

VIRGINIA ACTS OF ASSEMBLY -- 2004 SESSION

CHAPTER 764

An Act to amend and reenact §§ 37.1-70.5 through 37.1-70.9 of the Code of Virginia, relating to civil commitment of sexually violent predators.

[H 1237]

Approved April 12, 2004

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.1-70.5 through 37.1-70.9 of the Code of Virginia are amended and reenacted as follows:

§ 37.1-70.5. CRC assessment of prisoners eligible for commitment as sexually violent predators; mental health examination; recommendation.

A. Within 90 days of receiving notice from the Director pursuant to § 37.1-70.4 regarding a prisoner who is incarcerated for a sexually violent offense, the CRC shall (i) complete its assessment of such prisoner for possible commitment pursuant to subsection B and (ii) forward its recommendation regarding the prisoner, in written form, to the Attorney General pursuant to subsection C.

B. CRC assessments of prisoners incarcerated for sexually violent offenses shall include a mental health examination, including a personal interview, of the prisoner by a licensed psychiatrist or a licensed clinical psychologist, designated by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services, who is skilled in the diagnosis and treatment of mental abnormalities and disorders associated with violent sex offenders, and who is not a member of the CRC. The licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner is a sexually violent predator as defined in § 37.1-70.1 and forward the results of this evaluation and any supporting documents to the CRC for its review. The CRC assessment shall also include consideration of the prisoner's score on the Rapid Risk Assessment for Sexual Offender Recidivism or a comparable, scientifically validated instrument as designated by the Commissioner and a review of (i) the prisoner's institutional history and treatment record, if any; (ii) the prisoner's criminal background; and (iii) any other factor which is relevant to the determination of whether such prisoner is a sexually violent predator. *Notwithstanding § 19.2-299.1 or any other provision of law, the CRC is authorized to possess, copy and use presentence reports, postsentence reports and victim impact statements for all lawful purposes.*

C. Following the examination and review of a prisoner conducted pursuant to subsection B, the CRC shall recommend that such prisoner (i) be committed as a sexually violent predator pursuant to this article; (ii) not be committed, but be placed in a conditional release program as a less restrictive alternative; or (iii) not be committed because he does not meet the definition of a sexually violent predator. To assist the Attorney General in his review, the Department of Corrections, the CRC, and the psychiatrist or psychologist who conducts the mental health examination pursuant to this section shall provide the Attorney General with all evaluation reports, prisoner records, criminal records, medical files, and any other documentation relevant to determining whether a prisoner is a sexually violent predator.

D. Pursuant to clause (ii) of subsection C, the CRC shall recommend that a prisoner enter a conditional release program if it finds that (i) such prisoner does not need inpatient hospitalization, but needs outpatient treatment and monitoring to prevent his condition from deteriorating to a degree that he would need inpatient hospitalization; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the prisoner, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety.

E. Notwithstanding any other provision of law, all state and local courts, clerks, agencies, boards, and commissions shall provide to the CRC, all requested records, documents, notes, recording or other information of any kind, including, but not limited to, presentence or postsentence reports, victim impact statements, and child abuse registry records, within 20 days of receiving such request.

§ 37.1-70.6. Review of prisoners incarcerated for sexually violent offenses; unrestorably incompetent defendants charged with sexually violent offenses; petition for commitment; notice to Department of Corrections or referring court regarding disposition of review.

A. Upon receipt of a recommendation by the CRC regarding a prisoner incarcerated for a sexually violent offense or upon receipt of a court order referring an unrestorably incompetent defendant for review pursuant to § 19.2-169.3, the Attorney General shall have 90 days to conduct a review of such prisoner or defendant and (i) file a petition for the civil commitment of such prisoner or defendant as a sexually violent predator and stating sufficient facts to support such allegation or (ii) notify the Director and Commissioner in the case of a prisoner, or the referring court and the Commissioner in the case of

an unrestorably incompetent defendant, that he will not file a petition for commitment. Petitions for commitment shall be filed in the circuit court wherein the prisoner was last convicted of a sexually violent offense or wherein the defendant was deemed unrestorably incompetent and referred for commitment review pursuant to § 19.2-169.3.

B. In determining whether to file a petition to civilly commit a prisoner under this article, the Attorney General shall review (i) the CRC recommendation and its reasoning; (ii) the results of the mental health examination conducted pursuant to § 37.1-70.5; (iii) the prisoner's institutional history and treatment record, if any; (iv) the prisoner's criminal offense history; and (v) any other factor relevant to the determination of whether the prisoner should be civilly committed. Although the Attorney General shall consider the CRC recommendation as part of the review, the CRC recommendation is not binding upon the Attorney General.

C. In determining whether to file a petition to civilly commit a defendant under this article, the Attorney General shall review (i) the defendant's warrant or indictment, (ii) the competency report completed pursuant to § 19.2-169.1, (iii) the report and recommendations prepared by the director of the defendant's treating facility pursuant to § 19.2-169.3, (iv) the defendant's criminal offense history, (v) information about the alleged crime, and (vi) any other factor relevant to the determination of whether the defendant should be civilly committed.

D. Notwithstanding § 19.2-299.1 or any other provision of law, the Attorney General is authorized to possess, copy and use presentence reports, postsentence reports and victim impact statements for all lawful purposes.

§ 37.1-70.7. Probable cause hearing.

A. Upon the filing of a petition alleging that a person is a sexually violent predator, the circuit court shall (i) *forthwith order that until a final order is entered in the proceeding, in the case of a prisoner, he remain in the secure custody of the Department of Corrections or, in the case of a defendant, he remain in the secure custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services, and* (ii) schedule a hearing within ~~thirty~~ 60 days to determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. A copy of the petition shall be ~~personally served on the person named in the petition, his attorney, and his guardian or committee, if applicable~~ mailed by the clerk to the attorney appointed or retained for the person named in the petition, and in those cases in which the person named in the petition is a prisoner, to the warden or superintendent of the correctional facility wherein the person is then confined. The warden or superintendent shall cause the petition to be delivered to the person and shall certify such delivery to the clerk. In addition, a written explanation of the sexually violent predator involuntary commitment process and the statutory protections associated with the process shall be given to the person at the time the petition is ~~served~~ delivered.

B. Prior to any hearing under this section, the judge shall ascertain if the person whose commitment is sought is represented by counsel, and if he is not represented by counsel, the judge shall appoint an attorney-at-law to represent him. However, if such person requests an opportunity to employ counsel, the court shall give him a reasonable opportunity to employ counsel at his own expense.

C. At the probable cause hearing, the judge shall (i) verify the person's identity and (ii) determine whether probable cause exists to believe that the person is a sexually violent predator. In the case of a prisoner in the custody of the Department of Corrections, if the judge finds that there is not probable cause to believe that the person is a sexually violent predator, the judge shall dismiss the petition and the person shall remain in the custody of the Department of Corrections until his scheduled date of release from prison. In the case of a defendant, if the judge finds that there is not probable cause to believe the defendant is a sexually violent predator, the judge shall dismiss the petition and order that the defendant be released, committed pursuant to § 37.1-67.3, or certified pursuant to § 37.1-65.1. ~~If the judge finds that probable cause exists to believe that the prisoner or defendant is a sexually violent predator, the judge shall order that the prisoner remain in the secure custody of the Department of Corrections or the defendant remain in the secure custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services until a trial is conducted to determine whether he should be committed.~~

§ 37.1-70.8. Right to assistance of experts; compensation.

A. Any person who is the subject of a petition under this article shall have, prior to trial, the right to employ experts at his own expense to perform examinations and testify on his behalf. However, if a person has not employed an expert and requests expert assistance, the judge shall appoint such experts as he deems necessary to perform examinations and participate in the trial on the person's behalf. *Any expert appointed to assist the person on matters relating to the person's mental health, including examination, evaluation, diagnosis and treatment, shall have the qualifications required by subsection B of § 37.1-70.5. Any expert employed to assist the person on matters relating to the person's mental health shall be a licensed psychiatrist or licensed clinical psychologist who is skilled in the diagnosis and treatment of mental abnormalities and disorders associated with violent sex offenders, and who is not a member of the CRC.* Any expert employed or appointed pursuant to this section shall have reasonable access to all relevant medical and psychological records and reports pertaining to the person

he has been employed or appointed to represent.

B. Each psychiatrist, psychologist or other expert appointed by the court to render professional service pursuant to this article who is not regularly employed by the Commonwealth of Virginia, except by the University of Virginia School of Medicine and the Virginia Commonwealth University School of Medicine, shall receive a reasonable fee for such service. The fee shall be determined in each instance by the court that appointed the expert, in accordance with guidelines established by the Supreme Court after consultation with the Department of Mental Health, Mental Retardation and Substance Abuse Services. The fee shall not exceed \$5,000; however, in addition, if any such expert is required to appear as a witness in any hearing held pursuant to this article, he shall receive mileage and a fee of \$750 for each day during which he is required to serve. An itemized account of expenses, duly sworn to, must be presented to the court, and when allowed shall be certified to the Supreme Court for payment out of the state treasury, and be charged against the appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized shall also be made by order of the court, duly certified to the Supreme Court for payment out of the appropriation to pay criminal charges.

§ 37.1-70.9. Trial; right to trial by jury; standard of proof; discovery.

A. Within 90 days after the completion of the probable cause hearing held pursuant to § 37.1-70.7, the court shall conduct a trial to determine whether the person who is the subject of the petition is a sexually violent predator.

B. The Attorney General or the person who is the subject of the petition shall have the right to a trial by jury. Seven persons from a panel of 13 shall constitute a jury in such cases. If a jury determines a person to be a sexually violent predator, a unanimous verdict shall be required. If no demand is made by either party for a trial by jury, the trial shall be before the court.

C. The court or jury shall determine whether, by clear and convincing evidence, the person who is the subject of the petition is a sexually violent predator. If the court or jury does not find clear and convincing evidence that the person is a sexually violent predator, the court shall, in the case of a prisoner, direct that he be returned to the custody of the Department of Corrections until his scheduled date of release, or that the prisoner be unconditionally released if his scheduled date of release has passed. In the case of a defendant, if the court or jury does not find by clear and convincing evidence that the defendant is a sexually violent predator, the court shall order that the defendant be released, committed pursuant to § 37.1-67.3, or certified pursuant to § 37.1-65.1.

If the court or jury finds the person to be a sexually violent predator, the court shall then determine the nature of treatment the person is to receive. If the court finds, in its determination of treatment needs, that alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment, the judge shall by written order and specific findings so certify and order that the person be committed to the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for appropriate treatment and confinement in a secure facility designated by the Commissioner. Persons committed pursuant to this article are subject to the provisions of §§ 19.2-174.1 and 37.1-134.21.

~~However~~ *If the court determines not to order full commitment, the court shall continue the case for not less than 30 days and shall require the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services to submit a report to the court, the Attorney General, and counsel for the person suggesting possible alternatives to full commitment. The court shall then reconvene the hearing and receive testimony on the possible alternatives to full commitment. At the conclusion of the hearing, if the court finds, in determining the treatment needs of a person found to be a sexually violent predator, that less restrictive alternatives to institutional confinement and treatment have been investigated and are deemed suitable, and if the judge finds specifically that the person meets the criteria for conditional release set forth in § 37.1-70.13, the judge shall order outpatient treatment, day treatment in a hospital, night treatment in a hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to § 37.1-134.21, or such other appropriate course of treatment as may be necessary to meet the needs of the individual. The Department of Mental Health, Mental Retardation and Substance Abuse Services shall recommend a specific course of treatment and programs for provision of such treatment and shall monitor the person's compliance with such treatment as may be ordered by the court under this section unless the person is on parole or probation, in which case the parole or probation officer shall monitor the person's compliance, and the person's failure to comply with involuntary outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held pursuant to the provisions of this article. Upon failure of the person to adhere to the terms of the outpatient treatment, the judge may revoke the same and, upon notice to the person undergoing outpatient treatment and after a hearing, order the person committed as a sexually violent predator for treatment at a hospital.*

In the event of a mistrial, the court shall direct that the prisoner remain in the secure custody of the Department of Corrections or the defendant remain in the secure custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial.

All proceedings conducted hereunder are civil proceedings. However, no discovery other than that

provided in § 37.1-70.2 shall be allowed without prior leave of court, which may deny or limit discovery in any such proceeding. *No less than 30 days prior to the trial of the matter, any expert employed or appointed pursuant to § 37.1-70.8 shall prepare a written report detailing his findings and conclusions and shall submit the report, along with all supporting data, to the court, the Attorney General and counsel for the person.* Under no circumstances shall the prisoner or defendant be entitled to receive a copy of the Victim Impact Statement or the presentence investigation report, ~~provided that~~ however counsel for the prisoner or defendant *and any expert employed or appointed pursuant to § 37.1-70.8 may, upon motion to the court and for good cause shown,* review the Victim Impact Statement or presentence investigation report outside the presence of ~~his client~~ *the prisoner or defendant.* The Attorney General shall file with the clerk redacted copies of any relevant presentence reports, postsentence reports and victim impact statements in his possession, withholding identifying information about victims. Such filings shall be held by the court in confidence and reviewable only by the court, the Attorney General and counsel for the prisoner or defendant pursuant to this section.