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SENATE BILL NO. 159

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance
on February 7, 2012)

(Patron Prior to Substitute—Senator Obenshain)

A *BILL to amend and reenact § 18.2-248 of the Code of Virginia, relating to penalty for repeat drug trafficking offenses.*

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-248 of the Code of Virginia is amended and reenacted 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. 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 conviction of such a violation, and it is alleged in the warrant, indictment, or information that the person has been before convicted of such an offense or of a substantially similar offense in any other jurisdiction, which offense would be a felony if committed in the Commonwealth, and such prior conviction occurred before the date of the offense alleged in the warrant, indictment, or information, 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, *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.

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~~ 10 years, ~~five~~ 10 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.

Any person who manufactures, sells, gives, distributes or possesses with the intent to manufacture, sell, give, or distribute the following is guilty of a felony punishable by a fine of not more than \$1 million and imprisonment for five years to life, five years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence:

1. 100 grams or more of a mixture or substance containing a detectable amount of heroin;
2. 500 grams or more 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 that contains any quantity of any of the substances referred to in subdivisions 2a through 2c;
3. 250 grams or more of a mixture or substance described in subdivisions 2a through 2d that contain cocaine base; or
4. 10 grams or more of methamphetamine, its salts, isomers, or salts of its isomers or 20 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

The mandatory minimum term of imprisonment to be imposed for a violation of this subsection shall

60 not be applicable if the court finds that:

- 61 a. The person does not have a prior conviction for an offense listed in subsection C of § 17.1-805;
- 62 b. The person did not use violence or credible threats of violence or possess a firearm or other
63 dangerous weapon in connection with the offense or induce another participant in the offense to do so;
- 64 c. The offense did not result in death or serious bodily injury to any person;
- 65 d. The person was not an organizer, leader, manager, or supervisor of others in the offense, and was
66 not engaged in a continuing criminal enterprise as defined in subsection I; and
- 67 e. Not later than the time of the sentencing hearing, the person has truthfully provided to the
68 Commonwealth all information and evidence the person has concerning the offense or offenses that were
69 part of the same course of conduct or of a common scheme or plan, but the fact that the person has no
70 relevant or useful other information to provide or that the Commonwealth already is aware of the
71 information shall not preclude a determination by the court that the defendant has complied with this
72 requirement.

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

92 D. If such person proves that he gave, distributed or possessed with intent to give or distribute a
93 controlled substance classified in Schedule I or II only as an accommodation to another individual who
94 is not an inmate in a community correctional facility, local correctional facility or state correctional
95 facility as defined in § 53.1-1 or in the custody of an employee thereof, and not with intent to profit
96 thereby from any consideration received or expected nor to induce the recipient or intended recipient of
97 the controlled substance to use or become addicted to or dependent upon such controlled substance, he
98 shall be guilty of a Class 5 felony.

99 E. If the violation of the provisions of this article consists of the filling by a pharmacist of the
100 prescription of a person authorized under this article to issue the same, which prescription has not been
101 received in writing by the pharmacist prior to the filling thereof, and such written prescription is in fact
102 received by the pharmacist within one week of the time of filling the same, or if such violation consists
103 of a request by such authorized person for the filling by a pharmacist of a prescription which has not
104 been received in writing by the pharmacist and such prescription is, in fact, written at the time of such
105 request and delivered to the pharmacist within one week thereof, either such offense shall constitute a
106 Class 4 misdemeanor.

107 E1. Any person who violates this section with respect to a controlled substance classified in Schedule
108 III except for an anabolic steroid classified in Schedule III, constituting a violation of § 18.2-248.5, shall
109 be guilty of a Class 5 felony.

110 E2. Any person who violates this section with respect to a controlled substance classified in Schedule
111 IV shall be guilty of a Class 6 felony.

112 E3. Any person who proves that he gave, distributed or possessed with the intent to give or distribute
113 a controlled substance classified in Schedule III or IV, except for an anabolic steroid classified in
114 Schedule III, constituting a violation of § 18.2-248.5, only as an accommodation to another individual
115 who is not an inmate in a community correctional facility, local correctional facility or state correctional
116 facility as defined in § 53.1-1 or in the custody of an employee thereof, and not with the intent to profit
117 thereby from any consideration received or expected nor to induce the recipient or intended recipient of
118 the controlled substance to use or become addicted to or dependent upon such controlled substance, is
119 guilty of a Class 1 misdemeanor.

120 F. Any person who violates this section with respect to a controlled substance classified in Schedule
121 V or Schedule VI or an imitation controlled substance which imitates a controlled substance classified in

Schedule V or Schedule VI, shall be guilty of a Class 1 misdemeanor.

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

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

1. 1.0 kilograms or more of a mixture or substance containing a detectable amount of heroin;
2. 5.0 kilograms or more 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. 2.5 kilograms or more of a mixture or substance described in subdivision 2 which contains cocaine base;
4. 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana; or
5. 100 grams or more of methamphetamine, its salts, isomers, or salts of its isomers or 200 grams or more 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 20 years to life, 20 years of which shall be a mandatory minimum sentence. Such mandatory minimum sentence shall not be applicable if the court finds that (i) the person does not have a prior conviction for an offense listed in subsection C of § 17.1-805; (ii) the person did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense or induce another participant in the offense to do so; (iii) the offense did not result in death or serious bodily injury to any person; (iv) the person was not an organizer, leader, manager, or supervisor of others in the offense, and was not engaged in a continuing criminal enterprise as defined in subsection I of this section; and (v) not later than the time of the sentencing hearing, the person has truthfully provided to the Commonwealth all information and evidence the person has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the person has no relevant or useful other information to provide or that the Commonwealth already is aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

H1. Any person who was the principal or one of several principal administrators, organizers or leaders of a continuing criminal enterprise shall be guilty of a felony if (i) the enterprise received at least \$100,000 but less than \$250,000 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 1.0 kilograms but less than 5.0 kilograms of a mixture or substance containing a detectable amount of heroin;
2. At least 5.0 kilograms but less than 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 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

183 leaders of a continuing criminal enterprise if (i) the enterprise received \$250,000 or more in gross
184 receipts during any 12-month period of its existence from the manufacture, importation, or distribution
185 of heroin or cocaine or ecgonine or methamphetamine or the derivatives, salts, isomers, or salts of
186 isomers thereof or marijuana or (ii) the person engaged in the enterprise to manufacture, sell, give,
187 distribute or possess with the intent to manufacture, sell, give or distribute the following during any
188 12-month period of its existence:

- 189 1. At least 5.0 kilograms of a mixture or substance containing a detectable amount of heroin;
- 190 2. At least 10 kilograms of a mixture or substance containing a detectable amount of:
 - 191 a. Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and
192 derivatives of ecgonine or their salts have been removed;
 - 193 b. Cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - 194 c. Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 - 195 d. Any compound, mixture, or preparation which contains any quantity of any of the substances
196 referred to in subdivisions a through c;
- 197 3. At least 5.0 kilograms of a mixture or substance described in subdivision 2 which contains cocaine
198 base;
- 199 4. At least 250 kilograms of a mixture or substance containing a detectable amount of marijuana; or
- 200 5. At least 250 grams of methamphetamine, its salts, isomers, or salts of its isomers or at least 1.0
201 kilograms of a mixture or substance containing a detectable amount of methamphetamine, its salts,
202 isomers, or salts of its isomers shall be guilty of a felony punishable by a fine of not more than \$1
203 million and imprisonment for life, which shall be served with no suspension in whole or in part. Such
204 punishment shall be made to run consecutively with any other sentence. However, the court may impose
205 a mandatory minimum sentence of 40 years if the court finds that the defendant substantially cooperated
206 with law-enforcement authorities.

207 I. For purposes of this section, a person is engaged in a continuing criminal enterprise if (i) he
208 violates any provision of this section, the punishment for which is a felony and either (ii) such violation
209 is a part of a continuing series of violations of this section which are undertaken by such person in
210 concert with five or more other persons with respect to whom such person occupies a position of
211 organizer, a supervisory position, or any other position of management, and from which such person
212 obtains substantial income or resources or (iii) such violation is committed, with respect to
213 methamphetamine or other controlled substance classified in Schedule I or II, for the benefit of, at the
214 direction of, or in association with any criminal street gang as defined in § 18.2-46.1.

215 J. Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), any person who possesses any
216 two or more different substances listed below with the intent to manufacture methamphetamine,
217 methcathinone or amphetamine is guilty of a Class 6 felony: liquified ammonia gas, ether,
218 hypophosphorus acid solutions, hypophosphite salts, hydrochloric acid, iodine crystals or tincture of
219 iodine, phenylacetone, phenylacetic acid, red phosphorus, methylamine, methyl formamide, lithium
220 metal, sodium metal, sulfuric acid, sodium hydroxide, potassium dichromate, sodium dichromate,
221 potassium permanganate, chromium trioxide, methylbenzene, methamphetamine precursor drugs,
222 trichloroethane, or 2-propanone.

223 K. The term "methamphetamine precursor drug," when used in this article, means a drug or product
224 containing ephedrine, pseudoephedrine, or phenylpropanolamine or any of their salts, optical isomers, or
225 salts of optical isomers.

226 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
227 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is**
228 **\$5,512,531 for periods of imprisonment in state adult correctional facilities and is \$0 for periods of**
229 **commitment to the custody of the Department of Juvenile Justice.**