

12105658D

SENATE BILL NO. 436

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 27, 2012)

(Patron Prior to Substitute—Senator Obenshain)

A BILL to amend and reenact §§ 18.2-61, 18.2-67.1, 18.2-67.2, and 18.2-67.5:3 of the Code of Virginia, relating to penalties for certain sex crimes.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-61, 18.2-67.1, 18.2-67.2, and 18.2-67.5:3 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-61. Rape.

A. If any person has sexual intercourse with a complaining witness, whether or not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person; or (ii) through the use of the complaining witness's mental incapacity or physical helplessness; or (iii) with a child under age 13 as the victim, he or she shall be guilty of rape.

B. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in a state correctional facility for life or for any term not less than five years; ~~the penalty for. For a violation of subdivision clause (iii) of subsection A (iii), where it is alleged in the indictment that the offender is was 18 years of age or older at the time of the offense, the punishment shall include a mandatory minimum term of confinement for life. For an offender who was convicted of a violation of clause (iii) of subsection A, where it is alleged in the indictment that the offender was younger than 18 years of age at the time of the offense and more than three years older than the victim, if done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 or § 18.2-48, (ii) § 18.2-89, 18.2-90 or 18.2-91, or (iii) § 18.2-51.2, the penalty shall include a mandatory minimum term of confinement of 25 years. If the term of confinement imposed for any violation of subdivision A (iii), where the offender is more than three years older than the victim, is for a term less than life imprisonment, and the judge shall impose, in addition to any the active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court.~~

There shall be a rebuttable presumption that a juvenile over the age of 10 but less than 12, does not possess the physical capacity to commit a violation of this section. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation under this section against a spouse may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant who has not previously had a proceeding against him for violation of this section dismissed pursuant to this subsection and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

§ 18.2-67.1. Forcible sodomy.

A. An accused shall be guilty of forcible sodomy if he or she engages in cunnilingus, fellatio, anilingus, or anal intercourse with a complaining witness whether or not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person, and

1. The complaining witness is less than 13 years of age; or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. Forcible sodomy is a felony punishable by confinement in a state correctional facility for life or for any term not less than five years. The penalty for a violation of subdivision A 1, *where it is alleged in the indictment that the offender is was 18 years of age or older at the time of the offense, shall include a mandatory minimum term of confinement for life. The penalty for an offender who was convicted of a violation of subdivision A 1, where it is alleged in the indictment that the offender was younger than 18 years of age at the time of the offense and more than three years older than the victim, if done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 or 18.2-48, (ii) § 18.2-89, 18.2-90 or 18.2-91, or (iii) § 18.2-51.2, shall include a mandatory minimum term of confinement of 25 years. If the term of confinement imposed for any violation of subdivision A 1, where the offender is more than three years older than the victim, is for a term less than life imprisonment, and the judge shall impose, in addition to any the active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court.*

In any case deemed appropriate by the court, all or part of any sentence imposed for a violation under this section against a spouse may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant who has not previously had a proceeding against him for violation of this section dismissed pursuant to this subsection and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

§ 18.2-67.2. Object sexual penetration; penalty.

A. An accused shall be guilty of inanimate or animate object sexual penetration if he or she penetrates the labia majora or anus of a complaining witness, whether or not his or her spouse, other than for a bona fide medical purpose, or causes such complaining witness to so penetrate his or her own body with an object or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person or to penetrate, or to be penetrated by, an animal, and

1. The complaining witness is less than 13 years of age; or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. Inanimate or animate object sexual penetration is a felony punishable by confinement in the state correctional facility for life or for any term not less than five years. The penalty for a violation of subdivision A 1, *where it is alleged in the indictment that the offender is was 18 years of age or older at the time of the offense, shall include a mandatory minimum term of confinement for life. The penalty for an offender who was convicted of a violation of subdivision A 1, where it is alleged in the indictment that the offender was younger than 18 years of age at the time of the offense and more than three years older than the victim, if done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 or 18.2-48, (ii) § 18.2-89, 18.2-90 or 18.2-91, or (iii) § 18.2-51.2, shall include a mandatory minimum term of confinement of 25 years. If the term of confinement imposed for any violation of subdivision A 1, where the offender is more than three years older than the victim, is for a term less than life imprisonment, and the judge shall impose, in addition to any the active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court.*

In any case deemed appropriate by the court, all or part of any sentence imposed for a violation under this section against a spouse may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case

122 tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the
 123 defendant who has not previously had a proceeding against him for violation of this section dismissed
 124 pursuant to this subsection and with the consent of the complaining witness and the attorney for the
 125 Commonwealth, may defer further proceedings and place the defendant on probation pending completion
 126 of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the
 127 defendant fails to so complete such counseling or therapy, the court may make final disposition of the
 128 case and proceed as otherwise provided. If such counseling is completed as prescribed under
 129 § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after
 130 consideration of the views of the complaining witness and such other evidence as may be relevant, the
 131 court finds such action will promote maintenance of the family unit and be in the best interest of the
 132 complaining witness.

133 § 18.2-67.5:3. Punishment upon conviction of certain subsequent violent felony sexual assault.

134 A. Any person convicted of ~~more than one~~ *an* offense specified in subsection ~~B~~ *B1*, and convicted of
 135 *an offense in subsection B*, when such offenses were not part of a common act, transaction, or scheme,
 136 and who has been at liberty as defined in § 53.1-151 between each conviction, shall, upon conviction of
 137 ~~the second or subsequent such~~ *the offense listed in subsection B1*, be sentenced to life imprisonment and
 138 shall not have all or any portion of the sentence suspended, provided it is admitted, or found by the jury
 139 or judge before whom he is tried, that he has been previously convicted of at least one of the ~~specified~~
 140 *offenses listed in subsection B*.

141 B. The ~~provisions of offenses included in this subsection A shall apply to convictions for~~ *are as*
 142 *follows*:

- 143 1. Rape in violation of § 18.2-61;
- 144 2. Forcible sodomy in violation of § 18.2-67.1;
- 145 3. Object sexual penetration in violation of § 18.2-67.2;
- 146 4. Abduction with intent to defile in violation of § 18.2-48; or
- 147 5. Conspiracy to commit any offense listed in subdivisions 1 through 4 pursuant to § 18.2-22.

148 *B1. The offenses included in this subsection are as follows:*

- 149 1. *Rape in violation of clause (i) or (ii) of subsection A of § 18.2-61;*
- 150 2. *Forcible sodomy in violation of subdivision A 2 of § 18.2-67.1;*
- 151 3. *Object sexual penetration in violation of subdivision A 2 of § 18.2-67.2;*
- 152 4. *Abduction with intent to defile in violation of § 18.2-48; or*
- 153 5. *Conspiracy to commit any offense listed in subdivisions B 1 through 4 pursuant to § 18.2-22.*

154 C. For purposes of this section, ~~prior~~ convictions *listed in subsection B* shall include (i) adult
 155 convictions for felonies under the laws of any state or the United States that are substantially similar to
 156 those listed in subsection B and (ii) findings of not innocent, adjudications or convictions in the case of
 157 a juvenile if the juvenile offense is substantially similar to those listed in subsection B, the offense
 158 would be a felony if committed by an adult in the Commonwealth and the offense was committed less
 159 than ~~twenty~~ 20 years before the second offense.

160 The Commonwealth shall notify the defendant in the indictment, information, or warrant, at least
 161 ~~thirty~~ 30 days prior to trial, of its intention to seek punishment pursuant to this section.

162 2. **That the provisions of this act may result in a net increase in periods of imprisonment or**
 163 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**
 164 **be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter**
 165 **890 of the Acts of Assembly of 2011 requires the Virginia Criminal Sentencing Commission to**
 166 **assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated amount of the**
 167 **necessary appropriation is \$0 for periods of commitment to the custody of the Department of**
 168 **Juvenile Justice.**