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SENATE BILL NO. 1071

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on January 24, 2007)

(Patron Prior to Substitute—Senator McDougle)

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.

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~~ Subsection B 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 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

60 consider all of the following factors that are relevant to the case: (i) the degree to which the delinquent
61 act was committed with the use of force, threat or intimidation, (ii) the age and maturity of the
62 complaining witness, (iii) the age and maturity of the offender, (iv) the difference in the ages of the
63 complaining witness and the offender, (v) the nature of the relationship between the complaining witness
64 and the offender, (vi) the offender's prior criminal history, and (vii) any other aggravating or mitigating
65 factors relevant to the case.

66 § 9.1-903. Registration procedures.

67 A. Every person convicted, including juveniles tried and convicted in the circuit courts pursuant to
68 § 16.1-269.1, whether sentenced as an adult or juvenile, of an offense for which registration is required
69 and every juvenile found delinquent of an offense for which registration is required under subsection C
70 of § 9.1-902 shall be required upon conviction to register and reregister with the Department of State
71 Police. The court shall order the person to provide to the local law-enforcement agency of the county or
72 city where he physically resides all information required by the State Police for inclusion in the
73 Registry. The court shall immediately remand the person to the custody of the local law-enforcement
74 agency for the purpose of obtaining the person's fingerprints and photographs of a type and kind
75 specified by the State Police for inclusion in the Registry. Upon conviction, the local law-enforcement
76 agency shall forthwith forward to the State Police all the necessary registration information.

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

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

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

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

118 F. Any person required to register shall reregister in person with the local law-enforcement agency
119 where his residence is located within three days following any change of the *electronic mail address*
120 *information, any instant message, chat or other Internet communication name or identity information*
121 *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.

FG. 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.

GH. 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

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

188 *C. Registry information regarding all registered offenders' electronic mail address information, any*
189 *instant message, chat or other Internet communication name or identity information may be*
190 *electronically transmitted by the Department of State Police to a business or organization that offers*
191 *electronic communication services for the purpose of a comparison with information held by the*
192 *requesting business or organization. In order to obtain the information from the Department of State*
193 *Police, the requesting business or organization that offers electronic communication services shall agree*
194 *to notify the Department of State Police forthwith when a comparison indicates that any such registered*
195 *sex offender's electronic mail address information, any instant message, chat or other Internet*
196 *communication name or identity information is being used on their system. The requesting business or*
197 *organization shall also agree that the information will not be further disseminated.*

198 § 18.2-374.1. Production, publication, sale, financing, etc., of child pornography; presumption as to
199 age; severability.

200 *A. For purposes of this article and Article 4 (§ 18.2-362 et seq.) of this chapter, "child*
201 *pornography" means sexually explicit visual material which utilizes or has as a subject an identifiable*
202 *minor. An identifiable minor is a person who was a minor at the time the visual depiction was created,*
203 *adapted, or modified; or whose image as a minor was used in creating, adapting or modifying the*
204 *visual depiction; and who is recognizable as an actual person by the person's face, likeness, or other*
205 *distinguishing characteristic, such as a unique birthmark or other recognizable feature; and shall not be*
206 *construed to require proof of the actual identity of the identifiable minor.*

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

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

217 1. Accosts, entices or solicits a person less than ~~eighteen~~ 18 years of age with intent to induce or
218 force such person to perform in or be a subject of ~~sexually explicit visual material child pornography;~~
219 or

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

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

226 4. Sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or
227 possesses with intent to sell, give away, distribute, transmit or display with lascivious intent sexually
228 explicit visual material which utilizes or has as a subject a person less than eighteen years of age.

229 *shall be punished as provided in subsections C1 and C2.*

230 5. [Repealed.]

231 B1. [Repealed.]

232 *C1. A person shall be guilty of a Class 4 felony who knowingly finances or attempts or prepares to*
233 *finance sexually explicit visual material which utilizes or has as a subject a person less than eighteen*
234 *years of age. Any person who violates subsection B, and the subject of the child pornography is a*
235 *person less than 15 years of age is guilty of a Class 4 felony. However, if the offender is at least five*
236 *years older than the subject of the child pornography the offender shall be punished by a mandatory*
237 *minimum term of imprisonment of five years.*

238 *C2. Any person who violates subsection B, and the subject of the child pornography is a person at*
239 *least 15 but less than 18 years of age is guilty of a Class 5 felony. However, if the offender is at least*
240 *five years older than the subject of the child pornography the offender shall be punished by a*
241 *mandatory minimum term of imprisonment of not less than five years.*

242 *D. Any person who knowingly finances or attempts or prepares to finance child pornography is*
243 *guilty of a Class 4 felony.*

244 *E. For the purposes of this section a person who is depicted as or presents the appearance of being*

less than ~~eighteen~~ 18 years of age in sexually explicit visual material is prima facie presumed to be less than ~~eighteen~~ 18 years of age.

E. F. 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 ~~is~~ guilty of a Class 6 felony. Any ~~person who commits a second or subsequent violation under this subsection is 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, or judge, or other person having a proper interest in the material who possesses such material in the course of the conduct of his professional duties as such.

Any person who reproduces by any means including by computer, 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, child pornography is guilty of a Class 5 felony, five years of which shall be a mandatory minimum term of imprisonment.

C. Any person who intentionally operates an Internet website for the purpose of, and with the specific intent 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 it may be inferred by but not limited to text, title, or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.~~

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

A. 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. 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 Class 5 felony. ~~It shall be unlawful for any person 18 years of age or older to use a communications system for the purposes of soliciting, with lascivious intent, 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 five years.

C. It shall be unlawful for any person to use a communications system, for the purposes of soliciting, with lascivious intent, 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 B if the

306 offender is at least five years older than the child. A violation of this subsection is a Class 6 felony.

307 D. It shall be unlawful for any person 18 years of age or older to use a communications system,
308 including but not limited to computers or computer networks or bulletin boards, or any other electronic
309 means, for the purposes of soliciting any person he knows or has reason to believe is a child less than
310 18 years of age for (i) any activity in violation of § 18.2-355 or 18.2-361, (ii) any activity in violation of
311 § 18.2-374.1, or (iii) a violation of § 18.2-374.1:1.

312 Any person who violates this subsection is guilty of a Class 5 felony, five years of which shall be a
313 mandatory minimum term of confinement.

314 E. As used in subsections B, C and D "use a communications system" means making personal
315 contact or direct contact through any agent or agency, any print medium, the United States mail, any
316 common carrier or communication common carrier, any electronic communications system, the Internet,
317 or any telecommunications, wire, computer network, or radio communications system.

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

319 3. That the provisions of this act may result in a net increase in periods of imprisonment or
320 commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at
321 least \$1,194,404 for periods of imprisonment in state adult correctional facilities and is \$0 for
322 periods of commitment to the custody of the Department of Juvenile Justice.