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HOUSE BILL NO. 1133

Offered January 13, 2014

A BILL to amend and reenact §§ 18.2-10, 19.2-264.3:1.1, 19.2-264.3:1.2, and 19.2-264.3:3 of the Code of Virginia, relating to death penalty; persons with mental disability and mental impairments ineligible.

Patron—Hope

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-10, 19.2-264.3:1.1, 19.2-264.3:1.2, and 19.2-264.3:3 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-10. Punishment for conviction of felony; penalty.

The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, if the person so convicted was 18 years of age or older at the time of the offense and is not determined to be *mentally disabled, mentally impaired, or* 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 18 years of age at the time of the offense or is determined to be *mentally disabled, mentally impaired, or* 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 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 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 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 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 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 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.

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

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

§ 19.2-264.3:1.1. Capital cases; determination of mental disability, mental impairment, or mental retardation.

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

"Mentally disabled" means a disability, originating at any age, 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, including consideration of the test's standard of error measure and similar acknowledged phenomenon, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

"Mentally impaired" means a substantial disorder of a person's cognitive, volitional, or emotional processes characterized concurrently by a demonstrable and significant impairment in the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law but

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59 *which does not otherwise render him unrestorably incompetent to stand trial pursuant to § 19.2-169.1.*
60 *The term "mentally impaired" does not include a disorder that is manifested primarily by repeated*
61 *criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other*
62 *intoxicants.*

63 "Mentally retarded" means a disability, originating before the age of 18 years, characterized
64 concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a
65 standardized measure of intellectual functioning administered in conformity with accepted professional
66 practice, *including consideration of the test's standard of error measure and similar acknowledged*
67 *phenomenon*, that is at least two standard deviations below the mean and (ii) significant limitations in
68 adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

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

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

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

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

93 C. In any case in which the offense may be punishable by death ~~and is tried before a jury, if the~~
94 ~~defendant raises the issue of mental disability, mental impairment, or mental retardation, if raised by the~~
95 ~~defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be~~
96 ~~determined by the jury as part of the sentencing proceeding required by § 19.2-264.4 judge shall, prior~~
97 ~~to the commencement of the trial, conduct a hearing and determine whether the defendant is mentally~~
98 ~~disabled, mentally impaired, or mentally retarded and is subject to the death penalty. The decision of~~
99 ~~the judge shall be in writing.~~

100 In any case in which the offense may be punishable by death and is tried before a judge, the issue of
101 mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of
102 ~~§ 19.2-264.3:1.2, shall be determined by the judge as part of the sentencing proceeding required by~~
103 ~~§ 19.2-264.4.~~

104 The defendant shall bear the burden of proving that he is *mentally disabled, mentally impaired, or*
105 *mentally retarded* by a preponderance of the evidence.

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

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

112 Signed _____ foreman"

113 or

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

117 Signed _____ foreman"

118 **§ 19.2-264.3:1.2. Expert assistance when issue of defendant's mental disability, mental**
119 **impairment, or mental retardation relevant to capital case.**

120 A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and

(ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to assess whether or not the defendant is *mentally disabled, mentally impaired, or* mentally retarded and to assist the defense in the preparation and presentation of information concerning the defendant's *mental disability, mental impairment, or* mental retardation. The mental health expert appointed pursuant to this section shall be (a) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology;; (b) *in the case of assessing whether a defendant is mentally disabled or mentally retarded*, skilled in the administration, scoring, and interpretation of intelligence tests and measures of adaptive behavior; and (c) qualified by experience and by specialized training, approved by the Commissioner of Behavioral Health and Developmental Services, to perform forensic evaluations. The defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such expert.

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

C. The expert appointed pursuant to subsection A shall submit to the attorney for the defendant a report assessing whether the defendant is *mentally disabled, mentally impaired, or* mentally retarded. The report shall include the expert's opinion as to whether the defendant is *mentally disabled, mentally impaired, or* mentally retarded.

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

E. In any case in which a defendant charged with capital murder intends; ~~in the event of conviction,~~ to present testimony of an expert witness to support a claim that he is *mentally disabled, mentally impaired, or* mentally retarded, he or his attorney shall give notice in writing to the attorney for the Commonwealth, at least 24 ~~60~~ 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 the defendant's *mental disability, mental impairment, or* mental retardation, 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 experts could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A. 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.

§ 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 disability, mental impairment, or* 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.

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 806 of the Acts of Assembly of 2013 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

182 necessary appropriation is \$0 for periods of commitment to the custody of the Department of
183 Juvenile Justice.