

## VIRGINIA ACTS OF ASSEMBLY — CHAPTER

*An Act to amend and reenact §§ 19.2-169.3, 37.2-900, 37.2-901 through 37.2-905, 37.2-906, 37.2-907, 37.2-908, 37.2-910, and 37.2-912 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 37.2-905.1 and 37.2-905.2, relating to civil commitment of sexually violent predators.*

[H 2671]

Approved

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 19.2-169.3, 37.2-900, 37.2-901 through 37.2-905, 37.2-906, 37.2-907, 37.2-908, 37.2-910, and 37.2-912 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 37.2-905.1 and 37.2-905.2 as follows:**

§ 19.2-169.3. Disposition of the unrestorably incompetent defendant; capital murder charge; referral to Commitment Review Committee.

A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § 19.2-169.2, the director of the treating facility concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the director's opinion, the defendant should be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, committed pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2, or certified pursuant to § 37.2-806 in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection E of § 19.2-169.1. If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be (i) released, (ii) committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, *or* (iii) ~~reviewed for~~ *commitment pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2, or* (iv) certified pursuant to § 37.2-806. *However, if the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future and the defendant has been charged with a sexually violent offense, as defined in § 37.2-900, he shall be reviewed for commitment pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.* If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A of § 19.2-169.2 if the defendant remains incompetent in the opinion of the director, the director shall so notify the court and make recommendations concerning disposition of the defendant as described above. The court shall hold a hearing according to the procedures specified in subsection E of § 19.2-169.1 and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described above. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § 19.2-169.2 for additional six-month periods, provided a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. Unless an incompetent defendant is charged with capital murder or the charges against an incompetent criminal defendant have been previously dismissed, charges against an unrestorably incompetent defendant shall be dismissed on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest for such charges, whichever is sooner.

D. If the court orders an unrestorably incompetent defendant to be reviewed for commitment pursuant to § 37.2-904, it shall order the attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services to provide the Commitment Review Committee established pursuant to § 37.2-902 with any information relevant to the review, including, but not limited to: (i) a copy of the warrant or indictment, (ii) a copy of the defendant's criminal record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to § 19.2-169.1, and (v) a copy of the report prepared by the director of the defendant's treating facility pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for secure confinement and treatment until the Commitment Review Committee's and Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice that the Attorney General has declined to file a petition for the commitment of

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an unrestorably incompetent defendant as a sexually violent predator after conducting a review pursuant to § 37.2-905, the court shall order that the defendant be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or certified pursuant to § 37.2-806.

E. In any case when an incompetent defendant is charged with capital murder, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the capital murder case may order that the defendant receive continued treatment under subsection A of § 19.2-169.2 for additional six-month periods without limitation, provided that (i) a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others.

F. The attorney for the Commonwealth may bring charges that have been dismissed against the defendant when he is restored to competency.

§ 37.2-900. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Commissioner" means the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services.

"Defendant" means any person charged with a sexually violent offense who is deemed to be an unrestorably incompetent defendant pursuant to § 19.2-169.3 and is referred for commitment review pursuant to this chapter.

"Department" means the Department of Mental Health, Mental Retardation and Substance Abuse Services.

"Director" means the Director of the Department of Corrections.

"Mental abnormality" or "personality disorder" means a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.

"Respondent" means the person who is subject of a petition filed under this chapter.

"Sexually violent offense" means a felony under (i) a ~~felony conviction under~~ former § 18-54, former § 18.1-44, subdivision 5 of § 18.2-31, § 18.2-61, 18.2-67.1, or 18.2-67.2; (ii) a ~~conviction under~~ § 18.2-48 (ii), 18.2-48 (iii), 18.2-63, 18.2-64.1, or 18.2-67.3; (iii) subdivision 1 of § 18.2-31 where the abduction was committed with intent to defile the victim; (iv) § 18.2-32 when the killing was in the commission of, or attempt to commit rape, forcible sodomy, or inanimate or animate object sexual penetration; (v) a ~~felony conviction under~~ the laws of the Commonwealth for a forcible sexual offense committed prior to July 1, 1981, where the criminal behavior on which the conviction is based is set forth in § 18.2-67.1 or 18.2-67.2, or is set forth in § 18.2-67.3; or (iv vi) a ~~felony conviction for~~ conspiracy to commit or attempt to commit any of the above offenses.

"Sexually violent predator" means any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to § 19.2-169.3 and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

§ 37.2-901. Rights of prisoners and defendants.

In hearings and trials held pursuant to this chapter, prisoners and defendants shall have the following rights:

1. To receive adequate notice of the proceeding.
2. To be represented by counsel.
3. To remain silent or to testify.
4. To be present during the hearing or trial.
5. To present evidence and to cross-examine witnesses.
6. To view and copy all petitions and reports in the court file.

In no event shall a prisoner or defendant be permitted, as a part of any proceedings under this chapter, to raise challenges to the validity of his prior criminal or institutional convictions, charges, or sentences, or the computation of his term of confinement.

In the event the prisoner or defendant refuses to cooperate with the mental health examination required under § 37.2-904, the court may admit evidence of such refusal and may bar the prisoner or defendant from introducing his own expert psychiatric or psychological evidence.

§ 37.2-902. Commitment Review Committee; membership.

A. The Director shall establish a Commitment Review Committee (CRC) to screen, evaluate, and make recommendations regarding prisoners in the custody of the Department of Corrections for the purposes of this chapter. The CRC shall be under the supervision of the Department of Corrections. Members of the CRC and any licensed psychiatrists or licensed clinical psychologists providing examinations under subsection B of § 37.2-904 shall be immune from personal liability while acting within the scope of their duties except for gross negligence or intentional misconduct.

B. The CRC shall consist of seven members to be appointed as follows: (i) three full-time employees of the Department of Corrections, appointed by the Director; (ii) three full-time employees of the Department, appointed by the Commissioner, at least one of whom shall be a psychiatrist or psychologist licensed to practice in the Commonwealth who is skilled in the ~~diagnosis of mental abnormalities and personality disorders associated with violent~~ *diagnosis, treatment and risk assessment* of sex offenders; and (iii) one assistant or deputy attorney general, appointed by the Attorney General. Initial appointments by the Director and the Commissioner shall be for terms as follows: one member each for two years, one member each for three years, and one member each for four years. The initial appointment by the Attorney General shall be for a term of four years. Thereafter, all appointments to the CRC shall be for terms of four years, and vacancies shall be filled for the unexpired terms. ~~Five~~ *Four* members shall constitute a quorum.

C. The CRC shall meet at least monthly and at other times as it deems appropriate. The CRC shall elect a chairman from its membership to preside during meetings.

§ 37.2-903. Treatment plans; database of prisoners convicted of sexually violent offenses; maintained by Department of Corrections; notice of pending release to CRC.

A. The Director shall establish and maintain a treatment program for prisoners convicted pursuant to Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 and committed to the custody of the Department of Corrections. This program shall include a clinical assessment of all such prisoners upon receipt into the custody of the Department of Corrections and the development of appropriate treatment plans, if indicated. This program shall be operated under the direction of a licensed psychiatrist or licensed clinical psychologist who is experienced in the ~~diagnosis and treatment of mental abnormalities and disorders associated with criminal sexual~~ *diagnosis, treatment and risk assessment of sex* offenders.

B. The Director shall establish and maintain a database of each prisoner in his custody who is (i) incarcerated for a sexually violent offense or (ii) serving or will serve concurrent or consecutive time for another offense in addition to time for a sexually violent offense. The database shall include the following information regarding each prisoner: (a) the prisoner's criminal record and (b) the prisoner's sentences and scheduled date of release. A prisoner who is serving or will serve concurrent or consecutive time for other offenses in addition to his time for a sexually violent offense, shall remain in the database until such time as he is released from the custody or supervision of the Department of Corrections or Virginia Parole Board for all of his charges. Prior to the initial assessment of a prisoner under subsection C, the Director shall order a national criminal history records check to be conducted on the prisoner.

C. Each month, the Director shall review the database and identify all such prisoners who are scheduled for release from prison within 10 months from the date of such review who receive a score of five or more on the Static-99 or a ~~like~~ *similar* score on a comparable, scientifically validated instrument designated by the Commissioner, or a score of four on the Static-99 or a like score on a comparable, scientifically validated instrument if the sexually violent offense mandating the prisoner's evaluation under this section was a violation of ~~(a) elause (iii) of subsection A of § 18.2-61; (b) subdivision A 1 of § 18.2-67.1; (c) subdivision A 1 of § 18.2-67.2; or (d) subdivision A 1 of § 18.2-67.3 where the victim was under the age of 13 and suffered physical bodily injury and any of the following where the victim was under the age of 13: § 18.2-61, 18.2-67.1, or 18.2-67.2.~~

D. If the Director and the Commissioner agree that no specific scientifically validated instrument exists to measure the risk assessment of a prisoner, the prisoner may instead be evaluated by a licensed psychiatrist or licensed clinical psychologist for an initial determination of whether or not the prisoner may meet the definition of a sexually violent predator.

E. Upon the identification of such prisoners, the Director shall forward their names, their scheduled dates of release, and copies of their files to the CRC for assessment.

§ 37.2-904. CRC assessment of prisoners or defendants eligible for commitment as sexually violent predators; mental health examination; recommendation.

A. Within ~~90~~ *120* days of receiving notice from the Director pursuant to § 37.2-903 regarding a prisoner who is in the database, or from a court referring ~~an incompetent~~ *a* defendant pursuant to § 19.2-169.3, the CRC shall (i) complete its assessment of the prisoner or defendant for possible commitment pursuant to subsection B and (ii) forward its written recommendation regarding the prisoner to the Attorney General pursuant to subsection C.

B. CRC assessments of eligible prisoners or ~~incompetent~~ defendants shall include a mental health examination, including a personal interview, of the prisoner or ~~incompetent~~ defendant by a licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the ~~diagnosis and, treatment of mental abnormalities and disorders associated with, and risk assessment of~~ sex offenders, and not a member of the CRC. If the prisoner's or defendant's name was forwarded to the CRC based upon an evaluation by a licensed psychiatrist or licensed clinical psychologist, a different licensed psychiatrist or licensed clinical psychologist shall perform the examination for the CRC. The

licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner or ~~incompetent~~ defendant is a sexually violent predator, as defined in § 37.2-900, and forward the results of this evaluation and any supporting documents to the CRC for its review.

The CRC assessment ~~shall also include~~ *may be based on:*

1. ~~Consideration of the prisoner's score on the Static-99 or a comparable, scientifically validated instrument designated by the Commissioner; and~~

2. ~~A~~ *An actuarial evaluation, clinical evaluation, or any other information or evaluation determined by the CRC to be relevant, including but not limited to, a review of (i) the prisoner's or incompetent defendant's institutional history and treatment record, if any; (ii) his criminal background; and (iii) any other factor that is relevant to the determination of whether he 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 conducted pursuant to subsection B, the CRC shall recommend that the prisoner or ~~incompetent~~ defendant (i) be committed as a sexually violent predator pursuant to this chapter; (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 or ~~incompetent~~ defendant is a sexually violent predator.

D. Pursuant to clause (ii) of subsection C, the CRC ~~shall~~ *may* recommend that a prisoner or ~~incompetent~~ defendant enter a conditional release program if it finds that (i) he does not need inpatient treatment, but needs outpatient treatment and monitoring to prevent his condition from deteriorating to a degree that he would need inpatient treatment; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that, if conditionally released, he 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, departments, agencies, boards, and commissions shall provide to the CRC all requested records, documents, notes, recordings, or other information of any kind, including presentence or postsentence reports, victim impact statements, and child abuse registry records, within 20 days of receiving such request.

F. Notwithstanding any other provision of law, any mental health professional employed or appointed pursuant to subsection B or § 37.2-907 shall be permitted to copy and possess any presentence or postsentence reports and victim impact statements. *The mental health professional shall not disseminate the contents of the reports or the actual reports to any person or entity and shall only utilize the reports for use in examinations, creating reports, and testifying in any proceedings pursuant to this article.* However, at the conclusion of the examiner's testimony or service in such proceedings, the examiner shall return all presentence reports, postsentence reports and victim impact statements to the Office of the Attorney General.

G. Any mental health professional appointed or employed pursuant to subsection B or ~~§ 37.2-907~~ shall be permitted to testify at the probable cause hearing and at the trial as to his diagnosis, his opinion as to whether the prisoner or incompetent defendant meets the definition of a sexually violent predator, his recommendation as to treatment and his reasoning therefor. Such opinion shall not be dispositive of whether the person is a sexually violent predator.

H F. If the CRC deems it necessary to have the services of additional experts in order to complete its review of the prisoner, the Commissioner shall appoint such qualified experts as are needed.

§ 37.2-905. Review of prisoners convicted of a sexually violent offense; review of 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 an eligible prisoner or an unrestorably incompetent defendant for review pursuant to § 19.2-169.3, the Attorney General shall have 90 days to conduct a review of the prisoner or defendant and (i) file a petition for the civil commitment of the 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 in which the prisoner was last convicted of a sexually violent offense or in which 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 chapter, the Attorney General shall review (i) the CRC recommendation and its reasoning; (ii) the results of the

mental health examination conducted pursuant to § 37.2-904; (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 chapter, the Attorney General shall review (i) the CRC recommendation and its reasoning; (ii) the defendant's warrant or indictment; (iii) the competency report completed pursuant to § 19.2-169.1; (iv) the report and recommendations prepared by the director of the defendant's treating facility pursuant to § 19.2-169.3; (v) the mental health evaluation completed pursuant to § 37.2-904; (vi) the defendant's criminal offense history; (vii) information about the alleged crime; and (viii) 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.

E. If the Attorney General decides not to file a petition for the civil commitment of a prisoner or incompetent defendant, or if a petition is filed but is dismissed for any reason, and the prisoner or incompetent defendant has outstanding probation or parole time to serve, the Attorney General and the Director may share any relevant information with the probation and parole officer to the extent allowed by state and federal law.

#### § 37.2-905.1. Substantial compliance.

*The provisions of §§ 37.2-903 and 37.2-904 are procedural and not substantive or jurisdictional. Absent a showing of failure to follow these provisions as a result of gross negligence or willful misconduct, it shall be presumed that there has been substantial compliance with these provisions.*

#### § 37.2-905.2. Access to records.

*Notwithstanding any other provision of law and for the purpose of performing their duties and obligations under this chapter, the Department of Corrections, the Commitment Review Committee, the Department, and the Office of the Attorney General are authorized to review and receive copies of all records from all state and local courts, clerks, departments, agencies, boards, and commissions, including but not limited to: offices of attorneys for the Commonwealth, Virginia State Police, local police and sheriffs' departments, local schools, colleges and universities, Department of Juvenile Justice, court services units, community services boards, Department, state and local departments of social services and probation and parole districts. Upon request, the records, documents, notes, recordings or other information of any kind shall be provided to the Department of Corrections, the Commitment Review Committee, the Department, or the Office of the Attorney General within 20 days of receiving such request. Notwithstanding any other provision of law, the Department of Corrections, the Commitment Review Committee, the Department, and the Office of the Attorney General may possess, copy and use presentence reports, postsentence reports, and victim impact statements for all lawful purposes under this chapter.*

#### § 37.2-906. Probable cause hearing.

A. Upon the filing of a petition alleging that a ~~person~~ *the respondent* 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 and (ii) schedule a hearing within 60 days to determine whether probable cause exists to believe that the ~~person named in the petition~~ *respondent* is a sexually violent predator. A continuance extending the case beyond the 60 days may be granted to either the Attorney General or the ~~person who is the subject of the petition~~ *only respondent* upon good cause shown: ~~A or by agreement of the parties. The clerk shall mail a copy of the petition shall be 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 respondent and to the person in charge of the facility in which the person respondent is then confined. The warden or superintendent person in charge of the facility shall cause the petition to be delivered to the person respondent and shall certify the 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 respondent at the time the petition is delivered.~~

B. Prior to any hearing under this section, the judge shall ascertain if the ~~person whose commitment is sought~~ *respondent* is represented by counsel and, if he is not represented by counsel, the judge shall appoint an attorney to represent him. However, if the ~~person~~ *respondent* 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~~ *respondent's* identity and (ii) determine whether probable cause exists to believe that ~~the person~~ *he* is a sexually violent predator. *The existence of any prior convictions or charges may be shown with affidavits or documentary evidence. The details underlying the commission of an offense or behavior that led to a prior conviction or charge may be shown by affidavits or documentary evidence, including but not limited to, hearing and/or trial transcripts, probation and parole and sentencing reports, police and sheriffs' reports, and mental health evaluations. If he meets the qualifications set forth in subsection B of § 37.2-904, the expert witness may be permitted to testify at the probable cause hearing as to his diagnosis, his opinion as to whether the respondent meets the definition of a sexually violent predator, his recommendations as to treatment, and the basis for his opinions. Such opinions shall not be dispositive of whether the respondent is a sexually violent predator.*

D. 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~~ *respondent* is a sexually violent predator, the judge shall dismiss the petition, and the ~~person~~ *respondent* 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~~ *respondent* is a sexually violent predator, the judge shall dismiss the petition and order that the ~~defendant~~ *respondent* be discharged, involuntarily admitted pursuant to §§ 37.2-814 through 37.2-819, or certified for admission pursuant to § 37.2-806.

§ 37.2-907. Right to assistance of experts; compensation.

A. Any ~~person who~~ *is the subject of a petition under this chapter 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, Upon a finding of probable cause the judge shall ascertain if the respondent is requesting expert assistance. If the respondent requests expert assistance and has not employed an expert at his own expense, the judge shall appoint such experts as he deems necessary to perform examinations and participate in the trial on the person's behalf; however, if the respondent refused to cooperate pursuant to § 37.2-901 any expert appointed to assist the respondent shall not be permitted to testify at trial. 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 § 37.2-904. Any expert employed to assist the person on matters relating to the person's mental health employed or appointed pursuant to this section shall be a licensed psychiatrist or licensed clinical psychologist who is skilled in the diagnosis and, treatment, and risk assessment of mental abnormalities and disorders associated with 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 assist respondent.*

B. Each psychiatrist, psychologist, or other expert appointed by the court to render professional service pursuant to this chapter who is not regularly employed by the Commonwealth, 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. 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 chapter, 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~~ *shall* be presented to the court, and, when allowed, shall be certified to the Supreme Court for payment out of the state treasury, and shall 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.

§ 37.2-908. 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 § 37.2-906, the court shall conduct a trial to determine whether the ~~person who~~ *is the subject of the petition respondent* is a sexually violent predator. A continuance extending the case beyond the 90 days may be granted to either the Attorney General or the ~~person who is the subject of the petition only~~ *respondent* upon good cause shown *or by agreement of the parties.*

B. The Attorney General or the ~~person who is the subject of the petition~~ *respondent* 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 that the respondent is~~ *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 respondent* is a sexually violent predator. If the court or jury does not find clear and convincing evidence that the ~~person~~ *respondent* 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. The Department of Corrections shall immediately release him if his scheduled release date has passed, or hold him until his scheduled release date. In the case of a defendant, if the court or jury does not find by clear and convincing evidence that ~~the defendant~~ *he* is a sexually violent predator, the court shall order that ~~the defendant~~ *he* be discharged, involuntarily admitted pursuant to §§ 37.2-814 through 37.2-819, or certified for admission pursuant to § 37.2-806.

*If he meets the qualifications set forth in subsection B of § 37.2-904 or 37.2-907, any expert witness may be permitted to testify at the trial as to his diagnosis, his opinion as to whether the respondent meets the definition of a sexually violent predator, his recommendation as to treatment, and the basis for his opinions. Such opinions shall not be dispositive of whether the respondent is a sexually violent predator.*

D. If the court or jury finds the ~~person~~ *respondent* to be a sexually violent predator, the court shall then determine ~~whether that the person respondent shall be fully committed or placed on conditional release or continue the trial for not less than 30 days nor more than 60 days pursuant to subsection E.~~ In making its determination, the court may consider (i) the nature and circumstances of the sexually violent offense for which the ~~person~~ *respondent* was charged or convicted, including the age and maturity of the victim; (ii) the results of any actuarial test, including the likelihood of recidivism; (iii) the results of any diagnostic tests previously administered to the ~~person~~ *respondent* under this chapter; (iv) the ~~person's~~ *respondent's* mental history, including treatments for mental illness or mental disorders, participation in and response to therapy or treatment, and any history of previous hospitalizations; (v) the ~~person's~~ *respondent's* present mental condition; (vi) the ~~person's~~ *respondent's* disciplinary record and types of infractions he may have committed while incarcerated or hospitalized; (vii) the ~~person's~~ *respondent's* living arrangements and potential employment if he were to be placed on conditional release; (viii) the availability of transportation and appropriate supervision to ensure participation by the ~~person~~ *respondent* in necessary treatment; and (ix) any other factors that the court deems relevant. ~~If the court finds, in its determination of treatment needs, that alternatives to involuntary secure inpatient treatment have been investigated and deemed unsuitable and If after considering the factors listed in § 37.2-912, the court finds that there is no suitableless restrictive alternative to involuntary secure inpatient treatment, the judge shall by written order and specific findings so certify and order that the person respondent be committed to the custody of the Department for appropriate inpatient treatment in a secure facility designated by the Commissioner. Persons Respondents committed pursuant to this chapter are subject to the provisions of § 19.2-174.1 and Chapter 11 (§ 37.2-1100 et seq.).~~

E. If the court determines ~~not to order full commitment, the court shall to continue the case for not less than 30 days nor more than 60 days and trial to receive additional evidence on possible alternatives to full commitment, the court shall require the Commissioner to submit a report to the court, the Attorney General, and counsel for the person respondent suggesting possible alternatives to full commitment. The court shall then reconvene the hearing trial and receive testimony on the possible alternatives to full commitment. At the conclusion of the hearing trial, if the court finds, in determining the treatment needs of a person respondent found to be a sexually violent predator, that less restrictive alternatives to involuntary secure inpatient treatment have been investigated and are deemed suitable, and that any such alternatives will be able to accommodate needed and appropriate supervision and treatment plans for the person respondent, including but not limited to, therapy or counseling, access to medications, availability of travel, location of residence, and regular psychological monitoring of the person respondent if appropriate, including polygraph examinations, penile plethysmograph testing, or sexual interest testing, if necessary. Access to anti-androgen medications or other medication prescribed to lower blood serum testosterone shall not be used as a primary reason for determining that less restrictive alternatives are appropriate pursuant to this chapter. If the judge finds specifically that the person respondent meets the criteria for conditional release set forth in § 37.2-912, 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 Chapter 11 (§ 37.2-1100 et seq.), or such other appropriate course of treatment as may be necessary to meet the needs of the individual that the respondent be returned to the custody of the Department of Corrections to be processed for conditional release as a sexually violent predator, pursuant to his conditional release plan. The court shall also order the person respondent to be subject to electronic monitoring of his location by means of a GPS (Global Positioning System) tracking device, or other similar device, at all times while he is on conditional release.~~

F. The Department shall recommend a specific course of treatment and programs for provision of such treatment and shall monitor the ~~person's~~ *respondent's* compliance with such treatment as may be ordered by the court under this section, unless the ~~person~~ *respondent* is on parole or probation, in which case the parole or probation officer shall monitor ~~the person's~~ *his* compliance. The ~~person's~~ *respondent'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 chapter. Upon failure of the ~~person~~ *respondent* to adhere to the terms of the involuntary outpatient treatment, the judge may revoke the same and, upon notice to the ~~person~~ *respondent* undergoing involuntary outpatient treatment and after a hearing, order the ~~person~~ *respondent* committed as a sexually violent predator for inpatient treatment at a secure facility designated by the Commissioner.

G. 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 until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial.

H. All proceedings conducted hereunder are civil proceedings. However, no discovery ~~other than that provided in § 37.2-901~~ shall be allowed ~~prior to the probable cause hearing. After the probable cause hearing, no discovery other than that provided in § 37.2-901~~ shall be allowed without prior leave of the 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 ~~§ 37.2-907~~ *this chapter* 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~~ *respondent*. Under no circumstances shall the prisoner or defendant be entitled to receive a copy of the victim impact statement or the presentence investigation report. However, counsel ~~Counsel~~ for the prisoner or defendant ~~respondent~~ and any expert employed or appointed pursuant to ~~§ 37.2-907~~ *this chapter* may possess and copy the victim impact statement or presentence or postsentence report for use at the trial. Within 30 days after the case is finally disposed of, counsel for the prisoner or defendant and any expert employed or appointed pursuant to § 37.2-907 shall return all copies of the victim impact statements and presentence and postsentence reports to the Attorney General. However, ~~in;~~ *however, neither counsel for the respondent nor any expert shall disseminate the contents of the reports or the actual reports to any person or entity and shall only utilize the reports in examinations, creating reports, and testifying in any proceedings pursuant to this chapter.* In no event shall the ~~prisoner or defendant~~ *respondent* be permitted to possess or copy a victim impact statement or presentence or postsentence report.

§ 37.2-910. Review of continuation of secure inpatient treatment hearing; procedure and reports; disposition.

A. The committing court shall conduct a hearing 12 months after the date of commitment to assess each ~~committed person's~~ *respondent's* need for secure inpatient treatment. A hearing for assessment shall be conducted at yearly intervals for five years and at biennial intervals thereafter. The court shall schedule the matter for hearing as soon as possible after it becomes due, giving the matter priority over all pending matters before the court. *A continuance extending the review may be granted to either the Attorney General or the respondent upon good cause shown or by agreement of the parties.*

B. Prior to the hearing, the Commissioner shall provide to the court a report reevaluating the ~~committed person's~~ *respondent's* condition and recommending treatment. The report shall be prepared by a licensed psychiatrist or a licensed clinical psychologist skilled in the ~~diagnosis and treatment of mental abnormalities and personality disorders associated with sex offenders and qualified by training and experience to perform forensic evaluations;~~ *diagnosis, treatment and risk assessment of sex offenders.* If the Commissioner's report recommends discharge or the ~~committed person~~ *respondent* requests discharge, the ~~committed person's~~ *respondent's* condition and need for secure inpatient treatment shall be evaluated by a second person with such credentials who is not currently treating the ~~committed person~~ *respondent*. Any professional person who conducts a second evaluation of a ~~committed person~~ *respondent* shall submit a report of his findings to the court and the Commissioner. A copy of any report submitted pursuant to this subsection shall be sent to the Attorney General.

C. The burden of proof at the hearing shall be upon the Commonwealth to prove to the court by clear and convincing evidence that the ~~committed person~~ *respondent* remains a sexually violent predator.

D. If the court finds, based upon the report and other evidence provided at the hearing, that the ~~committed person~~ *respondent* is no longer a sexually violent predator, the court shall release the ~~committed person~~ *respondent* from secure inpatient treatment. If the court finds that the ~~committed person~~ *respondent* remains a sexually violent predator, it shall order that he remain in the custody of the Commissioner for secure inpatient hospitalization and treatment or that he be conditionally released. To determine if the ~~committed person~~ *respondent* shall be conditionally released, the court shall determine if the ~~person~~ *respondent* meets the criteria for conditional release set forth in § 37.2-912. If the court orders that the ~~person~~ *respondent* be conditionally released, the court shall allow the Department no less than 30 days and no more than 60 days to prepare a conditional release plan. Any such plan must be able to accommodate needed and appropriate supervision and treatment plans for the ~~person~~ *respondent*, including but not limited to, therapy or counseling, access to medications, availability of travel, location of residence, and regular psychological monitoring of the ~~person~~ *respondent* if called for, including polygraph examinations, penile plethysmograph testing, or sexual interest testing, if necessary. Access to



anti-androgen medications or other medication prescribed to lower blood serum testosterone shall not be used as a primary reason for determining that less restrictive alternatives are appropriate pursuant to this chapter.

If the court places the ~~person~~ *respondent* on conditional release, the court shall order the ~~person~~ *respondent* to be subject to electronic monitoring of his location by means of a GPS (Global Positioning System) tracking device, or other similar device, at all times while he is on conditional release.

§ 37.2-912. Conditional release; criteria; conditions; reports.

A. At any time the court considers the ~~committed person's~~ *respondent's* need for secure inpatient treatment pursuant to this chapter, it shall place the ~~committed person~~ *respondent* on conditional release if it finds that (i) ~~based on consideration of the factors that the court must consider in its commitment decision~~, he does not need secure inpatient treatment but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need secure inpatient treatment; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the ~~committed person~~ *respondent*, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety. In making its determination, the court may consider (i) the nature and circumstances of the sexually violent offense for which the ~~person~~ *respondent* was charged or convicted, including the age and maturity of the victim; (ii) the results of any actuarial test, including the likelihood of recidivism; (iii) the results of any diagnostic tests previously administered to the ~~person~~ *respondent* under this chapter; (iv) the ~~person's~~ *respondent's* mental history, including treatments for mental illness or mental disorders, participation in and response to therapy or treatment, and any history of previous hospitalizations; (v) the ~~person's~~ *respondent's* present mental condition; (vi) the ~~person's~~ *respondent's* response to treatment while in secure inpatient treatment or on conditional release, including his disciplinary record and any infractions; (vii) the ~~person's~~ *respondent's* living arrangements and potential employment if he were to be placed on conditional release; (viii) the availability of transportation and appropriate supervision to ensure participation by the ~~person~~ *respondent* in necessary treatment; and (ix) any other factors that the court deems relevant. The court shall subject a ~~conditionally released committed person~~ *the respondent* to the orders and conditions it deems will best meet the ~~committed person's~~ *his* need for treatment and supervision and best serve the interests of justice and society. In all cases of conditional release, the court shall order the ~~person~~ *respondent* to be subject to electronic monitoring of his location by means of a GPS (Global Positioning System) tracking device, or other similar device, at all times while he is on conditional release. *A continuance extending the review may be granted to either the Attorney General or the respondent upon good cause shown or by agreement of the parties.*

The Department or, if the ~~person~~ *respondent* is on parole or probation, the ~~person's~~ *respondent's* parole or probation officer shall implement the court's conditional release orders and shall submit written reports to the court on the ~~committed person's~~ *respondent's* progress and adjustment in the community no less frequently than every six months. The Department of Mental Health, Mental Retardation and Substance Abuse Services is authorized to contract with the Department of Corrections to provide services for the monitoring and supervision of ~~persons committed~~ as sexually violent predators who are on conditional release.

The Department or, if the ~~person~~ *respondent* is on parole or probation, the ~~person's~~ *respondent's* parole or probation officer shall send a copy of each written report submitted to the court and copies of all correspondence with the court pursuant to this section to the Attorney General and the Commissioner.

B. Notwithstanding any other provision of law, when any ~~person~~ *respondent* is placed on conditional release under this article, the Department of Corrections *and the Office of the Attorney General* shall provide to the Department of Mental Health, Mental Retardation and Substance Abuse Services, or if the ~~person~~ *respondent* is on parole or probation, the ~~person's~~ *respondent's* parole or probation officer, all relevant criminal history information, medical and mental health records, presentence and postsentence reports and victim impact statements, and the mental health evaluations performed pursuant to ~~subsection B of § 37.2-904 and § 37.2-907 this chapter~~, for use in the management and treatment of the ~~person~~ *respondent* placed on conditional release. Any information or document provided pursuant to this subsection shall not be subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).