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SENATE BILL NO. 296

Senate Amendments in [] - February 15, 2022

Prefiled January 11, 2022

A BILL to amend and reenact § 19.2-295.1 of the Code of Virginia, relating to sentencing proceeding by jury after conviction; relevant mitigating evidence.

Patron Prior to Engrossment—Senator Deeds

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:**1. That § 19.2-295.1 of the Code of Virginia is amended and reenacted as follows:****§ 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 offense of which he was convicted, and (iv) the punishment imposed. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce at sentencing. After the Commonwealth has introduced in its case-in-chief of the sentencing phase such evidence of prior convictions or victim impact testimony, or both, or if no such evidence is introduced, the defendant may introduce relevant, admissible evidence related to punishment. Nothing in this section shall prevent the Commonwealth or the defendant from introducing relevant, admissible evidence in rebuttal.

Relevant evidence that may be admissible 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: (a) whether the defendant has no significant history of prior criminal activity, or of serious or violent criminal activity; (b) whether the offense was committed while the defendant (1) was under the influence of mental illness, (2) suffered from an intellectual disability or developmental disability, or (3) was of subaverage intellectual functioning at the time of offense; (c) the age of the defendant at the time of offense, including whether the offense was committed while the defendant was of an age where the development and maturation of the defendant's prefrontal cortex was complete; (d) the likelihood of recidivism, including whether the likelihood of re-offense will be lower due to the defendant's age at the time of release; (e) at the time of the commission of the offense, 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; (f) whether the victim was a participant in the defendant's conduct or consented to the act; (g) any conviction and sentence imposed against a codefendant or other party with accessory liability, or the absence of a conviction and sentence, whether through declination, dismissal, acquittal, or otherwise; (h) evidence of the defendant's positive adjustment to incarceration, including on a pretrial basis, or evidence of his good behavior in the community pending trial; (i) the impact of incarceration on the defendant and the defendant's family, including the loss of employment, child custody, child care, medical care, housing, and emotional welfare; and (j) the availability and eligibility for suitable alternatives to incarceration, including community supervision, mental health treatment, substance abuse treatment, employment readiness, and vocational training.

If the jury cannot agree on a punishment, the court shall fix punishment.

If the sentence imposed pursuant to this section is subsequently set aside or found invalid solely due to an error in the sentencing proceeding, the court shall impanel 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.

ENGROSSED

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59 *[Any relevant evidence and facts in mitigation that may be considered by a jury when ascertainment*
60 *of punishment by jury has been requested by the accused also may be considered by the court when the*
61 *court fixes punishment.]*