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SENATE BILL NO. 811

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary
on February 5, 2020)

(Patron Prior to Substitute—Senator Morrissey)

A BILL to amend and reenact §§ 19.2-264.3, 19.2-288, 19.2-295, 19.2-295.1, and 19.2-295.3, relating to sentencing in a criminal case; jury trial.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-264.3, 19.2-288, 19.2-295, 19.2-295.1, and 19.2-295.3 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-264.3. Procedure for trial by jury.

A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed and the accused has requested that the jury ascertain punishment of the offense as provided in subsection A of § 19.2-295, it shall fix the punishment as provided in § 19.2-295.1.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

§ 19.2-288. Verdict when accused found guilty of punishable homicide.

If a person indicted for murder be found by the jury guilty of any punishable homicide, they shall in their verdict fix the degree thereof and the court shall ascertain the extent of the punishment to be inflicted within the bounds prescribed by §§ 18.2-30 to 18.2-36, unless the accused has requested that the jury ascertain punishment of the offense as provided in subsection A of § 19.2-295. However, in any case in which the accused is found guilty of capital murder, the provisions of Article 4.1 (§ 19.2-264.2 et seq.) of Chapter 15 shall apply.

§ 19.2-295. Ascertainment of punishment.

A. Within the limits prescribed by law, the court shall ascertain the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of when a person is convicted of a criminal offense, shall be ascertained by the jury, or by the court in cases tried without a jury unless the accused is tried by a jury and has requested that the jury ascertain punishment at least 30 days prior to trial.

B. When the accused is tried by a jury, deliberations of the jury shall be confined to a determination of the guilt or innocence of the accused, except that when the ascertainment of punishment by the jury has been requested by the accused, a proceeding in accordance with § 19.2-295.1 shall apply, or when the accused is found guilty of capital murder, the provisions of Article 4.1 (§ 19.2-264.2 et seq.) of Chapter 15 shall apply.

C. In any case in which a jury has fixed a sentence as provided in this chapter and the sentence is modified by the court pursuant to the authority contained within this chapter, the court shall file with the record of the case a written explanation of such modification including the cause therefor.

§ 19.2-295.1. Sentencing proceeding by the jury after conviction.

In cases of trial by jury, upon a finding that the defendant is guilty of a felony or a Class 1 misdemeanor, or upon a finding in the trial de novo of an appealed misdemeanor conviction that the defendant is guilty of a Class 1 misdemeanor, a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury when ascertainment of punishment by jury has been requested by the accused as provided in subsection A of § 19.2-295. At such proceeding, the Commonwealth may present any victim impact testimony pursuant to § 19.2-295.3 and shall present the defendant's prior criminal history, including prior convictions and the punishments imposed, by certified, attested or exemplified copies of the final order, including adult convictions and juvenile convictions and adjudications of delinquency. Prior convictions shall include convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories. The Commonwealth shall provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's prior criminal history, including prior convictions and punishments imposed. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had, (iii) each

60 offense of which he was convicted, and (iv) the punishment imposed. Prior to commencement of the
61 trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final
62 orders which it intends to introduce at sentencing. After the Commonwealth has introduced in its
63 case-in-chief of the sentencing phase such evidence of prior convictions or victim impact testimony, or
64 both, or if no such evidence is introduced, the defendant may introduce relevant, admissible evidence
65 related to punishment. Nothing in this section shall prevent the Commonwealth or the defendant from
66 introducing relevant, admissible evidence in rebuttal.

67 If the jury cannot agree on a punishment, the court shall impanel a different jury to ascertain
68 punishment, unless the defendant, the attorney for the Commonwealth, and the court agree, in the
69 manner provided in § 19.2-257, that the court shall fix punishment.

70 If the sentence imposed pursuant to this section is subsequently set aside or found invalid solely due
71 to an error in the sentencing proceeding, the court shall impanel a different jury to ascertain punishment,
72 unless the defendant, the attorney for the Commonwealth and the court agree, in the manner provided in
73 § 19.2-257, that the court shall fix punishment.

74 **§ 19.2-295.3. Admission of victim impact testimony.**

75 Whether by trial or upon a plea of guilty, upon a finding that the defendant is guilty of a felony, the
76 court shall permit the victim, as defined in § 19.2-11.01, upon motion of the attorney for the
77 Commonwealth, to testify in the presence of the accused regarding the impact of the offense upon the
78 victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of
79 subsection A of § 19.2-299.1. In the case of trial by jury *and when the accused has requested the jury*
80 *to ascertain punishment as provided in subsection A of § 19.2-295*, the court shall permit the victim to
81 testify at the sentencing hearing conducted pursuant to § 19.2-295.1. ~~or in~~ *In all other cases of trial by*
82 *jury*, the case of trial by the court, or *the case of* a guilty plea, the court shall permit the victim to
83 testify before the court prior to the imposition of ~~a~~ *the* sentence *by the presiding judge*. Victim impact
84 testimony in all capital murder cases shall be admitted in accordance with § 19.2-264.4.