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## SENATE BILL NO. 1203

AMENDMENT IN THE NATURE OF A SUBSTITUTE  
(Proposed by the Senate Committee on Education and Health  
on February 1, 2007)

(Patron Prior to Substitute—Senator Hanger)

A BILL to amend and reenact §§ 37.2-908 and 37.2-912 of the Code of Virginia, relating to conditional release of certain sexually violent predators.

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

**1. That §§ 37.2-908 and 37.2-912 of the Code of Virginia are amended and reenacted 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 *the inmate's actuarial risk score in exploring an alternative to full commitment, where (i) a score of four on the Static-99 or a like score on a comparable, scientifically validated instrument, shall automatically be considered for conditional release unless specific characteristics of the inmate's criminal, psychological, or pattern of sexual offending history predict a high risk for sexually re-offending; (ii) a score of five on the Static-99 or a like score on a comparable, scientifically validated instrument, shall be considered eligible for conditional release unless specific characteristics of the inmate's criminal, psychological, or pattern of sexual offending history predict a high risk for sexually re-offending; (iii) a score of six or above on the Static-99 or a like score on a comparable, scientifically validated instrument, shall automatically be considered for full commitment except in exceptional circumstances where characteristics of the inmate's criminal, psychological, or pattern of sexual offending history or some other relevant factor predict a low risk for sexually re-offending.*

*In making its determination, the court may further 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.*

If the court finds, in its determination of treatment needs, that alternatives to involuntary secure inpatient treatment have been investigated 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.).

60 E. If the court determines not to order full commitment, the court shall continue the case for not less  
61 than 30 days nor more than 60 days and shall require the Commissioner to submit a report to the court,  
62 the Attorney General, and counsel for the person suggesting possible alternatives to full commitment.  
63 The court shall then reconvene the hearing and receive testimony on the possible alternatives to full  
64 commitment. At the conclusion of the hearing, if the court finds, in determining the treatment needs of a  
65 person found to be a sexually violent predator, that less restrictive alternatives to involuntary secure  
66 inpatient treatment have been investigated and are deemed suitable, and that any such alternatives will  
67 be able to accommodate needed and appropriate supervision and treatment plans for the person,  
68 including but not limited to, therapy or counseling, access to medications, availability of travel, location  
69 of residence, and regular psychological monitoring of the person if appropriate, including polygraph  
70 examinations, penile plethysmograph testing, or sexual interest testing, if necessary. Access to  
71 anti-androgen medications or other medication prescribed to lower blood serum testosterone shall not be  
72 used as a primary reason for determining that less restrictive alternatives are appropriate pursuant to this  
73 chapter. If the judge finds specifically that the person meets the criteria for conditional release set forth  
74 in § 37.2-912, the judge shall order outpatient treatment, day treatment in a hospital, night treatment in a  
75 hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to Chapter 11  
76 (§ 37.2-1100 et seq.), or such other appropriate course of treatment as may be necessary to meet the  
77 needs of the individual. The court shall also order the person to be subject to electronic monitoring of  
78 his location by means of a GPS (Global Positioning System) tracking device, or other similar device, at  
79 all times while he is on conditional release.

80 F. The Department shall recommend a specific course of treatment and programs for provision of  
81 such treatment and shall monitor the person's compliance with such treatment as may be ordered by the  
82 court under this section, unless the person is on parole or probation, in which case the parole or  
83 probation officer shall monitor the person's compliance. The person's failure to comply with involuntary  
84 outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held  
85 pursuant to the provisions of this chapter. Upon failure of the person to adhere to the terms of the  
86 involuntary outpatient treatment, the judge may revoke the same and, upon notice to the person  
87 undergoing involuntary outpatient treatment and after a hearing, order the person committed as a  
88 sexually violent predator for inpatient treatment at a secure facility designated by the Commissioner.

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

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

107 § 37.2-912. Conditional release; criteria; conditions; reports.

108 A. At any time the court considers the committed person's need for secure inpatient treatment  
109 pursuant to this chapter, it shall place the committed person on conditional release if it finds that *a sex*  
110 *offender community containment program operated by the Department of Corrections is available in the*  
111 *area to which the inmate will be conditionally released,* and (i) based on consideration of the factors  
112 that the court must consider in its commitment decision, he does not need secure inpatient treatment but  
113 needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he  
114 would need secure inpatient treatment; (ii) appropriate outpatient supervision and treatment are  
115 reasonably available; (iii) there is significant reason to believe that the committed person, if  
116 conditionally released, would comply with the conditions specified; and (iv) conditional release will not  
117 present an undue risk to public safety. In making its determination, the court may consider (i) the nature  
118 and circumstances of the sexually violent offense for which the person was charged or convicted,  
119 including the age and maturity of the victim; (ii) the results of any actuarial test, including the  
120 likelihood of recidivism; (iii) the results of any diagnostic tests previously administered to the person  
121 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 response to treatment while in secure inpatient treatment or on conditional release, including his disciplinary record and any infractions; (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.

The court shall subject a conditionally released committed person to the orders and conditions it deems will best meet the committed person's need for treatment and supervision and best serve the interests of justice and society. *The court shall also order that the person:*

1. *Reside in a halfway house facility either operated either by the Commonwealth or under contract with a private provider, wherein program staff shall (i) maintain regular and random in-person checks on residents at all times when the person is in the facility, (ii) maintain regular and random in-person checks on residents during times they are at work, in training, attending treatment, or are otherwise authorized to be outside the facility, (iii) provide for availability of polygraph, plethysmograph, or other such psychophysiological assessment as is deemed necessary.*

*Such halfway houses that serve persons found to be sexually violent predators shall operate under regulations developed jointly between the Department of Mental Health, Mental Retardation and Substance Abuse Services and the Department of Corrections and in consultation with the Office of the Attorney General.*

*The conditionally released person shall remain a resident of the facility until such a time as the conditions of his conditional release plan are fully implemented and a move to another community location is approved by the supervising court.*

2. *Be subject to electronic monitoring of his location by means of a Global Positioning System (GPS) tracking device, or other similar device, at all times while he is on conditional release.*

3. *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. Such treatment shall include sex offender specific treatment with a certified sex offender treatment provider.*

4. *Live in a residence designated by the court or approved by the supervising agency with no change of residence without the approval of the supervising agency.*

5. *Have no contact with a victim of such person.*

6. *Not possess or use alcohol, inhalants, or a controlled substance.*

7. *Not possess sexually explicit materials, including books, magazines, films of all kinds including tape and disk, and computer generated files. The person shall, upon request, submit any computer to which he has access to forensic examination for such materials.*

8. *Not be present in geographical areas designated by the court.*

9. *Follow the specific course of treatment recommended by the supervising agency.*

10. *Not accept any employment that gives him isolated access to or authority over vulnerable persons, such as the elderly or disabled, women, or children.*

11. *Follow any other conditions imposed by the court.*

B. *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.*

*In all cases of conditional release, the court shall order the person 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.*

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

183 court pursuant to this section to the Attorney General and the Commissioner.

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

193     D. *The Department, in cooperation with the Department of Corrections and the Attorney General's*  
194 *office, shall also examine the feasibility of physical or chemical castration as treatment options to be*  
195 *used a possible components of conditional release and involuntary outpatient treatment programs and*  
196 *shall report to the Governor and the General Assembly by December 1, 2008.*