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SENATE BILL NO. 1352

Offered January 11, 2017

Prefiled January 11, 2017

A BILL to amend and reenact §§ 8.01-654.2, 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 capital cases; replacing certain terminology.

Patrons—Howell, Lucas and McClellan

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-654.2, 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:

§ 8.01-654.2. Presentation of claim of intellectual disability by person sentenced to death before April 29, 2003.

Notwithstanding any other provision of law, any person under sentence of death whose sentence became final in the circuit court before April 29, 2003, and who desires to have a claim of his ~~mental retardation~~ *intellectual disability* 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~~ *intellectual disability* 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~~ *intellectual disability*, 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~~ *intellectual disability* 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~~ *intellectual disability*. A person proceeding under this section shall allege the factual basis for his claim of ~~mental retardation~~ *intellectual disability*. 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~~ *intellectual disability*; 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~~ *intellectual disability* 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~~ *intellectual disability*.

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; 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 retarded~~ *a person with intellectual disability* 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 retarded~~ *a person with intellectual disability* 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

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SB1352

59 fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose
60 only a fine.

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

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

71 **§ 19.2-264.3:1.1. Capital cases; determination of intellectual disability.**

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

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

78 B. Assessments of ~~mental retardation~~ *intellectual disability* under this section and § 19.2-264.3:1.2
79 shall conform to the following requirements:

80 1. Assessment of intellectual functioning shall include administration of at least one standardized
81 measure generally accepted by the field of psychological testing and appropriate for administration to the
82 particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral
83 and other individual factors. All such measures shall be reported as a range of scores calculated by
84 adding and subtracting the standard error of measurement identified by the test publisher to the
85 defendant's earned score. Testing of intellectual functioning shall be carried out in conformity with
86 accepted professional practice, and whenever indicated, the assessment shall include information from
87 multiple sources. The Commissioner of Behavioral Health and Developmental Services shall maintain an
88 exclusive list of standardized measures of intellectual functioning generally accepted by the field of
89 psychological testing.

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

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

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

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

111 The defendant shall bear the burden of proving that he is ~~mentally retarded~~ *a person with intellectual*
112 *disability* by a preponderance of the evidence.

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

116 (4) 1. "We the jury, on the issue joined, having found the defendant guilty of (here set out the
117 statutory language of the offense charged), and that the defendant has proven by a preponderance of the
118 evidence that he is ~~mentally retarded~~ *a person with intellectual disability*, fix his punishment at (i)
119 imprisonment for life or (ii) imprisonment for life and a fine of \$_____.

120 Signed _____ foreman"

or
 (2) 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~~ *a person with intellectual disability*."

Signed _____ foreman"

§ 19.2-264.3:1.2. Expert assistance when issue of defendant's intellectual disability 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 is ~~mentally retarded~~ *a person with intellectual disability* and to assist the defense in the preparation and presentation of information concerning the defendant's ~~mental retardation~~ *intellectual disability*. 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) 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 retarded~~ *a person with intellectual disability*. The report shall include the expert's opinion as to whether the defendant is ~~mentally retarded~~ *a person with intellectual disability*.

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 retardation~~ *intellectual disability* 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 retardation~~ *intellectual disability* 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 retarded~~ *a person with intellectual disability*, he or his attorney shall give notice in writing to the attorney for the Commonwealth, at least 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 the defendant's ~~mental retardation~~ *intellectual disability*, 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 retardation~~ *an intellectual disability* 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

182 disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the
183 defense.
184 **2. That it is the expressed intent of the General Assembly that the provisions of this act serve only**
185 **to reflect a change in terminology approved and used by experts in the field to describe the**
186 **identical phenomenon, as stated by the U.S. Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986**
187 **(2014), and do not affect the meaning or applicability of the existing definition or case law**
188 **utilizing the existing definition.**