INTRODUCED
REPRINT

075732105

HOUSE BILL NO. 2749

Offered January 10, 2007
Prefiled January 10, 2007

A BILL to amend and reenact §§ 9.1-902, 9.1-903, 9.1-904, 9.1-912, 18.2-374.1, 18.2-374.1:1, and 18.2-374.3 of the Code of Virginia and to repeal § 18.2-374.1:2 of the Code of Virginia, relating to child pornography and sex offender registration requirements; penalties.

Patrons—Hurt, Albo, Jones, S.C., Kilgore, Lohr, Miller, P.J., O'Bannon and Oder

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 9.1-902, 9.1-903, 9.1-904, 9.1-912, 18.2-374.1, 18.2-374.1:1, and 18.2-374.3 of the Code of Virginia are amended and reenacted as follows:

§ 9.1-902. Offenses requiring registration.

A. For purposes of this chapter:

"Offense for which registration is required" means:

1. A violation or attempted violation of § 18.2-63, 18.2-64.1, former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape, § 18.2-374.1 or ~~subsection D~~ *a second or subsequent violation* of § 18.2-374.1:1; or a third or subsequent conviction of (i) § 18.2-67.4, (ii) subsection C of § 18.2-67.5 or (iii) § 18.2-386.1;

If the offense was committed on or after July 1, 2006, (i) a violation or attempted violation of § 18.2-91 with the intent to commit any felony offense listed in this section; (ii) a violation or attempted violation of subsection A *or B* of § 18.2-374.1:1; or (iii) a felony violation under § 18.2-67.5:1.

2. ~~Clause (iv) of subsection B~~ *A violation of subsection C* of § 18.2-374.3 or where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, a violation or attempted violation of subsection A of § 18.2-47, clause (i) or (iii) of § 18.2-48, § 18.2-67.4, subsection C of § 18.2-67.5, § 18.2-361, or 18.2-366;

3. A violation of Chapter 117 (18 U.S.C. § 2421 et seq.) of Title 18 of the United States Code;

4. A "sexually violent offense";

5. "Murder"; or

6. Criminal homicide in conjunction with a violation of clause (i) of § 18.2-371 or § 18.2-371.1, when the offenses arise out of the same incident.

"Murder" means a violation of § 18.2-31 or 18.2-32 where the victim is (i) under 15 years of age or (ii) where the victim is at least 15 years of age but under 18 years of age and the murder is related to an offense listed in this section.

"Sexually violent offense" means a violation or attempted violation of:

1. Clause (ii) of § 18.2-48, § 18.2-61, 18.2-67.1, 18.2-67.2, 18.2-67.3, § 18.2-67.4 where the perpetrator is 18 years of age or older and the victim is under the age of six, subsections A and B of § 18.2-67.5, § 18.2-370, or 18.2-370.1;

2. Sections 18.2-63, 18.2-64.1, former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape or, where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, a violation or attempted violation of subsection A of § 18.2-47, § 18.2-67.4, subsection C of § 18.2-67.5, clause (i) or (iii) of § 18.2-48, § 18.2-361, 18.2-366, or 18.2-374.1. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications; or

3. If the offense was committed on or after July 1, 2006, a violation or attempted violation of § 18.2-91 with the intent to commit any felony offense listed in this section. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that the person had been at liberty between such convictions or adjudications.

B. "Offense for which registration is required" and "sexually violent offense" shall also include any similar offense under the laws of (i) any foreign country or any political subdivision thereof, (ii) the United States or any political subdivision thereof and any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.

C. Juveniles adjudicated delinquent shall not be required to register; however, where the offender is a juvenile over the age of 13 at the time of the offense who is tried as a juvenile and is adjudicated

INTRODUCED

HB2749

3/21/10 8:42

delinquent of any offense enumerated in subdivisions A 1 through A 4 on or after July 1, 2005, the court may, in its discretion and upon motion of the attorney for the Commonwealth, find that the circumstances of the offense require offender registration. In making its determination, the court shall consider all of the following factors that are relevant to the case: (i) the degree to which the delinquent act was committed with the use of force, threat or intimidation, (ii) the age and maturity of the complaining witness, (iii) the age and maturity of the offender, (iv) the difference in the ages of the complaining witness and the offender, (v) the nature of the relationship between the complaining witness and the offender, (vi) the offender's prior criminal history, and (vii) any other aggravating or mitigating factors relevant to the case.

§ 9.1-903. Registration procedures.

A. Every person convicted, including juveniles tried and convicted in the circuit courts pursuant to § 16.1-269.1, whether sentenced as an adult or juvenile, of an offense for which registration is required and every juvenile found delinquent of an offense for which registration is required under subsection C of § 9.1-902 shall be required upon conviction to register and reregister with the Department of State Police. The court shall order the person to provide to the local law-enforcement agency of the county or city where he physically resides all information required by the State Police for inclusion in the Registry. The court shall immediately remand the person to the custody of the local law-enforcement agency for the purpose of obtaining the person's fingerprints and photographs of a type and kind specified by the State Police for inclusion in the Registry. Upon conviction, the local law-enforcement agency shall forthwith forward to the State Police all the necessary registration information.

B. Every person required to register shall register in person within three days of his release from confinement in a state, local or juvenile correctional facility, in a state civil commitment program for sexually violent predators or, if a sentence of confinement is not imposed, within three days of suspension of the sentence or in the case of a juvenile of disposition. A person required to register shall register, submit to be photographed as part of the registration, and submit to have a sample of his blood, saliva, or tissue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person, *provide electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use,* and provide information regarding place of employment. The local law-enforcement agency shall obtain from the person who presents himself for registration or reregistration one set of fingerprints, *electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use,* place of employment information, proof of residency and a photograph of a type and kind specified by the State Police for inclusion in the Registry and advise the person of his duties regarding reregistration. The local law-enforcement agency shall obtain from the person who presents himself for registration a sample of his blood, saliva or tissue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. If a sample has been previously taken from the person, as indicated by the Local Inmate Data System (LIDS), no additional sample shall be taken. The local law-enforcement agency shall forthwith forward to the State Police all necessary registration information.

C. To establish proof of residence in Virginia, a person shall present one photo-identification form issued by a governmental agency of the Commonwealth which contains the person's complete name, gender, date of birth and complete physical address.

D. Any person required to register shall also reregister in person with the local law-enforcement agency following any change of residence, whether within or without the Commonwealth. If his new residence is within the Commonwealth, the person shall register in person with the local law-enforcement agency where his new residence is located within three days following his change in residence. If the new residence is located outside of the Commonwealth, the person shall register in person with the local law-enforcement agency where he previously registered within 10 days prior to his change of residence. If a probation or parole officer becomes aware of a change of residence for any of his probationers or parolees required to register, the probation or parole officer shall notify the State Police forthwith of learning of the change of residence. Whenever a person subject to registration changes residence to another state, the State Police shall notify the designated law-enforcement agency of that state.

E. Any person required to register shall reregister in person with the local law-enforcement agency where his residence is located within three days following any change of the place of employment, whether within or without the Commonwealth. If a probation or parole officer becomes aware of a change of the place of employment for any of his probationers or parolees required to register, the probation or parole officer shall notify the State Police forthwith upon learning of the change of the person's place of employment. Whenever a person subject to registration changes his place of employment to another state, the State Police shall notify the designated law-enforcement agency of that state.

F. Any person required to register shall reregister in person with the local law-enforcement agency

where his residence is located within three days following any change of the electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use, whether within or without the Commonwealth. If a probation or parole officer becomes aware of a change of the electronic mail address information, any instant message, chat or other Internet communication name or identity information for any of his probationers or parolees required to register, the probation or parole officer shall notify the State Police forthwith upon learning of the change.

~~F~~*G*. The registration shall be maintained in the Registry and shall include the person's name, all aliases that he has used or under which he may have been known, the date and locality of the conviction for which registration is required, his fingerprints and a photograph of a type and kind specified by the State Police, his date of birth, social security number, current physical and mailing address and a description of the offense or offenses for which he was convicted. The registration shall also include the locality of the conviction and a description of the offense or offenses for previous convictions for the offenses set forth in § 9.1-902.

~~G~~*H*. The local law-enforcement agency shall forthwith forward to the State Police all necessary registration or reregistration information received by it. Upon receipt of registration or reregistration information the State Police shall forthwith notify the chief law-enforcement officer of the locality listed as the person's address on the registration and reregistration.

§ 9.1-904. Reregistration.

A. Every person required to register, other than a person convicted of a sexually violent offense or murder, shall reregister with the State Police on an annual basis from the date of the initial registration. Every person convicted of a sexually violent offense or murder shall reregister with the State Police every 90 days from the date of initial registration. Reregistration means that the person has notified the State Police, confirmed his current physical and mailing address *and electronic mail address information, any instant message, chat or other Internet communication name or identity information that he uses or intends to use,* and provided such other information, including identifying information, which the State Police may require. Upon registration and as may be necessary thereafter, the State Police shall provide the person with an address verification form to be used for reregistration. The form shall contain in bold print a statement indicating that failure to comply with the registration required is punishable as provided in § 18.2-472.1.

B. Any person convicted of a violation of § 18.2-472.1, other than a person convicted of a sexually violent offense or murder, shall reregister with the State Police every 180 days from the date of such conviction. Any person convicted of a violation of § 18.2-472.1, in which such person was included on the Registry for a conviction of a sexually violent offense or murder, shall reregister with the State Police every 30 days from the date of conviction. Reregistration means the person has notified the State Police, confirmed his current physical and mailing address *and electronic mail address information, any instant message, chat or other Internet communication name or identity information that he uses or intends to use,* and provided such other information, including identifying information, which the State Police may require. Upon registration and as may be necessary thereafter, the State Police shall provide the person with an address verification form to be used for reregistration. The form shall state the registration requirements and contain in bold print a statement indicating that failure to comply with the registration requirements is punishable as provided in § 18.2-472.1.

C. Every person required to register pursuant to this chapter shall submit to be photographed by a local law-enforcement agency every two years commencing with the date of initial registration. Photographs shall be in color, be taken with the registrant facing the camera, and clearly show the registrant's face and shoulders only. No person other than the registrant may appear in the photograph submitted. The photograph shall indicate the registrant's full name, date of birth and the date the photograph was taken. The local law-enforcement agency shall forthwith forward the photograph and the registration form to the State Police. Where practical, the local law-enforcement agency may electronically transfer a digital photograph containing the required information to the Sex Offender and Crimes Against Minors Registry within the State Police.

§ 9.1-912. Registry access and dissemination; fees.

A. Except as provided in § 9.1-913 and subsection B *or C* of this section, Registry information shall be disseminated upon request made directly to the State Police or to the State Police through a local law-enforcement agency. Such information may be disclosed to any person requesting information on a specific individual in accordance with subsection B. The State Police shall make Registry information available, upon request, to criminal justice agencies including local law-enforcement agencies through the Virginia Criminal Information Network (VCIN). Registry information provided under this section shall be used for the purposes of the administration of criminal justice, for the screening of current or prospective employees or volunteers or otherwise for the protection of the public in general and children in particular. The Superintendent of State Police may by regulation establish a fee not to exceed $15 for

responding to requests for information from the Registry. Any fees collected shall be deposited in a special account to be used to offset the costs of administering the Registry.

B. Information regarding a specific person shall be disseminated upon receipt of an official request form that may be submitted directly to the State Police or to the State Police through a local law-enforcement agency. The official request form shall include a statement of the reason for the request; the name and address of the person requesting the information; the name, address and, if known, the social security number of the person about whom information is sought; and such other information as the State Police may require to ensure reliable identification.

C. Registry information regarding a registered offender's electronic mail address information, any instant message, chat or other Internet communication name or identity information that may be electronically transmitted by the Department of State Police, in a format approved by the State Police, to any registered entity for comparison with information contained in the registered entity's information files. The registered entity shall notify the State Police forthwith when a comparison indicates that a registered sex offender has electronic mail address information, any instant message, chat or other Internet communication name or identity information contained in their files. Whenever it appears from the records of the State Police that a person has failed to comply with the duty to register or reregister pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, the State Police shall promptly investigate and, if there is probable cause to believe a violation has occurred, obtain a warrant or assist in obtaining an indictment charging a violation of § 18.2-472.1 in the jurisdiction in which the person resides.

The Superintendent of the State Police shall promulgate regulations, pursuant to the Administrative Process Act (§ 2.2-4000 et seq.), for the registration of entities and the implementation of a program to disseminate electronic mail address information, any instant message, chat or other Internet communication name or identity information to registered entities pursuant to this section.

D. For purposes of this section:

"Entity" means a business that provides Internet service, electronic communications service, remote computing service, online service, electronic mail service or electronic instant message or chat services whether such business is within or without the Commonwealth.

§ 18.2-374.1. Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability.

A. *For purposes of this article, "child pornography" means sexually explicit visual material which utilizes or has as a subject a person less than 18 years of age.*

For the purposes of this article and Article 4 (§ 18.2-362 et seq.) of this chapter, the term "sexually explicit visual material" means a picture, photograph, drawing, sculpture, motion picture film, digital image, *including such material stored in a computer's temporary Internet cache or other volatile memory,* or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.

B. ~~A person shall be guilty of a Class 5 felony~~ *Any person* who:

1. Accosts, entices or solicits a person less than eighteen years of age with intent to induce or force such person to perform in or be a subject of ~~sexually explicit visual material~~ *child pornography*; or

2. Produces or makes or attempts or prepares to produce or make ~~sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age~~ *child pornography*; or

3. Who knowingly takes part in or participates in the filming, photographing, or other ~~reproduction~~ *production* of ~~sexually explicit visual material~~ *child pornography* by any means, including but not limited to computer-generated ~~reproduction, which utilizes or has as a subject a person less than eighteen years of age~~ *child pornography*; or

4. ~~Sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit or display with lascivious intent sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age.~~ *Knowingly finances or attempts or prepares to finance child pornography shall be punished as provided in subsections C1 and C2.*

5. [Repealed.]

B1. [Repealed.]

C*1*. ~~A person shall be guilty of a Class 4 felony who knowingly finances or attempts or prepares to finance sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age.~~ *Any person who violates this section, and the subject of the child pornography is a person less than 15 years of age, shall be punished by not less than five years nor more than 30 years in a state correctional facility. However, if the offender is at least five years older than the subject of the child pornography the offender shall be punished by a mandatory minimum term of imprisonment of not less than 15 years nor more than 30 years in a state correctional facility. Any offender who commits a*

second or subsequent violation of this section where the offender is at least five years older than the subject shall be punished by a mandatory minimum term of imprisonment of not less than 25 years nor more than 40 years.

C2. Whoever violates this section, and the subject of the child pornography is a person at least 15 but less than 18 years of age, shall be punished by not less than one year nor more than 20 years in a state correctional facility. However, if the offender is at least five years older than the subject of the child pornography the offender shall be punished by a mandatory minimum term of imprisonment of not less than five years nor more than 30 years in a state correctional facility. Any offender who commits a second or subsequent violation of this section where the offender is at least five years older than the subject shall be punished by a mandatory minimum term of imprisonment of not less than 15 years nor more than 30 years.

D. For the purposes of this section a person who is depicted as or presents the appearance of being less than eighteen years of age in sexually explicit visual material is prima facie presumed to be less than eighteen years of age.

E. The provisions of this section shall be severable and, if any of its provisions shall be held unconstitutional by a court of competent jurisdiction, then the decision of such court shall not affect or impair any of the remaining provisions.

§ 18.2-374.1:1. Possession, reproduction, distribution, and facilitation of child pornography; penalty.

A. Any person who knowingly possesses ~~any sexually explicit visual material utilizing or having as a subject a person less than 18 years of age~~ *child pornography* shall be guilty of a Class 6 felony. *Any person who commits a second or subsequent violation under this subsection shall be guilty of a Class 5 felony.* ~~However, no prosecution for possession of material prohibited by this section shall lie where the prohibited material comes into the possession of the person charged from a law-enforcement officer or law-enforcement agency.~~

B. ~~The provisions of this section shall not apply to any such material which is possessed for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial or other proper purpose by a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, attorney, judge, or other person having a proper interest in the material.~~ *Any person who reproduces, sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possess with intent to sell, give away, distribute, transmit, or display with lascivious intent child pornography shall be punished by not less than five years nor more than 20 years in a state correctional facility. Any person who commits a second or subsequent violation under this subsection shall be punished by a mandatory minimum term of not less than five years nor more than 20 years in a state correctional facility.*

C. Any person who intentionally operates an Internet website for the purpose of facilitating the payment for access to child pornography is guilty of a Class 4 felony.

~~C.~~*D.* All ~~sexually explicit visual material which utilizes or has as a subject a person less than 18 years of age~~ *child pornography* shall be subject to lawful seizure and forfeiture pursuant to § 19.2-386.31.

~~D.~~*E.* ~~Any person convicted of a second or subsequent offense under this section shall be guilty of a Class 5 felony.~~*For purposes of this section a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is prima facie presumed to be less than 18 years of age.*

§ 18.2-374.3. Use of communications systems to facilitate certain offenses involving children.

A. As used in this section, "use a communications system" means making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, the Internet, or any telecommunications, wire, computer network, or radio communications system.

~~A.~~*B.* It shall be unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 or § 18.2-374.1. A violation of this subsection is a Class 6 felony.

~~B.~~*C.* ~~It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child less than 18 years of age for (i) any activity in violation of § 18.2-355 or § 18.2-361, (ii) any activity in violation of § 18.2-374.1, (iii) a violation of § 18.2-374.1:1, or (iv) any activity in violation of subsection A of § 18.2-370. As used in this subsection, "use a communications system" means making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications system. A violation of this subsection is a~~

INTRODUCED

~~Class 5 felony.~~*It shall be unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally:*

1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;

2. Propose that any such child feel or fondle the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;

3. Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361; or

4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.

Whoever violates this subsection shall be guilty of a Class 5 felony. However, if the offender is at least five years older than the person he knows or has reason to believe is less than 15 years of age, the offender shall be punished by a mandatory minimum term of imprisonment of not less than five years nor more than 30 years in a state correctional facility. Any offender who commits a second or subsequent violation of this subsection where the offender is at least five years older than the person he knows or has reason to believe is less than 15 years of age shall be punished by a mandatory minimum term of imprisonment of not less than 15 years nor more than 40 years.

D. It shall be unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child at least 15 but less than 18 years of age to knowingly and intentionally commit any of the activities listed in subsection C if the offender is at least five years older than the child. A violation of this subsection is a Class 5 felony. Any offender who commits a second or subsequent violation of this subsection shall be punished by a mandatory minimum term of imprisonment of not less than one nor more than 20 years.

E. It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child less than 18 years of age for (i) any activity in violation of § 18.2-355 or 18.2-361, (ii) any activity in violation of § 18.2-374.1, or (iii) a violation of § 18.2-374.1:1.

Whoever violates this subsection shall be punished by a term of imprisonment of not less than five years nor more than 30 years in a state correctional facility. Any offender who commits a second or subsequent violation of this subsection shall be punished by a mandatory minimum term of imprisonment of not less than five years nor more than 30 years.

2. That § 18.2-374.1:2 of the Code of Virginia is repealed.

3. 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 is at least $1,322,375 for periods of imprisonment in state adult correctional facilities and is $0 for periods of commitment to the custody of the Department of Juvenile Justice.