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HOUSE BILL NO. 2438

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Appropriations
on February 3, 2005)

(Patrons Prior to Substitute—Delegates Carrico and Shuler [HB 2504])

A *BILL to amend and reenact § 18.2-248 of the Code of Virginia, relating to penalties for methamphetamines.*

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-248 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 18.2-248.02 as follows:

§ 18.2-248. Manufacturing, selling, giving, distributing or possessing with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance prohibited; penalties.

A. Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.

B. In determining whether any person intends to manufacture, sell, give or distribute an imitation controlled substance, the court may consider, in addition to all other relevant evidence, whether any distribution or attempted distribution of such pill, capsule, tablet or substance in any other form whatsoever included an exchange of or a demand for money or other property as consideration, and, if so, whether the amount of such consideration was substantially greater than the reasonable value of such pill, capsule, tablet or substance in any other form whatsoever, considering the actual chemical composition of such pill, capsule, tablet or substance in any other form whatsoever and, where applicable, the price at which over-the-counter substances of like chemical composition sell.

C. ~~Any~~ Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than \$500,000. Upon a second or subsequent conviction of such a violation, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than five years and be fined not more than \$500,000.

When a person is convicted of a third or subsequent offense under this subsection and it is alleged in the warrant, indictment or information that he has been before convicted of two or more such offenses or of substantially similar offenses in any other jurisdiction which offenses would be felonies if committed in the Commonwealth and such prior convictions occurred before the date of the offense alleged in the warrant, indictment, or information, he shall be sentenced to imprisonment for life or for a period of not less than five years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence and he shall be fined not more than \$500,000.

C1. Any person who violates this section with respect to the manufacturing of methamphetamine, its salts, isomers, or salts of its isomers or less than 200 grams of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers shall, upon conviction, be imprisoned for not less than 10 nor more than 40 years and fined not more than \$500,000. Upon a second conviction of such a violation, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than 10 years, and be fined not more than \$500,000. When a person is convicted of a third or subsequent offense under this subsection and it is alleged in the warrant, indictment, or information that he has been previously convicted of two or more such offenses or of substantially similar offenses in any other jurisdiction, which offenses would be felonies if committed in the Commonwealth and such prior convictions occurred before the date of the offense alleged in the warrant, indictment, or information, he shall be sentenced to imprisonment for life or for a period not less than 10 years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence and he shall be fined not more than \$500,000. Upon conviction, in addition to any other punishment, a person found guilty of this offense shall be ordered by the court to make restitution, as the court deems appropriate, to any innocent property owner whose property is damaged, destroyed, or otherwise rendered unusable as a result of such methamphetamine production. This restitution may include the person's or his estate's estimated or actual expenses associated with cleanup, removal, or repair of the affected property.

D. If such person proves that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II only as an accommodation to another individual who is not an inmate in a community correctional facility, local correctional facility or state correctional

60 facility as defined in § 53.1-1 or in the custody of an employee thereof, and not with intent to profit
61 thereby from any consideration received or expected nor to induce the recipient or intended recipient of
62 the controlled substance to use or become addicted to or dependent upon such controlled substance, he
63 shall be guilty of a Class 5 felony.

64 E. If the violation of the provisions of this article consists of the filling by a pharmacist of the
65 prescription of a person authorized under this article to issue the same, which prescription has not been
66 received in writing by the pharmacist prior to the filling thereof, and such written prescription is in fact
67 received by the pharmacist within one week of the time of filling the same, or if such violation consists
68 of a request by such authorized person for the filling by a pharmacist of a prescription which has not
69 been received in writing by the pharmacist and such prescription is, in fact, written at the time of such
70 request and delivered to the pharmacist within one week thereof, either such offense shall constitute a
71 Class 4 misdemeanor.

72 F. Any person who violates this section with respect to a controlled substance classified in Schedule
73 III, IV or V or an imitation controlled substance which imitates a controlled substance classified in
74 Schedule III, IV or V, except for an anabolic steroid classified in Schedule III constituting a violation of
75 § 18.2-248.5, shall be guilty of a Class 1 misdemeanor.

76 G. Any person who violates this section with respect to an imitation controlled substance which
77 imitates a controlled substance classified in Schedule I or II shall be guilty of a Class 6 felony. In any
78 prosecution brought under this subsection, it is not a defense to a violation of this subsection that the
79 defendant believed the imitation controlled substance to actually be a controlled substance.

80 H. Any person who manufactures, sells, gives, distributes or possesses with the intent to manufacture,
81 sell, give or distribute the following:

82 1. 1.0 kilograms or more of a mixture or substance containing a detectable amount of heroin;

83 2. 5.0 kilograms or more of a mixture or substance containing a detectable amount of:

84 a. Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and
85 derivatives of ecgonine or their salts have been removed;

86 b. Cocaine, its salts, optical and geometric isomers, and salts of isomers;

87 c. Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

88 d. Any compound, mixture, or preparation which contains any quantity of any of the substances
89 referred to in subdivisions a through c;

90 3. 2.5 kilograms or more of a mixture or substance described in subdivision 2 which contains
91 cocaine base;

92 4. 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana; or

93 5. 100 grams or more of methamphetamine, its salts, isomers, or salts of its isomers or 200 grams or
94 more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers,
95 or salts of its isomers shall be guilty of a felony punishable by a fine of not more than \$1 million and
96 imprisonment for 20 years to life, 20 years of which shall be a mandatory minimum sentence. Such
97 mandatory minimum sentence shall not be applicable if the court finds that (i) the person does not have
98 a prior conviction for an offense listed in subsection C of § 17.1-805; (ii) the person did not use
99 violence or credible threats of violence or possess a firearm or other dangerous weapon in connection
100 with the offense or induce another participant in the offense to do so; (iii) the offense did not result in
101 death or serious bodily injury to any person; (iv) the person was not an organizer, leader, manager, or
102 supervisor of others in the offense, and was not engaged in a continuing criminal enterprise as defined
103 in subsection I of this section; and (v) not later than the time of the sentencing hearing, the person has
104 truthfully provided to the Commonwealth all information and evidence the person has concerning the
105 offense or offenses that were part of the same course of conduct or of a common scheme or plan, but
106 the fact that the person has no relevant or useful other information to provide or that the Commonwealth
107 already is aware of the information shall not preclude a determination by the court that the defendant
108 has complied with this requirement.

109 H1. Any person who was the principal or one of several principal administrators, organizers or
110 leaders of a continuing criminal enterprise shall be guilty of a felony if (i) the enterprise received at
111 least \$100,000 but less than \$250,000 in gross receipts during any 12-month period of its existence from
112 the manufacture, importation, or distribution of heroin or cocaine or ecgonine or methamphetamine or
113 the derivatives, salts, isomers, or salts of isomers thereof or marijuana or (ii) the person engaged in the
114 enterprise to manufacture, sell, give, distribute or possess with the intent to manufacture, sell, give or
115 distribute the following during any 12-month period of its existence:

116 1. At least 1.0 kilograms but less than 5.0 kilograms of a mixture or substance containing a
117 detectable amount of heroin;

118 2. At least 5.0 kilograms but less than 10 kilograms of a mixture or substance containing a detectable
119 amount of:

120 a. Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and
121 derivatives of ecgonine or their salts have been removed;

b. Cocaine, its salts, optical and geometric isomers, and salts of isomers;
 c. Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 d. Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subdivisions a through c;

3. At least 2.5 kilograms but less than 5.0 kilograms of a mixture or substance described in subdivision 2 which contains cocaine base;

4. At least 100 kilograms but less than 250 kilograms of a mixture or substance containing a detectable amount of marijuana; or

5. At least 100 grams but less than 250 grams of methamphetamine, its salts, isomers, or salts of its isomers or at least 200 grams but less than 1.0 kilograms of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

A conviction under this section shall be punishable by a fine of not more than \$1 million and imprisonment for 20 years to life, 20 years of which shall be a mandatory minimum sentence.

H2. Any person who was the principal or one of several principal administrators, organizers or leaders of a continuing criminal enterprise if (i) the enterprise received \$250,000 or more in gross receipts during any 12-month period of its existence from the manufacture, importation, or distribution of heroin or cocaine or ecgonine or methamphetamine or the derivatives, salts, isomers, or salts of isomers thereof or marijuana or (ii) the person engaged in the enterprise to manufacture, sell, give, distribute or possess with the intent to manufacture, sell, give or distribute the following during any 12-month period of its existence:

1. At least 5.0 kilograms of a mixture or substance containing a detectable amount of heroin;

2. At least 10 kilograms of a mixture or substance containing a detectable amount of:

a. Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

b. Cocaine, its salts, optical and geometric isomers, and salts of isomers;

c. Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

d. Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subdivisions a through c;

3. At least 5.0 kilograms of a mixture or substance described in subdivision 2 which contains cocaine base;

4. At least 250 kilograms of a mixture or substance containing a detectable amount of marijuana; or

5. At least 250 grams of methamphetamine, its salts, isomers, or salts of its isomers or at least 1.0 kilograms of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers shall be guilty of a felony punishable by a fine of not more than \$1 million and imprisonment for life, which shall be served with no suspension in whole or in part. Such punishment shall be made to run consecutively with any other sentence. However, the court may impose a mandatory minimum sentence of 40 years if the court finds that the defendant substantially cooperated with law-enforcement authorities.

I. For purposes of this section, a person is engaged in a continuing criminal enterprise if (i) he violates any provision of this section, the punishment for which is a felony and (ii) such violation is a part of a continuing series of violations of this section which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and from which such person obtains substantial income or resources.

2. That the Virginia Department of State Police, Department of Environmental Quality, Department of Health, and Division of Forensic Science, together, shall establish a multi-agency work group to create a best practices protocol for use by law-enforcement and emergency response agencies regarding the clean-up of abandoned and deactivated methamphetamine production sites. The work group shall consult with the Virginia Sheriff's Association, the Virginia Association of Chiefs of Police and the Virginia Fire Chiefs Association in the development of the best practices protocol. The best practices protocol shall be developed no later than September 1, 2005.

3. That the Division of Forensic Science, in consultation with the Division of Consolidated Laboratory Services, and consistent with current protocols, shall create a best practices protocol regarding the retention and handling of the by-products of methamphetamine production after testing is conducted on behalf of law-enforcement officials. The best practices protocol shall be implemented no later than September 1, 2005.

4. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.