2012 SESSION

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SENATE BILL NO. 436

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice

on January 23, 2012)

(Patron Prior to Substitute—Senator Obenshain)

5 6 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, 7 relating to penalties for certain sex crimes. 8

Be it enacted by the General Assembly of Virginia:

9 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 10 reenacted as follows:

§ 18.2-61. Rape.

12 A. If any person has sexual intercourse with a complaining witness, whether or not his or her spouse, 13 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 14 15 or intimidation of or against the complaining witness or another person; or (ii) through the use of the 16 complaining witness's mental incapacity or physical helplessness; or (iii) with a child under age 13 as 17 the victim, he or she shall be guilty of rape.

18 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. The 19 20 penalty for a violation of subdivision A (iii), where the offender is 18 years of age or older at the time of the offense shall include a mandatory minimum term of confinement of life. The penalty for an offender who was convicted of a violation of subdivision A (iii) who was younger than 18 years of age 21 22 23 at the time of the offense and more than three years older than the victim, if done in the commission of, 24 or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) 25 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 26 27 any violation of subdivision A (iii), where the offender is more than three years older than the victim, is 28 for a term less than life imprisonment, and the judge shall impose, in addition to any the active 29 sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for 30 the remainder of the defendant's life, subject to revocation by the court.

31 There shall be a rebuttable presumption that a juvenile over the age of 10 but less than 12, does not 32 possess the physical capacity to commit a violation of this section. In any case deemed appropriate by 33 the court, all or part of any sentence imposed for a violation under this section against a spouse may be 34 suspended upon the defendant's completion of counseling or therapy, if not already provided, in the 35 manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and 36 such other evidence as may be relevant, the court finds such action will promote maintenance of the 37 family unit and will be in the best interest of the complaining witness.

38 C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case 39 tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the 40 defendant who has not previously had a proceeding against him for violation of this section dismissed 41 pursuant to this subsection and with the consent of the complaining witness and the attorney for the 42 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 43 44 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 45 § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after 46 consideration of the views of the complaining witness and such other evidence as may be relevant, the 47 **48** court finds such action will promote maintenance of the family unit and be in the best interest of the 49 complaining witness. 50

§ 18.2-67.1. Forcible sodomy.

51 A. An accused shall be guilty of forcible sodomy if he or she engages in cunnilingus, fellatio, 52 anilingus, or anal intercourse with a complaining witness whether or not his or her spouse, or causes a 53 complaining witness, whether or not his or her spouse, to engage in such acts with any other person, 54 and 55

1. The complaining witness is less than 13 years of age₅; or

2. The act is accomplished against the will of the complaining witness, by force, threat or 56 intimidation of or against the complaining witness or another person, or through the use of the 57 complaining witness's mental incapacity or physical helplessness. 58

59 B. Forcible sodomy is a felony punishable by confinement in a state correctional facility for life or SB436S1

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60 for any term not less than five years. The penalty for a violation of subdivision A $1_{\overline{1}}$ where the offender 61 is 18 years of age or older at the time of the offense shall include a mandatory minimum term of 62 confinement of life. The penalty for an offender who was convicted of a violation of subdivision A 1 who 63 was younger than 18 years of age at the time of the offense and more than three years older than the 64 victim, if done in the commission of, or as part of the same course of conduct as, or as part of a 65 common scheme or plan as a violation of (i) subsection A of § 18.2-47 or 18.2-48, (ii) § 18.2-89, 66 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 67 more than three years older than the victim, is for a term less than life imprisonment, and the judge 68 shall impose, in addition to any the active sentence, a suspended sentence of no less than 40 years. This 69 suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by 70 71 the court.

72 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 73 74 therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of 75 the views of the complaining witness and such other evidence as may be relevant, the court finds such 76 action will promote maintenance of the family unit and will be in the best interest of the complaining 77 witness.

78 C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case 79 tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the 80 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 81 Commonwealth, may defer further proceedings and place the defendant on probation pending completion 82 of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the 83 84 defendant fails to so complete such counseling or therapy, the court may make final disposition of the 85 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 86 87 consideration of the views of the complaining witness and such other evidence as may be relevant, the 88 court finds such action will promote maintenance of the family unit and be in the best interest of the 89 complaining witness. 90

§ 18.2-67.2. Object sexual penetration; penalty.

91 A. An accused shall be guilty of inanimate or animate object sexual penetration if he or she 92 penetrates the labia majora or anus of a complaining witness, whether or not his or her spouse, other 93 than for a bona fide medical purpose, or causes such complaining witness to so penetrate his or her own 94 body with an object or causes a complaining witness, whether or not his or her spouse, to engage in 95 such acts with any other person or to penetrate, or to be penetrated by, an animal, and 96

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

97 2. The act is accomplished against the will of the complaining witness, by force, threat or 98 intimidation of or against the complaining witness or another person, or through the use of the 99 complaining witness's mental incapacity or physical helplessness.

B. Inanimate or animate object sexual penetration is a felony punishable by confinement in the state 100 correctional facility for life or for any term not less than five years. The penalty for a violation of 101 102 subdivision A 1 where the offender is 18 years of age or older at the time of the offense shall include a mandatory minimum term of confinement of life. The penalty for an offender who was convicted of a 103 violation of subdivision A 1 who was younger than 18 years of age at the time of the offense and more 104 than three years older than the victim, if done in the commission of, or as part of the same course of 105 conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 or 106 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 107 of confinement of 25 years. If the term of confinement imposed for any violation of subdivision A 1, 108 109 where the offender is more than three years older than the victim, is for a term less than life 110 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 111 112 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 113 114 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 115 116 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 117 118 witness.

119 C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case 120 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 121

pursuant to this subsection and with the consent of the complaining witness and the attorney for the 122 123 Commonwealth, may defer further proceedings and place the defendant on probation pending completion 124 of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the 125 defendant fails to so complete such counseling or therapy, the court may make final disposition of the 126 case and proceed as otherwise provided. If such counseling is completed as prescribed under 127 § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after 128 consideration of the views of the complaining witness and such other evidence as may be relevant, the 129 court finds such action will promote maintenance of the family unit and be in the best interest of the 130 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 B1, 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.

139 B. The provisions of offenses included in this subsection A shall apply to convictions for are as 140 follows:

141 1. Rape in violation of § 18.2-61;

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- 142 2. Forcible sodomy in violation of § 18.2-67.1;
- **143** 3. Object sexual penetration in violation of § 18.2-67.2;
- 144 4. Abduction with intent to defile in violation of § 18.2-48; or
- 145 5. Conspiracy to commit any offense listed in subdivisions 1 through 4 pursuant to § 18.2-22.
- 146 B1. The offenses included in this subsection are as follows:
- 147 1. Rape in violation of subdivision A (i) or A (ii) of § 18.2-61;
- **148** 2. Forcible sodomy in violation of subdivision A 2 of § 18.2-67.1;
- **149** 3. Object sexual penetration in violation of subdivision A 2 of § 18.2-67.2;
- **150** 4. Abduction with intent to defile in violation of § 18.2-48; or
- **151** 5. Conspiracy to commit any offense listed in subdivisions B 1 through 4 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 20 years before the second offense.

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

160 2. That the provisions of this act may result in a net increase in periods of imprisonment or 161 commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at 162 least \$1,709,625 for periods of imprisonment in state adult correctional facilities and is \$0 for 163 periods of commitment to the custody of the Department of Juvenile Justice.

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