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SENATE BILL NO. 1203

Offered January 10, 2007

Prefiled January 10, 2007

A BILL to amend and reenact § 37.2-908 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 37.2-908.1, relating to conditional release of certain sexually violent predators.

Patron—Hanger

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That § 37.2-908 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 37.2-908.1 as follows:

§ 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 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 upon good cause shown.

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. 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 is a sexually violent predator, the court shall order that the defendant be discharged, involuntarily admitted pursuant to §§ 37.2-814 through 37.2-819, or certified for admission pursuant to § 37.2-806.

D. If the court or jury finds the person to be a sexually violent predator, the court shall then determine whether the person shall be fully committed or placed on conditional release. In making its determination, the court may consider (i) the nature and circumstances of the sexually violent offense for which the person 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 under this chapter; (iv) the person'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 present mental condition; (vi) the person's disciplinary record and types of infractions he may have committed while incarcerated or hospitalized; (vii) the person'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 in necessary treatment; and (ix) any other factors that the court deems relevant.

E. If the court finds, in the case of a prisoner, that the only alternative is secure inpatient treatment, the court may, on petition of the prisoner, order, as an alternative to involuntary secure inpatient treatment, that the prisoner undergo physical castration and be placed on conditional release pursuant to § 37.2-908.1.

F. If the court finds, in its determination of treatment needs, that alternatives to involuntary secure inpatient treatment have been investigated, *including the possibility of physical castration as provided in subsection E if the prisoner filed such a petition*, and deemed unsuitable and there is no less restrictive alternative to involuntary secure inpatient 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 for appropriate inpatient treatment in a secure facility designated by the Commissioner. Persons committed pursuant to this chapter are subject to the provisions of § 19.2-174.1 and Chapter 11 (§ 37.2-1100 et seq.).

EG. If the court determines not to order full commitment, the court shall continue the case for not less than 30 days nor more than 60 days and shall require the Commissioner to submit a report to the court, the Attorney General, and counsel for the person suggesting possible alternatives to full

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SB1203

59 commitment. The court shall then reconvene the hearing and receive testimony on the possible
60 alternatives to full commitment. At the conclusion of the hearing, if the court finds, in determining the
61 treatment needs of a person found to be a sexually violent predator, that less restrictive alternatives to
62 involuntary secure inpatient treatment have been investigated and are deemed suitable, and that any such
63 alternatives will be able to accommodate needed and appropriate supervision and treatment plans for the
64 person, including but not limited to, therapy or counseling, access to medications, availability of travel,
65 location of residence, and regular psychological monitoring of the person if appropriate, including
66 polygraph examinations, penile plethysmograph testing, or sexual interest testing, if necessary. Access to
67 anti-androgen medications or other medication prescribed to lower blood serum testosterone shall not be
68 used as a primary reason for determining that less restrictive alternatives are appropriate pursuant to this
69 chapter. If the judge finds specifically that the person meets the criteria for conditional release set forth
70 in § 37.2-912, the judge shall order outpatient treatment, day treatment in a hospital, night treatment in a
71 hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to Chapter 11
72 (§ 37.2-1100 et seq.), or such other appropriate course of treatment as may be necessary to meet the
73 needs of the individual. The court shall also order the person to be subject to electronic monitoring of
74 his location by means of a GPS (Global Positioning System) tracking device, or other similar device, at
75 all times while he is on conditional release. *This subsection shall not apply to persons petitioning for*
76 *conditional release in conjunction with physical castration.*

77 *F. H.* The Department shall recommend a specific course of treatment and programs for provision of
78 such treatment and shall monitor the person's compliance with such treatment as may be ordered by the
79 court under this section, unless the person is on parole or probation, in which case the parole or
80 probation officer shall monitor the person's compliance. The person's failure to comply with involuntary
81 outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held
82 pursuant to the provisions of this chapter. Upon failure of the person to adhere to the terms of the
83 involuntary outpatient treatment, the judge may revoke the same and, upon notice to the person
84 undergoing involuntary outpatient treatment and after a hearing, order the person committed as a
85 sexually violent predator for inpatient treatment at a secure facility designated by the Commissioner.
86 *This subsection shall not apply to persons petitioning for conditional release in conjunction with*
87 *physical castration.*

88 *G. I.* In the event of a mistrial, the court shall direct that the prisoner remain in the secure custody of
89 the Department of Corrections or the defendant remain in the secure custody of the Department until
90 another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the
91 previous trial.

92 *H. J.* All proceedings conducted hereunder are civil proceedings. However, no discovery other than
93 that provided in § 37.2-901 shall be allowed without prior leave of the court, which may deny or limit
94 discovery in any such proceeding. No less than 30 days prior to the trial of the matter, any expert
95 employed or appointed pursuant to § 37.2-907 shall prepare a written report detailing his findings and
96 conclusions and shall submit the report, along with all supporting data, to the court, the Attorney
97 General, and counsel for the person. Under no circumstances shall the prisoner or defendant be entitled
98 to receive a copy of the victim impact statement or the presentence investigation report. However,
99 counsel for the prisoner or defendant and any expert employed or appointed pursuant to § 37.2-907 may
100 possess and copy the victim impact statement or presentence or postsentence report for use at the trial.
101 Within 30 days after the case is finally disposed of, counsel for the prisoner or defendant and any expert
102 employed or appointed pursuant to § 37.2-907 shall return all copies of the victim impact statements and
103 presentence and postsentence reports to the Attorney General. However, in no event shall the prisoner or
104 defendant be permitted to possess or copy a victim impact statement or presentence or postsentence
105 report.

106 *§ 37.2-908.1. Conditional release in conjunction with physical castration.*

107 *A. If the court finds, in the case of a prisoner, that the only alternative is secure inpatient treatment,*
108 *the court may, on petition of the prisoner, order, as an alternative to involuntary secure inpatient*
109 *treatment, that the prisoner undergo physical castration and be placed on conditional release pursuant*
110 *to this section.*

111 *B. If the prisoner files a petition for physical castration as an alternative to involuntary inpatient*
112 *treatment, the court shall continue the case for not less than 30 days nor more than 60 days and shall*
113 *require the Commissioner to submit a report to the court, the Attorney General, and counsel for the*
114 *person evaluating the suitability of the prisoner as a candidate for conditional release in conjunction*
115 *with physical castration. The court shall then reconvene the hearing and receive testimony on the*
116 *suitability of the prisoner as a candidate for conditional release in conjunction with physical castration.*
117 *In making its decision the court shall consider whether (i) appropriate outpatient supervision and*
118 *treatment are reasonably available, including but not limited to, therapy or counseling, access to*
119 *medications, availability of travel, location of residence, and regular psychological monitoring of the*
120 *person, including if appropriate, polygraph examinations, penile plethysmograph testing, or sexual*

interest testing; (ii) there is significant reason to believe that the person, if physically castrated and conditionally released, would comply with the conditions specified; and (iii) conditional release will present an undue risk to public safety. In making its determination, the court may consider (a) the nature and circumstances of the sexually violent offense for which the person was charged or convicted, including the age and maturity of the victim; (b) the results of any actuarial test, including the likelihood of recidivism; (c) the results of any diagnostic tests previously administered to the person under this chapter; (d) the person'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; (e) the person's present mental condition; (f) the person's response to treatment while in secure inpatient treatment or on conditional release, including his disciplinary record and any infractions; (g) the person's living arrangements and potential employment if he were to be placed on conditional release; (h) the availability of transportation and appropriate supervision to ensure participation by the person in necessary treatment; and (i) any other factors that the court deems relevant. At the conclusion of the hearing, if the court finds that the prisoner is a suitable candidate for physical castration and that less restrictive alternatives to involuntary secure inpatient treatment have been investigated and are deemed suitable in the event the prisoner is physically castrated, the court shall place the person on conditional release in conjunction with physical castration.

C. The court shall subject a person conditionally released in conjunction with castration to the orders and conditions it deems will best meet his need for treatment and supervision and best serve the interests of justice and society. The court shall also order that the person:

1. 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.

2. Participate in 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.

3. Live in a residence designated by the court or approved by the supervising agency and that there be no change of residence without the approval of the supervising agency.

4. Have no contact with a victim of such person.

5. Not possess or use alcohol, inhalants, or a controlled substance.

6. Not be present in geographical areas designated by the court.

7. Follow the specific course of treatment recommended by the supervising agency.

8. Follow any other conditions imposed by the court.

D. The Department shall recommend a specific course of treatment and programs for provision of such treatment and shall closely 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 closely monitor the person's compliance. 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 chapter. Upon failure of the person to adhere to the terms of the involuntary outpatient treatment, the court may revoke the same and, upon notice to the person undergoing involuntary outpatient treatment and after a hearing, order the person committed as a sexually violent predator for inpatient treatment at a secure facility designated by the Commissioner.

E. The Department or, if the person is on parole or probation, the person'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.

F. Notwithstanding any other provision of law, when any person is placed on conditional release under this article, the Department of Corrections shall provide to the Department of Mental Health, Mental Retardation and Substance Abuse Services, or if the person is on parole or probation, the person'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, for use in the management and treatment of the person 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.*).