

12103707D

SENATE BILL NO. 436

Offered January 11, 2012

Prefiled January 11, 2012

A BILL to amend and reenact §§ 18.2-61, 18.2-67.1, 18.2-67.2, 18.2-67.5:3, and 19.2-303 of the Code of Virginia, relating to penalties for certain sex crimes.

Patrons—Obenshain, Garrett and Newman

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-61, 18.2-67.1, 18.2-67.2, 18.2-67.5:3, and 19.2-303 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 a violation of subdivision A (iii), ~~where the offender is 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 *life*. 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, the judge shall impose, in addition to any 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

INTRODUCED

SB436

59 for any term not less than five years. The penalty for a violation of subdivision A 1, where the offender
60 is more than three years older than the victim, if done in the commission of, or as part of the same
61 course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of
62 § 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
63 minimum term of confinement of 25 years *life*. If the term of confinement imposed for any violation of
64 subdivision A 1, where the offender is more than three years older than the victim, is for a term less
65 than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence
66 of no less than 40 years. This suspended sentence shall be suspended for the remainder of the
67 defendant's life, subject to revocation by the court.

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

74 C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case
75 tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the
76 defendant who has not previously had a proceeding against him for violation of this section dismissed
77 pursuant to this subsection and with the consent of the complaining witness and the attorney for the
78 Commonwealth, may defer further proceedings and place the defendant on probation pending completion
79 of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the
80 defendant fails to so complete such counseling or therapy, the court may make final disposition of the
81 case and proceed as otherwise provided. If such counseling is completed as prescribed under
82 § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after
83 consideration of the views of the complaining witness and such other evidence as may be relevant, the
84 court finds such action will promote maintenance of the family unit and be in the best interest of the
85 complaining witness.

86 § 18.2-67.2. Object sexual penetration; penalty.

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

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

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

96 B. Inanimate or animate object sexual penetration is a felony punishable by confinement in the state
97 correctional facility for life or for any term not less than five years. The penalty for a violation of
98 subdivision A 1 where the offender is more than three years older than the victim, if done in the
99 commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as
100 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)
101 § 18.2-51.2, shall include a mandatory minimum term of confinement of 25 years *life*. If the term of
102 confinement imposed for any violation of subdivision A 1, where the offender is more than three years
103 older than the victim, is for a term less than life imprisonment, the judge shall impose, in addition to
104 any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be
105 suspended for the remainder of the defendant's life, subject to revocation by the court.

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

112 C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case
113 tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the
114 defendant who has not previously had a proceeding against him for violation of this section dismissed
115 pursuant to this subsection and with the consent of the complaining witness and the attorney for the
116 Commonwealth, may defer further proceedings and place the defendant on probation pending completion
117 of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the
118 defendant fails to so complete such counseling or therapy, the court may make final disposition of the
119 case and proceed as otherwise provided. If such counseling is completed as prescribed under
120 § 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.

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

A. Any person convicted of ~~more than one~~ *an offense specified in subsection B 1, and convicted of an offense in subsection B*, when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in § 53.1-151 between each conviction shall, upon conviction of ~~the second or subsequent~~ *such the offense listed in subsection B1*, be sentenced to life imprisonment and shall not have all or any portion of the sentence suspended, provided it is admitted, or found by the jury or judge before whom he is tried, that he has been previously convicted of at least one of the ~~specified~~ *offenses listed in subsection B*.

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

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

B.1. The offenses included in this subsection are as follows:

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

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

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

§ 19.2-303. Suspension or modification of sentence; probation; taking of fingerprints and blood, saliva, or tissue sample as condition of probation.

After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine, including monitoring by a GPS (Global Positioning System) tracking device, or other similar device, or may, as a condition of a suspended sentence, require the defendant to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted, or to perform community service, or both, under terms and conditions which shall be entered in writing by the court. The defendant may be ordered by the court to pay the cost of the GPS tracking device or other similar device. If, however, the court suspends or modifies any sentence fixed by a jury pursuant to § 19.2-295, the court shall file a statement of the reasons for the suspension or modification in the same manner as the statement required pursuant to subsection B of § 19.2-298.01. The judge, after convicting the defendant of a felony, shall determine whether a copy of the defendant's fingerprints are on file at the Central Criminal Records Exchange. In any case where fingerprints are not on file, the judge shall require that fingerprints be taken as a condition of probation. Such fingerprints shall be submitted to the Central Criminal Records Exchange under the provisions of subsection D of § 19.2-390.

In those courts having electronic access to the Local Inmate Data System (LIDS) within the courtroom, prior to or upon sentencing, the clerk of court shall also determine by reviewing LIDS whether a blood, saliva, or tissue sample has been taken for DNA analysis and submitted to the DNA data bank maintained by the Department of Forensic Science pursuant to Article 1.1 (§ 19.2-310.2 et seq.) of Chapter 18 of this title. In any case in which the clerk has determined that a DNA sample or analysis is not stored in the DNA data bank, or in any case in which electronic access to LIDS is not available in the courtroom, the court shall order that the defendant appear within 30 days before the sheriff or probation officer and allow the sheriff or probation officer to take the required sample. The order shall also require that, if the defendant has not appeared and allowed the sheriff or probation officer to take the required sample by the date stated in the order, then the sheriff or probation officer shall report to the court the defendant's failure to appear and provide the required sample.

182 After conviction and upon sentencing of an active participant or member of a criminal street gang,
183 the court may, as a condition for suspending the imposition of the sentence in whole or in part or for
184 placing the accused on probation, place reasonable restrictions on those persons with whom the accused
185 may have contact. Such restrictions may include prohibiting the accused from having contact with
186 anyone whom he knows to be a member of a criminal street gang, except that contact with a family or
187 household member, as defined in § 16.1-228, shall be permitted unless expressly prohibited by the court.

188 In any case where a defendant is convicted of a violation of § 18.2-48, 18.2-61, 18.2-63, 18.2-67.1,
189 18.2-67.2, 18.2-67.3, 18.2-370, or 18.2-370.1, committed on or after July 1, 2006, and some portion of
190 the sentence is suspended, the judge shall order that the period of suspension shall be for a length of
191 time at least equal to the statutory maximum period for which the defendant might originally have been
192 sentenced to be imprisoned, and the defendant shall be placed on probation for that period of suspension
193 subject to revocation by the court. The conditions of probation may include such conditions as the court
194 shall determine, including active supervision. ~~Where the conviction is for a violation of clause (iii) of~~
195 ~~subsection A of § 18.2-61, subdivision A 1 of § 18.2-67.1, or subdivision A 1 of § 18.2-67.2, the court~~
196 ~~shall order that at least three years of the probation include active supervision of the defendant under a~~
197 ~~postrelease supervision program operated by the Department of Corrections, and for at least three years~~
198 ~~of such active supervision, the defendant shall be subject to electronic monitoring by means of a GPS~~
199 ~~(Global Positioning System) tracking device, or other similar device.~~

200 If a person is sentenced to jail upon conviction of a misdemeanor or a felony, the court may, at any
201 time before the sentence has been completely served, suspend the unserved portion of any such sentence,
202 place the person on probation for such time as the court shall determine, or otherwise modify the
203 sentence imposed.

204 If a person has been sentenced for a felony to the Department of Corrections but has not actually
205 been transferred to a receiving unit of the Department, the court which heard the case, if it appears
206 compatible with the public interest and there are circumstances in mitigation of the offense, may, at any
207 time before the person is transferred to the Department, suspend or otherwise modify the unserved
208 portion of such a sentence. The court may place the person on probation for such time as the court shall
209 determine.

210 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
211 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is**
212 **\$1,711,348 for periods of imprisonment in state adult correctional facilities and is \$0 for periods of**
213 **commitment to the custody of the Department of Juvenile Justice.**