

# **Attorney General Kilgore Announces New Legislation Passed by the 2004 Virginia General Assembly Aimed at Combating Gangs and Gang Violence**

## **I. Attorney General's Gang-Related Legislation, Consistent with the Recommendations of the Anti-Gang Task Force:**

**Gang Omnibus Bill:** Amended existing statutes and created new statutory provisions relating to gang crimes in the following ways: modifies gang definitions, expands gang recruitment offense, enhances penalties for third or subsequent violations of the gang statutes, permits asset forfeiture for gang offenses, creates obstruction of justice offense, and permits the use of multijurisdiction grand juries to investigate and indict for violations of the gang statutes. The gang omnibus bill can be broken down as follows:

### **Gang Definitions (Virginia Code § 18.2-46.1):**

- Simplifies Virginia Code § 18.2-46.1 by incorporating much of the defining language of "pattern of criminal street gang activity" into the definition of "criminal street gang."
- Eliminates from the definition of "criminal street gang" the requirement that one of the primary objectives or activities of the gang be the commission of one or more "predicate criminal acts" and, instead, only requires one such objective or activity to be the commission of one or more "criminal activities."
- Removes the word "scheme" from the definition of "criminal street gang," which required that the two predicate criminal acts not be part of a common act, transaction, or scheme.

### **Gang Recruitment (Virginia Code § 18.2-46.3):**

- Expands Virginia Code § 18.2-46.3, which only criminalized, as a Class 6 felony, the recruitment of a juvenile into a gang by a person eighteen years of age or older. (The restrictive nature of the old statute did not include most instances of gang recruitment and failed to address the threat or use of force that is commonly related to gang recruitment, withdrawal, and demands).
- The amendment leaves the original recruitment of a juvenile by an adult offense in tact, but adds two new offenses: 1) it is a Class 1 misdemeanor to recruit another into a gang, regardless of the age of the offender or the victim, and 2) it is a Class 6 felony to use or threaten force against an individual, or a member of his family or household, in order to encourage that individual to join a gang, remain in a gang, or submit to a demand by a gang to commit a felony.

### **Third or Subsequent Violation of the Gang Statutes (Virginia Code § 18.2-46.3:1):**

- Creates a new statute, § 18.2-46.3:1, which imposes an enhanced penalty, a Class 3 felony, for a third or subsequent violation of any combination of § 18.2-46.2 (gang participation) or § 18.2-46.3 (gang recruitment), if the two previous convictions occurred within ten years of the third or subsequent offense and each offense occurred on different dates.
- The new statute is aimed at combating gang recidivism by targeting the “hard core” gang members and to send a message that Virginia is not a safe haven for gangs.

### **Asset Forfeiture (Virginia Code § 18.2-46.3:2):**

- Creates a new statute, § 18.2-46.3:2, which provides for the forfeiture of assets used to violate the gang statutes, both in the commission of gang-related crimes and in the recruitment of members.
- Prior to this statute, assets obtained and used by gangs in Virginia were not subject to forfeiture, unless other crimes, such as illegal drug transactions or money laundering, were involved.

### **Obstructing Justice (Virginia Code § 18.2-460):**

- Amends § 18.2-460 by adding violations of the gang statutes (§§ 18.2-46.2 and 18.2-46.3) to the specific offenses listed under § 18.2-460(C), which, in part, subjects persons who obstruct or impede the administration of justice in any court relating to a violation or conspiracy to violate such an offense, to an enhanced penalty of a Class 5 felony.
- The amendment addresses the very real problem of gang intimidation of witnesses. Obstructing justice, particularly in the form of witness intimidation, is a tactic commonly used by gangs to thwart the criminal prosecutions of its members.

### **Multijurisdiction Grand Juries (Virginia Code § 19.2-215.1):**

- Amends Virginia Code § 19.2-215.1 to enable multijurisdiction grand juries to investigate and indict for violations of the gang statutes.
- The new law addresses the fact that gang activity regularly transcends jurisdictional boundaries. Further, enabling multijurisdiction grand juries to specifically look at such activity will improve the ability of law-enforcement to investigate and secure evidence resulting from such activity and indict those involved by giving police and prosecutors access to more resources. Additionally, the statewide subpoena power of a multijurisdiction grand jury and the ability of special counsel to participate in such proceedings to secure testimony of witnesses otherwise subject to gang intimidation, will be invaluable.

### **Presumption Against Bail (Virginia Code § 19.2-120):**

- Amends Virginia Code § 19.2-120 by adding violations of the gang statutes to the list of offenses for which there is a rebuttable presumption against admission to bail. Further, the amendment adds “membership in a criminal street gang” to the factors the court shall consider in determining, for the purpose of rebuttal of the presumption against bail, whether there are conditions of release that will assure the defendant’s appearance and the safety of the public.
- This new law will safeguard witnesses and victims of gang violence, who often are too intimidated by the gang or gangs to cooperate in the prosecution of gang members. It also addresses the fact that members of gangs are likely to re-offend while awaiting trial.

### **Pre-Sentence Report (Virginia Code § 19.2-299):**

- Amends Virginia Code § 19.2-299 by adding §§ 18.2-46.2 (gang participation) and 18.2-46.3 (gang recruitment) to the felonies for which a pre-sentence report is required. The amendment further requires that any pre-sentence report must include information about a defendant’s membership in a gang, as well as information about that gang.
- The amendment ensures that, for the purpose of sentencing, judges will be aware of any involvement offenders may have with a criminal street gang. This amendment also ensures that the court will be provided with information about the gang to which the defendant belongs.

### **Authority of State and Local Law-Enforcement Officers to Arrest Certain Illegal Aliens (Virginia Code §§ 19.2-81.6, 19.2-82, and 19.2-120):**

- Provides authority for state and local law-enforcement to arrest and hold certain illegal aliens encountered in performance of their duties by:

(\*) Creating § 19.2-81.6, which, in accordance with federal law, and in the course of acting upon reasonable suspicion that the individual has committed or is committing a crime, authorizes law-enforcement officers to arrest an individual that: 1) is an alien illegally present in the United States and 2) has previously been convicted of a felony in the United States and been deported or left the United States voluntarily after such conviction. Upon arrest, the person shall be taken before a magistrate for a probable cause determination.

(\*) Amending § 19.2-82 to provide that a person may be arrested in accordance with § 19.2-81.6 and held for up to 72 hours, or until the person is taken into federal custody, whichever occurs first, at which time the warrant shall be dismissed. (The purpose of this temporary detention is to enable federal immigration authorities to take the person into federal custody.) When a person is so detained or

arrested, the warrant shall recite § 19.2-81.6 and the applicable criminal violation of federal law previously confirmed with Immigration and Customs Enforcement (“ICE”). No recurrent applications for a warrant shall be permitted within a six month period.

(\*) Amending § 19.2-120 to create a rebuttable presumption against bail for the person arrested in accordance with § 19.2-81.6.

(\*) Note: The federal law which authorizes this legislation is 8 U.S.C. § 1252c.

#### **Non-Legislative Attorney General Initiative:**

- Separately, in accordance with 8 U.S.C. § 1357(g), upon the receipt of proper training and designation from federal immigration authorities, state law-enforcement can exercise limited functions of federal immigration agents regarding the arrest of illegal aliens.
- At the request of the Attorney General and the Superintendent of the Virginia Department of State Police, the Department has been approved by the United States Department of Homeland Security-Immigration & Customs Enforcement to have a certain number of state law-enforcement officials cross-designated in this regard. Virginia is the third state being permitted to participate in this program. Training is scheduled Summer of 2004 (federal training provided).
- It should be noted that, while also a recommendation of the Attorney General’s Anti-Gang Task Force, this was an entirely separate initiative from the legislation recommended by the task force that was enacted in the 2004 General Assembly. In any event, it certainly compliments that legislation.

#### **Fight Against Illegal Aliens Committing Crime in Virginia**

- In sum, pursuant to the new Virginia law, all state and local law-enforcement officers will have limited authority to detain certain illegal aliens. As outlined above, that detention is only for a limited period of time and only upon prior confirmation with federal authorities. As noted in the new code section, state criminal procedure is to be followed. Separate from this, upon completion of the necessary training and upon entering into a formal agreement with the federal government, certain designated state troopers will have expanded immigration enforcement capabilities.

#### **Racketeer Influenced and Corrupt Organization Act (“RICO”) (Virginia Code § 18.2-511 et seq.):**

- Enables law-enforcement to tackle organized criminal activity, including that committed by gangs, whereby lawful businesses are corrupted by force, threats, or intimidation, into illegal enterprises.

- The statute allows for the prosecution of the leaders of these enterprises. It also permits the forfeiture of their illegally obtained assets, and in appropriate situations, enables the Commonwealth to reform the enterprise back into a lawful business.

## **II. Additional Gang-Related Legislation Supported by the Attorney General and Passed During the 2004 Session of the General Assembly:**

### **Gang Definitions (Virginia Code § 18.2-46.1):**

- Adds additional offenses to the list of those included in the definition of “predicate criminal act.” The new offenses include:
  - § 18.2-46.3 (gang recruitment);
  - § 18.2-248(H) (manufacture, sale, gift, distribution, or possession with intent to distribute specified quantities of certain drugs);
  - § 18.2-248(H1) (principal administrator, organizer or leader of a continuing criminal enterprise if the enterprise received at least \$250,000 or more in gross receipts during any twelve month period from the manufacture, importation, or distribution of heroin, cocaine, ecgonine, methamphetamine, or marijuana, or engaged in the enterprise to manufacture, sell, give, distribute, or possess with the intent to manufacture, sell, give, or distribute specified quantities of certain drugs);
  - § 18.2-248(H2) (principal administrator, organizer, or leader of a continuing criminal enterprise if the enterprise received at least \$100,000 but less than \$250,000 in gross receipts during any twelve month period from the manufacture, importation, or distribution of heroin, cocaine, ecgonine, methamphetamine or marijuana, or engaged in the enterprise to manufacture, sell, give, distribute, or possess with the intent to manufacture, sell, give, or distribute specified quantities of certain drugs);
  - § 18.2-248.01 (transporting into the Commonwealth with the intent to sell or distribute certain quantities of Schedule II drugs, one or more ounce of any other Schedule I or II controlled substance, or five or more pounds of marijuana);
  - § 18.2-255 (distribution of a Schedule I, II, III, or IV drug or marijuana, by a person at least eighteen years of age, to any person under eighteen who is at least three years his junior, or causing such a juvenile to assist in distribution of any such drug);
  - § 18.2-255.2 (manufacture, sale, distribution, or possession with intent to distribute any controlled substance, imitation controlled substance or marijuana while on school property or upon public property within 1,000 feet of such school property); or
  - a second or subsequent felony violation of subsection C of § 18.2-248 (manufacture, sale, distribution, or possession with intent to distribute a controlled substance classified as Schedule I or II) or of § 18.2-248.1 (sale, distribution, or possession with intent to distribute marijuana).

### **“No Trespassing” Policy (Virginia Code § 36-22.1):**

- This law was part of the Attorney General’s legislative package and will aid in combating gang activity in Virginia.
- Creates a new statute, § 36-22.1, that requires each housing authority to adopt a “no trespassing” policy designed to protect the premises controlled by such authority and residents from nonresidents who enter the premises for unlawful purposes or without lawful purpose. In adopting such policies, the authority shall determine whether to petition a locality or the Commonwealth to close to the public and convey to the authority any streets serving authority property. Neither an authority nor the Commonwealth shall be required to grant the conveyance.
- The Attorney General shall develop and distribute a model policy that may be used by the housing authorities.

### **Machetes (Virginia Code § 18.2-308):**

- Patroned by a member of the Attorney General’s Anti-Gang Task Force.
- Amends § 18.2-308 to add machete (a weapon used frequently by certain gangs) to the list of weapons that are illegal to carry on or about the person hidden from common observation.

### **Wiretap Orders (Virginia Code § 19.2-66):**

- Patroned by a member of the Attorney General’s Anti-Gang Task Force.
- Amends § 19.2-66 to expand the list of crimes for which the Attorney General may seek a wiretap order to include crimes by mobs, crimes by gangs, robbery, and extortion. Criminal sexual assault is included only for felony offenses that are not Class 6 felonies.

### **Notice to School Superintendent (Virginia Code §§ 16.1-260, 19.2-83.1, and 22.1-279.3:1):**

- Amend § 16.1-260 to include violations of § 18.2-46.2 and § 18.2-46.3 among the offenses for which the intake officer is required to provide notice by telephone of the filing of the petition and the nature of the offense to the superintendent of the school division in which the petitioner alleges the juvenile is or should be enrolled.
- Amends § 19.2-83.1 to require that a public school student who is 18 or older and arrested for certain offenses be reported to the division Superintendent. The

offenses are the same as those for which a juvenile student would be reported (firearms, homicide, felonious assault, sexual assault, drug offenses, arson, burglary, robbery). This list is also expanded to include criminal street gang-related activity.

- Amends § 22.1-279.3:1 to add “the arrest of any student for an incident on a school bus, on school property, or at a school-sponsored activity,” to instances for which a report must be submitted to the division superintendent and to the principal.

### **Hazing of Youth Gang Members (Virginia Code § 18.2-55.1):**

- Creates a new statute, § 18.2-55.1, which makes it a Class 1 misdemeanor to cause bodily injury by hazing (i) any member of a youth gang as defined in § 16.1-299.2 or a criminal street gang as defined in § 18.2-46.1, or (ii) a person seeking to become a member of a youth gang or criminal street gang.
- Defines “hazing” to mean to recklessly or intentionally endangering the health or safety of a person or to inflict bodily injury on a person in connection with or for the purpose of initiation, admission into, or affiliation with, or as a condition for continued membership in a youth gang or criminal street gang regardless of whether the person so endangered or injured participated voluntarily in the relevant activity.

### **Possession or Transportation of Firearms by Illegal Aliens (Virginia Code § 18.2-308.2:01):**

- Amends § 18.2-308.2:01 to provide that it is a Class 6 felony for any person who is not a citizen of the United States and who is not lawfully present in the United States to knowingly and intentionally possess or transport any firearm or to knowingly and intentionally carry on or about his person, hidden from common observation, any firearm.
- The statute as it existed prior to the amendment prohibits the possession of an assault weapon by such a person who is not a citizen of the United States or who is not a person lawfully admitted for permanent residence.

### **Serious or Habitual Offender Comprehensive Action Program (“SHOCAP”) (Virginia Code § 16.1-330.1):**

- Amends § 16.1-330.1 to provide that a juvenile who has been convicted of one criminal street gang felony qualifies for SHOCAP. This program (SHOCAP) provides control, supervision, and treatment for serious or habitual juvenile offenders.