and 4.2 years with MSR. This amounts to an increase in average time served with MSR of 1.4 years per inmate. Excluding overhead and variable health care costs, the average cost of housing a new State inmate is about \$2,400 per year, which results in additional expenditures of \$3,360 per inmate for additional time served (with MSR) under the bill. If medical costs are included, these expenditures increase to \$12,936 per inmate for additional time served. Any increase in expenditures from additional time served are not realized until fiscal 2020 when the first inmates sentenced under the bill begin to serve additional time.

This illustration does not account for additional applicable variables, such as parole, sentences for more serious offenses imposed on individuals convicted of this offense, and consecutive sentences for repeat offenders.

While the bill's overall impact on general fund incarceration expenditures is anticipated to be minimal, the actual impact depends on the extent to which the bill's alteration of applicable definitions and expanded application of § 9-804 increases the number of individuals convicted of this offense and to what extent judges sentence defendants to lengthier sentences because of the increased penalties under the bill. This, in turn, depends on prosecutorial discretion and judicial sentencing practices and can only be determined with actual experience under the bill.

The Office of the Attorney General (OAG) did not respond to repeated requests for information with respect to the potential impacts of this bill. However, DLS advises that the bill is unlikely to result in a significant number of requests from the Governor to assist/prosecute gang cases. Thus, it is assumed that OAG can handle requests from the Governor to assist with and prosecute cases with existing budgeted resources.

Local Revenues: Local revenues increase, perhaps significantly, from fines imposed in circuit court cases.

The bill increases the maximum fines for various offenses and significantly increases the maximum fines for felony gang offenses, which are heard in the circuit courts. The magnitude of the increase in fine revenues depends on the extent to which judges impose significantly higher fines in these cases and the amount of fines actually collected, which cannot be predicted.

Local Expenditures: The bill does not materially affect local incarceration expenditures. This analysis assumes that defendants who receive longer sentences for the felony offenses subject to increased incarceration penalties under the bill serve their sentences in State, not local correctional facilities.

If the Addiction Treatment Divestiture Fund in DHMH provides funding to local health departments as a result of the bill, local health departments benefit from additional substance abuse treatment funding. Local health departments receive State funding and are often the main providers of substance abuse treatment in some jurisdictions. This analysis assumes that local jurisdictions use these funds to supplement, not supplant, any local expenditures for substance abuse treatment.

The State's Attorneys' Association advises that the bill does not have an effect on prosecutors.

Additional Comments: The bill does not specify where revenues from divested assets that are not required to be deposited in the Addiction Treatment Divestiture Fund are to be deposited. Thus, this analysis does not reflect any potential revenues from the divestiture of those assets at either the State or local level.

Additional Information

Prior Introductions: None.

Cross File: SB 388 (The President, *et al.*) (By Request - Administration) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of Public Safety and Correctional Services, Department of Health and Mental Hygiene, Maryland State Commission on Criminal Sentencing Policy, Department of State Police, Office of the Public Defender, American Bar Association, *Heroin and Opioid Emergency Task Force – Final Report*; Department of Legislative Services

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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Crimes – Criminal Gangs – Prohibitions and Funding

BILL NUMBER: SB388/HB461

PREPARED BY: Office of the Lieutenant Governor

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