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SENATE BILL NO. 436

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 §§ 18.2-61, 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.

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, 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. For a violation of subdivision clause (iii) of subsection A (iii), where it is alleged in the indictment that 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. 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 was 18 years of age or older at the time of the offense, the punishment shall include a mandatory minimum term of confinement of life.

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

60 *in the indictment that the offender is more than three years older than the victim, if done in the*
61 *commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as*
62 *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)*
63 *§ 18.2-51.2, shall include a mandatory minimum term of confinement of 25 years. If the term of*
64 *confinement imposed for any violation of subdivision A 1, where the offender is more than three years*
65 *older than the victim, is for a term less than life imprisonment, the judge shall impose, in addition to*
66 *any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be*
67 *suspended for the remainder of the defendant's life, subject to revocation by the court was 18 years of*
68 *age or older at the time of the offense, the punishment shall include a mandatory minimum term of*
69 *confinement of life.*

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

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

88 § 18.2-67.2. Object sexual penetration; penalty.

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

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

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

98 B. Inanimate or animate object sexual penetration is a felony punishable by confinement in the state
99 correctional facility for life or for any term not less than five years. The penalty for a violation of
100 subdivision A 1, where *it is alleged in the indictment that the offender is more than three years older*
101 *than the victim, if done in the commission of, or as part of the same course of conduct as, or as part of*
102 *a common scheme or plan as a violation of (i) subsection A of § 18.2-47 or 18.2-48, (ii) § 18.2-89,*
103 *18.2-90 or 18.2-91, or (iii) § 18.2-51.2, shall include a mandatory minimum term of confinement of 25*
104 *years. If the term of confinement imposed for any violation of subdivision A 1, where the offender is*
105 *more than three years older than the victim, is for a term less than life imprisonment, the judge shall*
106 *impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This*
107 *suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by*
108 *the court was 18 years of age or older at the time of the offense, the punishment shall include a*
109 *mandatory minimum term of confinement of life.*

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

116 C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case
117 tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the
118 defendant who has not previously had a proceeding against him for violation of this section dismissed
119 pursuant to this subsection and with the consent of the complaining witness and the attorney for the
120 Commonwealth, may defer further proceedings and place the defendant on probation pending completion
121 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.

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

A. Any person convicted of ~~more than one~~ an offense specified in subsection B ~~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.

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.

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

1. Rape in violation of clause (i) or (ii) of subsection A 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 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.

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.

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