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SENATE BILL NO. 802

Offered January 10, 2018

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.*

Patron—Favola

Referred to Committee for Courts of Justice

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 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, "severe mental illness" means the exhibition of 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 disorder manifested primarily by repeated criminal conduct or 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

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

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

62 If the judge or jury determines that the defendant had a severe mental illness at the time of the
63 offense, the defendant shall be sentenced to life imprisonment.

64 C. The verdict of the jury, if the issue of whether the defendant had a severe mental illness at the
65 time of the offense is raised, shall be in writing and, in addition to the forms specified in § 19.2-264.4,
66 shall include one of the following forms:

67 1. "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory
68 language of the offense charged), and that the defendant has proven by a preponderance of the evidence
69 that he had a severe mental illness at the time of the offense, fix his punishment at (i) imprisonment for
70 life or (ii) imprisonment for life and a fine of \$_____.

71 Signed _____ foreman"; or

72 2. "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory
73 language of the offense charged), find that the defendant has not proven by a preponderance of the
74 evidence that he had a severe mental illness at the time of the offense.

75 Signed _____ foreman".

76 **§ 19.2-264.3:1.5. Expert assistance when issue of defendant's severe mental illness relevant to**
77 **capital sentencing.**

78 A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and
79 (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court
80 shall appoint one or more qualified mental health experts to assess whether or not the defendant had a
81 severe mental illness at the time of the offense and to assist the defense in the preparation and
82 presentation of information concerning the defendant's severe mental illness. The mental health expert
83 appointed pursuant to this section shall be (a) a psychiatrist, a clinical psychologist, or an individual
84 with a doctorate degree in clinical psychology and (b) qualified by experience and by specialized
85 training, approved by the Commissioner of Behavioral Health and Developmental Services, to perform
86 forensic evaluations. The defendant shall not be entitled to a mental health expert of the defendant's
87 own choosing or to funds to employ such expert.

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

90 C. The expert appointed pursuant to subsection A shall submit to the attorney for the defendant a
91 report assessing whether the defendant had a severe mental illness at the time of the offense. The report
92 shall include the expert's opinion as to whether the defendant had a severe mental illness at the time of
93 the offense.

94 D. The report described in subsection C shall be sent solely to the attorney for the defendant and
95 shall be protected by the attorney-client privilege. However, the Commonwealth shall be given a copy of
96 the report, the results of any other evaluation of the defendant's severe mental illness at the time of the
97 offense, and copies of psychiatric, psychological, medical, or other records obtained during the course
98 of the evaluation, after the attorney for the defendant gives notice of an intent to present evidence of the
99 defendant's severe mental illness at the time of the offense pursuant to subsection E.

100 E. In any case in which a defendant charged with capital murder intends, in the event of conviction,
101 to present testimony of an expert witness to support a claim that he had a severe mental illness at the
102 time of the offense, he or his attorney shall give notice in writing to the attorney for the Commonwealth,
103 at least 60 days before trial, of his intention to present such testimony. In the event that such notice is
104 not given and the defendant tenders testimony by an expert witness at the sentencing phase of the trial,
105 then the court may, in its discretion, upon objection of the Commonwealth, either allow the
106 Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting
107 such evidence.

108 F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth
109 thereafter seeks an evaluation concerning whether the defendant had a severe mental illness at the time
110 of the offense, the court shall appoint one or more qualified experts to perform such an evaluation. The
111 court shall order the defendant to submit to such an evaluation and advise the defendant on the record
112 in court that a refusal to cooperate with the Commonwealth's experts could result in exclusion of the
113 defendant's expert evidence. The qualification of the experts shall be governed by subsection A. The
114 attorney for the Commonwealth shall be responsible for providing to the experts the information
115 specified in subsection C of § 19.2-169.5. After performing their evaluation, the experts shall report
116 their findings and opinions and provide copies of psychiatric, psychological, medical, or other records
117 obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense at
118 least 15 days before trial.

119 2. If the court finds, after hearing evidence presented by the parties, out of the presence of the jury,
120 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~~, an intellectual disability 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) *even if § 19.2-264.3:1.4 is inapplicable as a bar to the death penalty*, 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. 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.

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 836 of the Acts of Assembly of 2017 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 cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.