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HOUSE BILL NO. 277

Offered January 13, 2016

Prefiled January 1, 2016

A BILL to amend and reenact § 18.2-248 of the Code of Virginia, relating to manufacture, etc., of heroin; mandatory minimum sentence.

Patron—Miyares

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-248 of the Code of Virginia is amended and reenacted as follows:

§ 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. 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.

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.

Any person who manufactures, sells, gives, distributes or possesses with the intent to manufacture, sell, give, or distribute the following is guilty of a felony punishable by a fine of not more than \$1 million and imprisonment for five years to life, five years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence:

1. 100 grams or more of a mixture or substance containing a detectable amount of heroin;
2. 500 grams 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 that contains any quantity of any of the substances referred to in subdivisions 2a through 2c;
3. 250 grams or more of a mixture or substance described in subdivisions 2a through 2d that contain cocaine base; or

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59 4. 10 grams or more of methamphetamine, its salts, isomers, or salts of its isomers or 20 grams or
60 more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers,
61 or salts of its isomers.

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

64 a. The person does not have a prior conviction for an offense listed in subsection C of § 17.1-805;

65 b. The person did not use violence or credible threats of violence or possess a firearm or other
66 dangerous weapon in connection with the offense or induce another participant in the offense to do so;

67 c. The offense did not result in death or serious bodily injury to any person;

68 d. The person was not an organizer, leader, manager, or supervisor of others in the offense, and was
69 not engaged in a continuing criminal enterprise as defined in subsection I; and

70 e. Not later than the time of the sentencing hearing, the person has truthfully provided to the
71 Commonwealth all information and evidence the person has concerning the offense or offenses that were
72 part of the same course of conduct or of a common scheme or plan, but the fact that the person has no
73 relevant or useful other information to provide or that the Commonwealth already is aware of the
74 information shall not preclude a determination by the court that the defendant has complied with this
75 requirement.

76 C1. Any person who violates this section with respect to the manufacturing of methamphetamine, its
77 salts, isomers, or salts of its isomers or less than 200 grams of a mixture or substance containing a
78 detectable amount of methamphetamine, its salts, isomers, or salts of its isomers shall, upon conviction,
79 be imprisoned for not less than 10 nor more than 40 years and fined not more than \$500,000. Upon a
80 second conviction of such a violation, any such person may, in the discretion of the court or jury
81 imposing the sentence, be sentenced to imprisonment for life or for any period not less than 10 years,
82 and be fined not more than \$500,000. When a person is convicted of a third or subsequent offense
83 under this subsection and it is alleged in the warrant, indictment, or information that he has been
84 previously convicted of two or more such offenses or of substantially similar offenses in any other
85 jurisdiction, which offenses would be felonies if committed in the Commonwealth and such prior
86 convictions occurred before the date of the offense alleged in the warrant, indictment, or information, he
87 shall be sentenced to imprisonment for life or for a period not less than 10 years, three years of which
88 shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence
89 and he shall be fined not more than \$500,000.

90 Upon conviction, in addition to any other punishment, a person found guilty of this offense shall be
91 ordered by the court to make restitution, as the court deems appropriate, to any innocent property owner
92 whose property is damaged, destroyed, or otherwise rendered unusable as a result of such
93 methamphetamine production. This restitution shall include the person's or his estate's estimated or actual
94 expenses associated with cleanup, removal, or repair of the affected property. If the property that is
95 damaged, destroyed, or otherwise rendered unusable as a result of such methamphetamine production is
96 property owned in whole or in part by the person convicted, the court shall order the person to pay to
97 the Methamphetamine Cleanup Fund authorized in § 18.2-248.04 the reasonable estimated or actual
98 expenses associated with cleanup, removal, or repair of the affected property or, if actual or estimated
99 expenses cannot be determined, the sum of \$10,000. The convicted person shall also pay the cost of
100 certifying that any building that is cleaned up or repaired pursuant to this section is safe for human
101 occupancy according to the guidelines established pursuant to § 32.1-11.7.

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

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

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

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

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

1. At least 1.0 kilograms but less than 5.0 kilograms of a mixture or substance containing a detectable amount of heroin;
2. At least 5.0 kilograms but less than 10 kilograms 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. At least 2.5 kilograms but less than 5.0 kilograms of a mixture or substance described in subdivision 2 which contains cocaine base;

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

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

A conviction under this section shall be 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.

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

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

2. At least 10 kilograms 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. At least 5.0 kilograms of a mixture or substance described in subdivision 2 which contains cocaine base;

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

5. At least 250 grams of methamphetamine, its salts, isomers, or salts of its isomers or at least 1.0 kilograms 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 life, which shall be served with no suspension in whole or in part. Such 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.

H3. *In addition to any other sentence imposed for a violation of this section, the sentence of any person who violates this section with respect to heroin shall include a mandatory minimum term of 10 years' imprisonment to be served consecutively with any other sentence, including any other sentence imposed for a violation of this section.*

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.

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 is at least \$16,691,576 for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.