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HOUSE BILL NO. 2140

Offered January 14, 2015

Prefiled January 14, 2015

A BILL to amend and reenact §§ 18.2-46.3:1, 18.2-248, and 18.2-308.4 of the Code of Virginia, relating to enhanced penalties for gang and drug crimes.

Patron—Yancey

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-46.3:1, 18.2-248, and 18.2-308.4 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-46.3:1. Second or subsequent conviction of criminal street gang crimes.

Upon a felony conviction of § 18.2-46.2 or § 18.2-46.3, where it is alleged in the warrant, information or indictment on which a person is convicted that (i) such person has been previously convicted ~~twice~~ under ~~any combination~~ of § 18.2-46.2 or § 18.2-46.3; within 10 years of the ~~third~~ *second* or subsequent offense; and (ii) each such offense occurred on different dates, such person is guilty of a Class 3 felony.

§ 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; *however, if death or serious bodily injury resulted from the use of such substance, such person shall be imprisoned for not less than 20 nor more than 40 years.* 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; *however, if either the instant violation or the prior violation resulted in death or serious bodily injury from the use of such substance, such person shall be sentenced to imprisonment for life or for any period not less than 20 years, 10 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence.*

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 10 years, 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; *however, if either the instant violation or any prior violation resulted in death or serious bodily injury from the use of such substance, such person shall be sentenced to a mandatory minimum term of imprisonment for life.*

Any person who manufactures, sells, gives, distributes or possesses with the intent to manufacture,

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59 sell, give, or distribute the following is guilty of a felony punishable by a fine of not more than \$1
60 million and imprisonment for five years to life, five years of which shall be a mandatory minimum term
61 of imprisonment to be served consecutively with any other sentence; *however, if death or serious bodily*
62 *injury resulted from the use of such substance, such person shall be imprisoned for not less than 20*
63 *years nor more than life, 10 years of which shall be a mandatory minimum term of imprisonment to be*
64 *served consecutively with any other sentence:*

- 65 1. 100 grams or more of a mixture or substance containing a detectable amount of heroin;
- 66 2. 500 grams or more of a mixture or substance containing a detectable amount of:
 - 67 a. Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and
 - 68 derivatives of ecgonine or their salts have been removed;
 - 69 b. Cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - 70 c. Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 - 71 d. Any compound, mixture, or preparation that contains any quantity of any of the substances
 - 72 referred to in subdivisions 2a through 2c;
- 73 3. 250 grams or more of a mixture or substance described in subdivisions 2a through 2d that contain
- 74 cocaine base; or
- 75 4. 10 grams or more of methamphetamine, its salts, isomers, or salts of its isomers or 20 grams or
- 76 more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers,
- 77 or salts of its isomers.

78 The mandatory minimum term of imprisonment to be imposed for a violation of this subsection shall
79 not be applicable if the court finds that:

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

92 C1. Any person who violates this section with respect to the manufacturing of methamphetamine, its
93 salts, isomers, or salts of its isomers or less than 200 grams of a mixture or substance containing a
94 detectable amount of methamphetamine, its salts, isomers, or salts of its isomers shall, upon conviction,
95 be imprisoned for not less than 10 nor more than 40 years and fined not more than \$500,000; *however,*
96 *if death or serious bodily injury resulted from the use of such substance, such person shall be*
97 *imprisoned for not less than 20 years nor more than life, 10 years of which shall be a mandatory*
98 *minimum term of imprisonment to be served consecutively with any other sentence.* Upon a second
99 conviction of such a violation, any such person may, in the discretion of the court or jury imposing the
100 sentence, be sentenced to imprisonment for life or for any period not less than 10 years, and be fined
101 not more than \$500,000; *however, if either the instant violation or the prior violation resulted in death*
102 *or serious bodily injury from the use of such substance, such person shall be sentenced to imprisonment*
103 *for life or for any period not less than 20 years, 20 years of which shall be a mandatory minimum term*
104 *of imprisonment to be served consecutively with any other sentence.* When a person is convicted of a
105 third or subsequent offense under this subsection and it is alleged in the warrant, indictment, or
106 information that he has been previously convicted of two or more such offenses or of substantially
107 similar offenses in any other jurisdiction, which offenses would be felonies if committed in the
108 Commonwealth and such prior convictions occurred before the date of the offense alleged in the
109 warrant, indictment, or information, he shall be sentenced to imprisonment for life or for a period not
110 less than 10 years, three years of which shall be a mandatory minimum term of imprisonment to be
111 served consecutively with any other sentence and he shall be fined not more than \$500,000; *however, if*
112 *either the instant violation or any prior violation resulted in death or serious bodily injury from the use*
113 *of such substance, such person shall be sentenced for a mandatory minimum term of imprisonment for*
114 *life.*

115 Upon conviction, in addition to any other punishment, a person found guilty of this offense shall be
116 ordered by the court to make restitution, as the court deems appropriate, to any innocent property owner
117 whose property is damaged, destroyed, or otherwise rendered unusable as a result of such
118 methamphetamine production. This restitution shall include the person's or his estate's estimated or actual
119 expenses associated with cleanup, removal, or repair of the affected property. If the property that is
120 damaged, destroyed, or otherwise rendered unusable as a result of such methamphetamine production is

property owned in whole or in part by the person convicted, the court shall order the person to pay to the Methamphetamine Cleanup Fund authorized in § 18.2-248.04 the reasonable estimated or actual expenses associated with cleanup, removal, or repair of the affected property or, if actual or estimated expenses cannot be determined, the sum of \$10,000. The convicted person shall also pay the cost of certifying that any building that is cleaned up or repaired pursuant to this section is safe for human occupancy according to the guidelines established pursuant to § 32.1-11.7.

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

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

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

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

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

F. Any person who violates this section with respect to a controlled substance classified in Schedule 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; *however, if death or serious bodily injury resulted from the use of such substance, such person shall be imprisoned for a mandatory minimum term of imprisonment for life.* Such mandatory minimum sentence shall not be applicable if the court finds that (i) the person does not have a prior conviction for an

182 offense listed in subsection C of § 17.1-805; (ii) the person did not use violence or credible threats of
183 violence or possess a firearm or other dangerous weapon in connection with the offense or induce
184 another participant in the offense to do so; (iii) the offense did not result in death or serious bodily
185 injury to any person; (iv) the person was not an organizer, leader, manager, or supervisor of others in
186 the offense, and was not engaged in a continuing criminal enterprise as defined in subsection I of this
187 section; and (v) not later than the time of the sentencing hearing, the person has truthfully provided to
188 the Commonwealth all information and evidence the person has concerning the offense or offenses that
189 were part of the same course of conduct or of a common scheme or plan, but the fact that the person
190 has no relevant or useful other information to provide or that the Commonwealth already is aware of the
191 information shall not preclude a determination by the court that the defendant has complied with this
192 requirement.

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

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

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

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

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

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

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

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

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

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

217 A conviction under this section shall be punishable by a fine of not more than \$1 million and
218 imprisonment for 20 years to life, 20 years of which shall be a mandatory minimum sentence; *however,*
219 *if death or serious bodily injury resulted from the use of such substance, such person shall be*
220 *imprisoned for a mandatory minimum term of imprisonment for life.*

221 H2. Any person who was the principal or one of several principal administrators, organizers or
222 leaders of a continuing criminal enterprise if (i) the enterprise received \$250,000 or more in gross
223 receipts during any 12-month period of its existence from the manufacture, importation, or distribution
224 of heroin or cocaine or ecgonine or methamphetamine or the derivatives, salts, isomers, or salts of
225 isomers thereof or marijuana or (ii) the person engaged in the enterprise to manufacture, sell, give,
226 distribute or possess with the intent to manufacture, sell, give or distribute the following during any
227 12-month period of its existence:

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

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

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

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

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

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

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

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

239 5. At least 250 grams of methamphetamine, its salts, isomers, or salts of its isomers or at least 1.0
240 kilograms of a mixture or substance containing a detectable amount of methamphetamine, its salts,
241 isomers, or salts of its isomers shall be guilty of a felony punishable by a fine of not more than \$1
242 million and imprisonment for life, which shall be served with no suspension in whole or in part. Such
243 punishment shall be made to run consecutively with any other sentence. However, the court may impose

a mandatory minimum sentence of 40 years if the court finds that the defendant substantially cooperated with law-enforcement authorities.

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

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

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

§ 18.2-308.4. Possession of firearms while in possession of certain substances.

A. It shall be unlawful for any person unlawfully in possession of a controlled substance classified in Schedule I or II of the Drug Control Act (§ 54.1-3400 et seq.) of Title 54.1 to simultaneously with knowledge and intent possess any firearm. A violation of this subsection is a Class 6 felony and constitutes a separate and distinct felony.

B. It shall be unlawful for any person unlawfully in possession of a controlled substance classified in Schedule I or II of the Drug Control Act (§ 54.1-3400 et seq.) to simultaneously with knowledge and intent possess any firearm on or about his person. A violation of this subsection is a Class 6 felony and constitutes a separate and distinct felony and any person convicted hereunder shall be sentenced to a mandatory minimum term of imprisonment of two years. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

C. It shall be unlawful for any person to possess, use, or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with the intent to manufacture, sell, or distribute a controlled substance classified in Schedule I or Schedule II of the Drug Control Act (§ 54.1-3400 et seq.) or more than one pound of marijuana. A violation of this subsection is a Class 6 felony, and constitutes a separate and distinct felony and any person convicted hereunder shall be sentenced to a mandatory minimum term of imprisonment of five years. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

D. It shall be unlawful for any person to display any pistol, shotgun, rifle, or other firearm in a threatening manner while committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with the intent to manufacture, sell, or distribute a controlled substance classified in Schedule I or Schedule II of the Drug Control Act (§ 54.1-3400 et seq.) or more than one pound of marijuana. A violation of this subsection is a Class 5 felony and constitutes a separate and distinct felony, and any person convicted hereunder shall be sentenced to a mandatory minimum term of imprisonment of seven years. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

E. It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm while committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with the intent to manufacture, sell, or distribute a controlled substance classified in Schedule I or Schedule II of the Drug Control Act (§ 54.1-3400 et seq.) or more than one pound of marijuana. A violation of this subsection is a Class 5 felony and constitutes a separate and distinct felony, and any person convicted hereunder shall be sentenced to a mandatory minimum term of imprisonment of 10 years. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

F. Any person convicted of a violation of subsection C, D, or E where the firearm was a machine gun as defined in § 18.2-288 or was equipped with a silencer or muffler shall be sentenced to a mandatory minimum term of imprisonment of 30 years. Such punishment shall be separate and apart

305 *from, and shall be made to run consecutively with, any punishment received for the commission of the*
306 *primary felony.*

307 *G. Any person convicted of a second or subsequent offense of any combination of subsection C, D,*
308 *or E shall be sentenced to a mandatory minimum term of imprisonment of 25 years. Such punishment*
309 *shall be separate and apart from, and shall be made to run consecutively with, any punishment received*
310 *for the commission of the primary felony. Any person convicted of a second or subsequent offense of*
311 *subsection C, D, E, or F where the instant offense was a violation of subsection F or any of the prior*
312 *offenses were a violation of subsection F shall be sentenced to a mandatory minimum term of*
313 *imprisonment for life.*

314 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
315 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**
316 **be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter**
317 **2 of the Acts of Assembly of 2014, Special Session I, requires the Virginia Criminal Sentencing**
318 **Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated**
319 **amount of the necessary appropriation cannot be determined for periods of commitment to the**
320 **custody of the Department of Juvenile Justice.**