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SENATE BILL NO. 1348

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice on January 23, 2017)

(Patron Prior to Substitute—Senator Favola)

A BILL to amend and reenact §§ 19.2-264.3:1.3, 19.2-264.3:3, and 19.2-264.4 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 19.2-264.3:1.4 and 19.2-264.3:1.5, relating to death penalty; severe mental illness; penalty.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-264.3:1.3, 19.2-264.3:3, 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 19.2-264.3:1.4 and 19.2-264.3:1.5 as follows:

§ 19.2-264.3:1.3. Expert assistance for indigent defendants in capital cases.

A. In any case in which an indigent defendant (i) is charged with a capital offense and (ii) is found by the court to be financially unable to pay for expert assistance, the defendant or his attorney may, upon notice to the Commonwealth, move in circuit court for the court to designate another judge in the same circuit to hear an ex parte request for the appointment of a qualified expert to assist in the preparation of the defendant's defense. No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made in an adversarial proceeding before the trial judge demonstrating a particularized need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made part of the record available for appellate review or any other ~~post conviction~~ *post-conviction* review.

B. The motion for the appointment of a qualified expert shall be in writing, filed under seal, and shall be heard ex parte as soon as practicable by the designated judge. Upon hearing the ex parte request, the designated judge shall find, by clear and convincing evidence, a particularized need for confidentiality has been demonstrated before considering the request for expert services. After a hearing upon the motion, the court may order the appointment of a qualified expert upon a showing that the provision of the requested expert services would materially assist the defendant in preparing his defense and the lack of such confidential assistance would result in a fundamentally unfair trial. Any expert appointed pursuant to this subsection shall be compensated in accordance with § 19.2-332. The designated judge shall direct requests for scientific investigations to the Department of Forensic Science or Division of Consolidated Laboratory Services whenever practicable.

C. All ex parte hearings conducted under this section shall be on the record, and the record of the hearings, together with all papers filed and orders entered in connection with ex parte requests for expert assistance, shall be kept under seal as part of the record of the case. Following decision on the motion, whether it is granted or denied, the motion shall remain under seal. On motion of any party, and for good cause shown, the court may unseal the record after the trial is concluded. Following final judgment and after all appeals have been exhausted, the court shall unseal all records and other material sealed pursuant to this section. No ex parte ruling by a designated judge pursuant to this section in a proceeding where the Commonwealth is excluded shall be the subject of a claim of error on appeal, or form the basis for relief in any post-conviction litigation on behalf of the defendant.

D. This section does not apply to the appointment of a mental health expert pursuant to § 19.2-264.3:1 ~~or~~, 19.2-264.3:1.2, *or 19.2-264.3:1.5*.

§ 19.2-264.3:1.4. Capital cases; determination of severe mental illness at time of offense.

A. As used in this section and § 19.2-264.3:1.5:

"Active psychotic symptoms" means hallucinations, delusions, or grossly disorganized or irrational thinking such that the person at the time of the crime had an inability to distinguish fact from fantasy.

"Severe mental illness" means a mental disorder manifested by active psychotic symptoms that substantially impair a person's capacity to (i) appreciate the nature, consequences, or wrongfulness of the person's conduct; (ii) exercise rational judgment in relation to the person's conduct; or (iii) conform the person's conduct to the requirements of the law. "Severe mental illness" does not include a mental disorder attributable to the acute effects of voluntary use of alcohol or any drug.

B. In any case in which the offense may be punishable by death and is tried before a jury, the issue of whether the defendant had a severe mental illness at the time of the offense, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.5, 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 whether the defendant had a severe mental illness at the time of the offense, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.5, shall be determined by the

judge as part of the sentencing proceeding required by § 19.2-264.4.

The defendant has the burden of proving by a preponderance of the evidence that he had a severe mental illness at the time of the offense.

If the judge or jury determines that the defendant had a severe mental illness at the time of the offense, the defendant shall be sentenced to life imprisonment. Such determination shall be supported by any available medical or criminal justice records created prior to the commission of the offense; however, the absence of prior medical or criminal justice records shall not preclude a judge or jury from determining that the defendant had a severe mental illness at the time of the offense.

C. The verdict of the jury, if the issue of whether the defendant had a severe mental illness at the time of the offense 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 had a severe mental illness at the time of the offense, fix his punishment at (i) imprisonment for life or (ii) imprisonment for life 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 had a severe mental illness at the time of the offense.

Signed _____ foreman"

§ 19.2-264.3:1.5. Expert assistance when issue of defendant's severe mental illness relevant to capital sentencing.

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 had a severe mental illness at the time of the offense and to assist the defense in the preparation and presentation of information concerning the defendant's severe mental illness. The mental health expert appointed pursuant to this section shall be (a) a psychiatrist, a clinical psychologist, or an individual with a doctoral degree in clinical psychology and (b) 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 had a severe mental illness at the time of the offense. The report shall include the expert's opinion as to whether the defendant had a severe mental illness at the time of the offense.

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 severe mental illness at the time of the offense, 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 the defendant's severe mental illness at the time of the offense 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 the defendant had a severe mental illness at the time of the offense, he or his attorney shall give notice in writing to the attorney for the Commonwealth, at least 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 whether the defendant had a severe mental illness 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 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 to 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 at

least 15 days before trial.

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, *or an evaluation to determine whether the defendant had a severe mental illness at the time of the offense pursuant to § 19.2-264.3:1.5,* 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) *even if § 19.2-264.3:1.4 is inapplicable as a bar to the death penalty,* 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~~ *even if § 19.2-264.3:1.4 is inapplicable as a bar to the death penalty,* 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~~,~~ *at the time of the commission of the capital felony;* (v) the age of the defendant at the time of the commission of the capital offense~~,~~*;* or (vi) 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. In the event *that* the jury cannot agree as to the penalty, the court shall dismiss the jury~~,~~ and impose a sentence of imprisonment for life.

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 780 of the Acts of Assembly of 2016 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 necessary appropriation is $0 for periods of commitment to the custody of the Department of Juvenile Justice.