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## HOUSE BILL NO. 1070

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice  
on \_\_\_\_\_)

(Patron Prior to Substitute—Delegate Rasoul)

A BILL to amend the Code of Virginia by adding a section numbered 19.2-263.4, relating to procedure for use of prior adjudication, conviction, or status as element of offense charged.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 19.2-263.4 as follows:

§ 19.2-263.4. Procedure for use of prior adjudication, conviction, or status as element of offense charged.

A. Except as provided in subsection B, in any jury trial where proof of a prior adjudication or conviction is required pursuant to statute, upon motion of the defendant or his counsel made not less than 10 days prior to trial, the following procedure shall apply:

1. Prior to the impaneling of the jury, the court shall determine whether the defendant has waived the right for the jury to determine a prior adjudication or conviction as required pursuant to statute.

2. Upon a finding of a valid waiver, the court shall hold a hearing to determine whether the defendant is the person previously adjudicated or convicted of the offense required pursuant to statute that is alleged in the indictment. At such hearing, the Commonwealth shall present evidence to the court to prove that (i) the defendant is the same person who was previously adjudicated delinquent or convicted of such offense and (ii) such prior adjudication or conviction qualifies as the prior offense required pursuant to statute. The defendant or his counsel may present rebuttal evidence to disprove the defendant's identity, adjudication, or conviction or otherwise challenge the Commonwealth's evidence.

3. If the court finds beyond a reasonable doubt that the defendant is the same person who was adjudicated delinquent or convicted of a prior offense required pursuant to statute and is currently charged, the court shall enter such finding on the record. However, no evidence of such prior adjudication or conviction shall be presented to the jury during the guilt phase of the trial.

4. In any indictment, information, warrant, or other charging document that is read or shown to the jury, the charged offense shall be referred to by a description that omits any reference to the defendant's prior adjudication or conviction required pursuant to statute. Such prior adjudication or conviction shall be in a separate count or filing or a clearly designated and redactable portion of the indictment that is not read or shown to the jury.

5. The judge shall instruct the jury only on the substantive elements of the charged offense and omit any reference to a prior adjudication or conviction required pursuant to statute in such elements. Once such finding described in subdivision 3 occurs, the element of the prior adjudication or conviction required pursuant to statute shall be treated as proven by the Commonwealth for the purpose of establishing the grade of the offense or the potential for enhanced punishment.

6. If the jury finds the defendant guilty of the substantive elements of the charged offense, the court's finding described in subdivision 3 shall be used by the court or jury, as applicable, for the sentencing phase of the trial pursuant to §§ 19.2-295 and 19.2-295.1.

B. In any jury trial where proof of a prior adjudication, conviction, or status makes otherwise legal conduct illegal, including any violation of § 18.2-308.1:4, 18.2-308.1:8, 18.2-308.2, 18.2-370.2, 18.2-370.5, or 18.2-472.1, upon motion of the defendant or his counsel made not less than 10 days prior to trial, the following procedure shall apply:

1. If the defendant agrees to stipulate to the existence of a prior adjudication, conviction, or status as required pursuant to statute, the attorney for the Commonwealth and the court shall accept such stipulation to satisfy such requirement.

2. Upon acceptance of the stipulation described in subdivision 1, no evidence regarding the name, nature, or specific details of the prior offense or status required pursuant to statute shall be admitted or presented to the jury. The indictment for the charged offense shall be redacted if read to the jury to only allege that the defendant has been previously adjudicated delinquent or convicted of an offense required pursuant to statute or is the subject of an order that directly contributes to the defendant's current status required pursuant to statute.

3. The court shall (i) instruct the jury (a) that the defendant has stipulated to the prior adjudication, conviction, or status and (b) to accept such stipulation for the charged offense required pursuant to statute and (ii) inform the jury that the defendant (a) was adjudicated delinquent or convicted of the prior offense required pursuant to statute or (b) is the subject of an order that directly contributes to the defendant's current status required pursuant to statute. The court shall not inform the jury of the specific offense or findings for any such previous adjudication, conviction, or status.

60       C. If a defendant fails to make a motion 10 days prior to trial pursuant to this section, any prior  
61 adjudication, conviction, or status shall be submitted to the jury to determine if it meets the requirements of  
62 the charged offense pursuant to statute.

63       D. The court may, for good cause shown and in the interest of justice, permit the defendant to move the  
64 court less than 10 days prior to trial pursuant to this section, up and until the jury has been impaneled and  
65 sworn, and if the court grants such motion, the procedures of subsections A and B shall apply. In the event  
66 such motion is granted, the court shall, upon motion of the Commonwealth, grant a continuance for good  
67 cause shown.