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SENATE BILL NO. 1177

Offered January 12, 2005

Prefiled January 12, 2005

A BILL to amend and reenact §§ 18.2-18, 19.2-264.4, 19.2-266.2 and 19.2-398 of the Code of Virginia, relating to capital cases.

Patron—Obenshain

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-18, 19.2-264.4, 19.2-266.2 and 19.2-398 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-18. How principals in second degree and accessories before the fact punished.

In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of subdivision 2 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise under the provisions of subdivision 10 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of subdivision 13 of § 18.2-31, an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.

§ 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) 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

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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~~ shall empanel a different jury to ascertain punishment unless the defendant, the attorney for the Commonwealth, and the court agree in the manner provided in § 19.2-257, that the court shall fix punishment.

§ 19.2-266.2. Defense objections to be raised before trial; hearing; bill of particulars.

Defense motions or objections seeking (i) suppression of evidence on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, Section 8, 10 or 11 of the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination; ~~or~~ (ii) *dismissal of a warrant, information, or indictment or any count or charge thereof on the ground that: (a) the defendant would be deprived of a speedy trial in violation of the provisions of the Sixth Amendment to the United States Constitution, Article I, Section 8 of the Constitution of Virginia, or § 19.2-243; or (b) the defendant would be subjected to double jeopardy in violation of the provisions of the Fifth Amendment to the Constitution of the United States or Article I, Section 8 of the Constitution of Virginia; or (iii) dismissal* of a warrant, information, or indictment or any count or charge thereof on the ground that a statute upon which it was based is unconstitutional shall be raised by motion or objection, in writing, before trial. The motions or objections shall be filed and notice given to opposing counsel not later than seven days before trial. A hearing on all such motions or objections shall be held not later than three days prior to trial, unless such period is waived by the accused, as set by the trial judge. The court may, however, for good cause shown and in the interest of justice, permit the motions or objections to be raised at a later time.

To assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230. The trial court shall fix the time within which such bill of particulars is to be filed. Upon further motion of the defendant, the trial court may, upon a showing of good cause, direct the Commonwealth to supplement its bill of particulars. The attorney for the Commonwealth shall certify that the matters stated in the bill of particulars are true and accurate to the best of his knowledge and belief.

§ 19.2-398. When appeal by the Commonwealth allowed.

A. In a felony case a pretrial appeal from a circuit court may be taken by the Commonwealth from:

1. An order of a circuit court dismissing a warrant, information or indictment, or any count or charge thereof on the ground that (i) *the defendant would be deprived of a speedy trial in violation of the provisions of the Sixth Amendment to the United States Constitution, Article I, Section 8 of the Constitution of Virginia, or § 19.2-243; (ii) the defendant would be subjected to double jeopardy in violation of the provisions of the Fifth Amendment to the Constitution of the United States or Article I, Section 8 of the Constitution of Virginia; or (iii) a statute upon which it was based is unconstitutional;* or

2. An order of a circuit court prohibiting the use of certain evidence at trial on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, Section 8, 10 or 11 of the Constitution of Virginia prohibiting illegal searches and seizures and protecting rights against self-incrimination, provided the Commonwealth certifies that the appeal is not taken for purpose of delay and that the evidence is substantial proof of a fact material in the proceeding.

B. A petition for appeal may be taken by the Commonwealth in a felony case from any order of release on conditions pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title.

C. A petition for appeal may be taken by the Commonwealth in a felony case after conviction where the sentence imposed by the circuit court is contrary to mandatory sentencing or restitution terms required by statute.

D. Nothing in this chapter shall affect the Commonwealth's right to appeal in civil matters or cases involving a violation of law relating to the state revenue or appeals pursuant to § 17.1-411 or subsection C of § 19.2-317.

2. That the provisions of this act may result in a net increase in periods of imprisonment or

121 commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0
122 for periods of imprisonment in state adult correctional facilities and is \$0 for periods of
123 commitment to the custody of the Department of Juvenile Justice.

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