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SENATE BILL NO. 436

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on March 10, 2012)

(Patron Prior to Substitute—Senator Obenshain)

A BILL to amend and reenact §§ 18.2-61, 18.2-67.1, and 18.2-67.2 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, and 18.2-67.2 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; and in addition:~~

1. For a violation of clause (iii) of subsection A 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, the punishment shall include a mandatory minimum term of confinement of 25 years; or

2. For a violation of clause (iii) of subsection A where it is alleged in the indictment that the offender 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.

If the term of confinement imposed for any violation of ~~subdivision A~~ clause (iii) of subsection A, 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

60 intimidation of or against the complaining witness or another person, or through the use of the
61 complaining witness's mental incapacity or physical helplessness.

62 B. Forcible sodomy is a felony punishable by confinement in a state correctional facility for life or
63 for any term not less than five years: ~~The penalty for; and in addition:~~

64 1. For a violation of subdivision A 1, where the offender is more than three years older than the
65 victim, if done in the commission of, or as part of the same course of conduct as, or as part of a
66 common scheme or plan as a violation of (i) subsection A of § 18.2-47 or 18.2-48, (ii) § 18.2-89,
67 18.2-90 or 18.2-91, or (iii) § 18.2-51.2, *the punishment* shall include a mandatory minimum term of
68 confinement of 25 years; or

69 2. *For a violation of subdivision A 1 where it is alleged in the indictment that the offender was 18*
70 *years of age or older at the time of the offense, the punishment shall include a mandatory minimum*
71 *term of confinement for life.*

72 If the term of confinement imposed for any violation of subdivision A 1, where the offender is more
73 than three years older than the victim, is for a term less than life imprisonment, the judge shall impose,
74 in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended
75 sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court.

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

82 C. Upon a finding of guilt under this section, when a spouse is the complaining witness in any case
83 tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the
84 defendant who has not previously had a proceeding against him for violation of this section dismissed
85 pursuant to this subsection and with the consent of the complaining witness and the attorney for the
86 Commonwealth, may defer further proceedings and place the defendant on probation pending completion
87 of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the
88 defendant fails to so complete such counseling or therapy, the court may make final disposition of the
89 case and proceed as otherwise provided. If such counseling is completed as prescribed under
90 § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after
91 consideration of the views of the complaining witness and such other evidence as may be relevant, the
92 court finds such action will promote maintenance of the family unit and be in the best interest of the
93 complaining witness.

94 § 18.2-67.2. Object sexual penetration; penalty.

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

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

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

104 B. Inanimate or animate object sexual penetration is a felony punishable by confinement in the state
105 correctional facility for life or for any term not less than five years: ~~The penalty for; and in addition:~~

106 1. For a violation of subdivision A 1, where the offender is more than three years older than the
107 victim, if done in the commission of, or as part of the same course of conduct as, or as part of a
108 common scheme or plan as a violation of (i) subsection A of § 18.2-47 or 18.2-48, (ii) § 18.2-89,
109 18.2-90 or 18.2-91, or (iii) § 18.2-51.2, *the punishment* shall include a mandatory minimum term of
110 confinement of 25 years; or

111 2. *For a violation of subdivision A 1 where it is alleged in the indictment that the offender was 18*
112 *years of age or older at the time of the offense, the punishment shall include a mandatory minimum*
113 *term of confinement for life.*

114 If the term of confinement imposed for any violation of subdivision A 1, where the offender is more
115 than three years older than the victim, is for a term less than life imprisonment, the judge shall impose,
116 in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended
117 sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court.

118 In any case deemed appropriate by the court, all or part of any sentence imposed for a violation
119 under this section against a spouse may be suspended upon the defendant's completion of counseling or
120 therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of
121 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.

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.