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## SENATE BILL NO. 1239

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee  
on February 22, 2003)

(Patron Prior to Substitute—Senator Norment)

A BILL to amend and reenact §§ 18.2-10, 19.2-175, 19.2-264.3:1 and 19.2-264.4 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 8.01-654.2, 19.2-264.3:1.1, 19.2-264.3:1.2 and 19.2-264.3:3, relating to capital cases; mental retardation.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-10, 19.2-175, 19.2-264.3:1 and 19.2-264.4 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 8.01-654.2, 19.2-264.3:1.1, 19.2-264.3:1.2 and 19.2-264.3:3 as follows:

§ 8.01-654.2. Presentation of claim of mental retardation by person sentenced to death before the effective date of this section.

Notwithstanding any other provision of law, any person under sentence of death whose sentence became final in the circuit court before the effective date of this section, and who desires to have a claim of his mental retardation presented to the Supreme Court, shall do so by one of the following methods: (i) if the person has not commenced a direct appeal, he shall present his claim of mental retardation by assignment of error and in his brief in that appeal, or if his direct appeal is pending in the Supreme Court, he shall file a supplemental assignment of error and brief containing his claim of mental retardation, or (ii) if the person has not filed a petition for a writ of habeas corpus under subsection C of § 8.01-654, he shall present his claim of mental retardation in a petition for a writ of habeas corpus under such subsection, or if such a petition is pending in the Supreme Court, he shall file an amended petition containing his claim of mental retardation. A person proceeding under this section shall allege the factual basis for his claim of mental retardation. The Supreme Court shall consider a claim raised under this section and if it determines that the claim is not frivolous, it shall remand the claim to the circuit court for a determination of mental retardation; otherwise the Supreme Court shall dismiss the petition. The provisions of §§ 19.2-264.3:1.1 and 19.2-264.3:1.2 shall govern a determination of mental retardation made pursuant to this section. If the claim is before the Supreme Court on direct appeal and is remanded to the circuit court and the case wherein the sentence of death was imposed was tried by a jury, the circuit court shall empanel a new jury for the sole purpose of making a determination of mental retardation.

If the person has completed both a direct appeal and a habeas corpus proceeding under subsection C of § 8.01-654, he shall not be entitled to file any further habeas petitions in the Supreme Court and his sole remedy shall lie in federal court.

§ 18.2-10. Punishment for conviction of felony.

The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, if the person so convicted was ~~sixteen~~ 16 years of age or older at the time of the offense and is not determined to be mentally retarded pursuant to § 19.2-264.3:1.1, or imprisonment for life and, subject to subdivision (g), a fine of not more than \$100,000. If the person was under ~~sixteen~~ 16 years of age at the time of the offense or is determined to be mentally retarded pursuant to § 19.2-264.3:1.1, the punishment shall be imprisonment for life and, subject to subdivision (g), a fine of not more than \$100,000.

(b) For Class 2 felonies, imprisonment for life or for any term not less than ~~twenty~~ 20 years and, subject to subdivision (g), a fine of not more than \$100,000.

(c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than ~~twenty~~ 20 years and, subject to subdivision (g), a fine of not more than \$100,000.

(d) For Class 4 felonies, a term of imprisonment of not less than two years nor more than ~~ten~~ 10 years and, subject to subdivision (g), a fine of not more than \$100,000.

(e) For Class 5 felonies, a term of imprisonment of not less than one year nor more than ~~ten~~ 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than ~~twelve~~ 12 months and a fine of not more than \$2,500, either or both.

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than ~~twelve~~ 12 months and a fine of not more than \$2,500, either or both.

(g) Except as specifically authorized in subdivision (e) or (f), or in Class 1 felonies for which a sentence of death is imposed, the court shall impose either a sentence of imprisonment together with a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine.

60 For any felony offense committed (i) on or after January 1, 1995, the court may, and (ii) on or after  
61 July 1, 2000, shall, except in cases in which the court orders a suspended term of confinement of at  
62 least six months, impose an additional term of not less than six months nor more than three years,  
63 which shall be suspended conditioned upon successful completion of a period of post-release supervision  
64 pursuant to § 19.2-295.2 and compliance with such other terms as the sentencing court may require.  
65 However, such additional term may only be imposed when the sentence includes an active term of  
66 incarceration in a correctional facility.

67 For a felony offense prohibiting proximity to children as described in subsection A of § 18.2-370.2,  
68 the sentencing court is authorized to impose the punishment set forth in subsection B of that section in  
69 addition to any other penalty provided by law.

70 § 19.2-175. Compensation of experts.

71 Each psychiatrist, clinical psychologist or other expert appointed by the court to render professional  
72 service pursuant to §§ 19.2-168.1, 19.2-169.1, 19.2-169.5, subsection A of § 19.2-176, §§ 19.2-182.8,  
73 19.2-182.9, 19.2-264.3:1, 19.2-264.3:3 or § 19.2-301, who is not regularly employed by the  
74 Commonwealth of Virginia except by the University of Virginia School of Medicine and the Medical  
75 College of Virginia, shall receive a reasonable fee for such service. The fee shall be determined in each  
76 instance by the court that appointed the expert, in accordance with guidelines established by the  
77 Supreme Court after consultation with the Department of Mental Health, Mental Retardation and  
78 Substance Abuse Services. Except in capital murder cases the fee shall not exceed \$400, but in addition  
79 if any such expert is required to appear as a witness in any hearing held pursuant to such sections, he  
80 shall receive mileage and a fee of \$100 for each day during which he is required so to serve. An  
81 itemized account of expense, duly sworn to, must be presented to the court, and when allowed shall be  
82 certified to the Supreme Court for payment out of the state treasury, and be charged against the  
83 appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized  
84 shall also be made by order of the court, duly certified to the Supreme Court for payment out of the  
85 appropriation to pay criminal charges.

86 § 19.2-264.3:1. Expert assistance when defendant's mental condition relevant to capital sentencing.

87 A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and  
88 (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court  
89 shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the  
90 defense in the preparation and presentation of information concerning the defendant's history, character,  
91 or mental condition, including (i) whether the defendant acted under extreme mental or emotional  
92 disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the  
93 criminality of his conduct or to conform his conduct to the requirements of the law was significantly  
94 impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to  
95 the history or character of the defendant or the defendant's mental condition at the time of the offense.  
96 The mental health expert appointed pursuant to this section shall be (i) a psychiatrist, a clinical  
97 psychologist, or an individual with a doctorate degree in clinical psychology who has successfully  
98 completed forensic evaluation training as approved by the Commissioner of Mental Health, Mental  
99 Retardation and Substance Abuse Services and (ii) qualified by specialized training and experience to  
100 perform forensic evaluations. The defendant shall not be entitled to a mental health expert of the  
101 defendant's own choosing or to funds to employ such expert.

102 B. Evaluations performed pursuant to subsection A may be combined with evaluations performed  
103 pursuant to § 19.2-169.5 and shall be governed by subsections B and C of § 19.2-169.5.

104 C. The expert appointed pursuant to subsection A shall submit to the attorney for the defendant a  
105 report concerning the history and character of the defendant and the defendant's mental condition at the  
106 time of the offense. The report shall include the expert's opinion as to (i) whether the defendant acted  
107 under extreme mental or emotional disturbance at the time of the offense, (ii) whether the capacity of  
108 the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements  
109 of the law was significantly impaired, and (iii) whether there are any other factors in mitigation relating  
110 to the history or character of the defendant or the defendant's mental condition at the time of the  
111 offense.

112 D. The report described in subsection C shall be sent solely to the attorney for the defendant and  
113 shall be protected by the attorney-client privilege. However, the Commonwealth shall be given the report  
114 and the results of any other evaluation of the defendant's mental condition conducted relative to the  
115 sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during  
116 the course of such evaluation, after the attorney for the defendant gives notice of an intent to present  
117 psychiatric or psychological evidence in mitigation pursuant to subsection E.

118 E. In any case in which a defendant charged with capital murder intends, in the event of conviction,  
119 to present testimony of an expert witness to support a claim in mitigation relating to the defendant's  
120 history, character or mental condition, he or his attorney shall give notice in writing to the attorney for  
121 the Commonwealth, at least ~~twenty-one~~ 21 days before trial, of his intention to present such testimony.

In the event that such notice is not given and the defendant tenders testimony by an expert witness at the sentencing phase of the trial, then the court may, in its discretion, upon objection of the Commonwealth, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence.

F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense, the court shall appoint one or more qualified experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation, and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A. The location of the evaluation shall be governed by subsection B of § 19.2-169.5. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in subsection C of § 19.2-169.5. After performing their evaluation, the experts shall report their findings and opinions and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense.

2. If the court finds, after hearing evidence presented by the parties, out of the presence of the jury, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.

G. No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.

§ 19.2-264.3:1.1. *Capital cases; determination of mental retardation.*

A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

"Mentally retarded" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in all of the following: conceptual adaptive skills, social adaptive skills and practical adaptive skills.

B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include information from multiple sources. The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.

2. Assessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records. The assessment shall include at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the defendant's history and characteristics and the context of the assessment.

3. Assessment of developmental origin shall be based on multiple sources of information generally accepted by the field of psychological testing and appropriate for the particular defendant being assessed, including, whenever available, educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data, recognizing that valid clinical assessment conducted during the defendant's childhood may not have conformed to current practice standards.

C. In any case in which the offense may be punishable by death and is tried before a jury, the issue

183 of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection  
184 E of § 19.2-264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by  
185 § 19.2-264.4.

186 In any case in which the offense may be punishable by death and is tried before a judge, the issue of  
187 mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E  
188 of § 19.2-264.3:1.2, shall be determined by the judge as part of the sentencing proceeding required by  
189 § 19.2-264.4.

190 The defendant shall bear the burden of proving that he is mentally retarded by a preponderance of  
191 the evidence.

192 D. The verdict of the jury, if the issue of mental retardation is raised, shall be in writing, and, in  
193 addition to the forms specified in § 19.2-264.4, shall include 1 of the following forms:

194 (1) "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory  
195 language of the offense charged), and that the defendant has proven by a preponderance of the evidence  
196 that he is mentally retarded, fix his punishment at (i) imprisonment for life or (ii) imprisonment for life  
197 and a fine of \$.....

198 Signed.....foreman"

199 or

200 (2) "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory  
201 language of the offense charged) and find that the defendant has not proven by a preponderance of the  
202 evidence that he is mentally retarded.

203 Signed.....foreman"

204 § 19.2-264.3:1.2. Expert assistance when issue of defendant's mental retardation relevant to capital  
205 sentencing.

206 A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and  
207 (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court  
208 shall appoint 1 or more qualified mental health experts to assess whether or not the defendant is  
209 mentally retarded and to assist the defense in the preparation and presentation of information  
210 concerning the defendant's mental retardation. The mental health expert appointed pursuant to this  
211 section shall be (a) a psychiatrist, a clinical psychologist or an individual with a doctorate degree in  
212 clinical psychology, (b) skilled in the administration, scoring and interpretation of intelligence tests and  
213 measures of adaptive behavior and (c) qualified by experience and by specialized training, approved by  
214 the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services, to perform  
215 forensic evaluations. The defendant shall not be entitled to a mental health expert of the defendant's  
216 own choosing or to funds to employ such expert.

217 B. Evaluations performed pursuant to subsection A may be combined with evaluations performed  
218 pursuant to §§ 19.2-169.1, 19.2-169.5, or § 19.2-264.3:1.

219 C. The expert appointed pursuant to subsection A shall submit to the attorney for the defendant a  
220 report assessing whether the defendant is mentally retarded. The report shall include the expert's  
221 opinion as to whether the defendant is mentally retarded.

222 D. The report described in subsection C shall be sent solely to the attorney for the defendant and  
223 shall be protected by the attorney-client privilege. However, the Commonwealth shall be given a copy of  
224 the report, the results of any other evaluation of the defendant's mental retardation and copies of  
225 psychiatric, psychological, medical or other records obtained during the course of the evaluation, after  
226 the attorney for the defendant gives notice of an intent to present evidence of mental retardation  
227 pursuant to subsection E.

228 E. In any case in which a defendant charged with capital murder intends, in the event of conviction,  
229 to present testimony of an expert witness to support a claim that he is mentally retarded, he or his  
230 attorney shall give notice in writing to the attorney for the Commonwealth, at least 21 days before trial,  
231 of his intention to present such testimony. In the event that such notice is not given and the defendant  
232 tenders testimony by an expert witness at the sentencing phase of the trial, then the court may, in its  
233 discretion, upon objection of the Commonwealth, either allow the Commonwealth a continuance or,  
234 under appropriate circumstances, bar the defendant from presenting such evidence.

235 F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth  
236 thereafter seeks an evaluation concerning the existence or absence of the defendant's mental retardation,  
237 the court shall appoint one or more qualified experts to perform such an evaluation. The court shall  
238 order the defendant to submit to such an evaluation, and advise the defendant on the record in court  
239 that a refusal to cooperate with the Commonwealth's experts could result in exclusion of the defendant's  
240 expert evidence. The qualification of the experts shall be governed by subsection A. The attorney for the  
241 Commonwealth shall be responsible for providing the experts the information specified in subsection C  
242 of § 19.2-169.5. After performing their evaluation, the experts shall report their findings and opinions  
243 and provide copies of psychiatric, psychological, medical or other records obtained during the course of  
244 the evaluation to the attorneys for the Commonwealth and the defense.

2. If the court finds, after hearing evidence presented by the parties, out of the presence of the jury, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.

§ 19.2-264.3:3. Limitations on use of statements or disclosure by defendant during evaluations.

No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6, a mental condition evaluation performed pursuant to § 19.2-264.3:1 or a mental retardation evaluation performed pursuant to § 19.2-264.3:1.2, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.

§ 19.2-264.4. Sentence proceeding.

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

A1. In any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of § 19.2-299.1.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) ~~mental retardation~~ even if § 19.2-264.3:1.1 is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed \_\_\_\_\_, foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life; or (ii) imprisonment for life and a fine of \$.....

Signed \_\_\_\_\_, foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

306 2. That an emergency exists and this act is in force from its passage.

307 3. That the provisions of this act may result in a net increase in periods of imprisonment or  
308 commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0  
309 for periods of imprisonment in state adult correctional facilities and is \$0 for periods of  
310 commitment to the custody of the Department of Juvenile Justice.