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SENATE BILL NO. 855

Offered January 14, 2015

Prefiled January 6, 2015

A BILL to amend and reenact § 19.2-264.3:1.1 of the Code of Virginia, relating to capital cases; determination of mental retardation.

Patron—Marsden

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-264.3:1.1 of the Code of Virginia is amended and reenacted as follows:

§ 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 conceptual, social 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. *All such measures shall be reported as a range of scores calculated by adding and subtracting the standard error of measurement identified by the test publisher to the defendant's earned score.* 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 Behavioral Health and Developmental 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 of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4.

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

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

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

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

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and a fine of $_____.

Signed _____ foreman"

or

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

Signed _____ foreman"

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 $0 for periods of imprisonment in state adult correctional facilities and $0 for periods of commitment to the custody of the Department of Juvenile Justice.