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**HOUSE BILL NO. 257**

Offered January 9, 2008

Prefiled January 2, 2008

*A BILL to amend and reenact § 37.2-908 of the Code of Virginia, relating to jury trial in violent sexual predator determination proceedings.*

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Patron—Fralin

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Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:****1. That § 37.2-908 of the Code of Virginia is 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 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 respondent upon good cause shown or by agreement of the parties.

B. The Attorney General or the 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 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~~ *may* be before the court *or the court may require the empanelment of a jury.*

C. The court or jury shall determine whether, by clear and convincing evidence, the respondent is a sexually violent predator. If the court or jury does not find clear and convincing evidence that the 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 he is a sexually violent predator, the court shall order that 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 respondent to be a sexually violent predator, the court shall then determine that the respondent shall be fully committed 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 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 respondent under this chapter; (iv) the 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 respondent's present mental condition; (vi) the respondent's disciplinary record and types of infractions he may have committed while incarcerated or hospitalized; (vii) the 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 respondent in necessary treatment; and (ix) any other factors that the court deems relevant. If after considering the factors listed in § 37.2-912, the court finds that there is no suitable less restrictive alternative to involuntary secure inpatient treatment, the judge shall by written order and specific findings so certify and order that the respondent be committed to the custody of the Department for appropriate inpatient treatment in a secure facility designated by the Commissioner. 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 to continue the 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 respondent suggesting possible alternatives to full commitment. The court shall then reconvene the trial and receive testimony on the possible alternatives to full commitment. At the conclusion of the trial, if the court finds, in determining the treatment needs of a respondent found to be a sexually violent predator, that less restrictive alternatives to involuntary secure

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59 inpatient treatment have been investigated and are deemed suitable, and that any such alternatives will  
60 be able to accommodate needed and appropriate supervision and treatment plans for the respondent,  
61 including but not limited to, therapy or counseling, access to medications, availability of travel, location  
62 of residence, and regular psychological monitoring of the respondent if appropriate, including polygraph  
63 examinations, penile plethysmograph testing, or sexual interest testing, if necessary. Access to  
64 anti-androgen medications or other medication prescribed to lower blood serum testosterone shall not be  
65 used as a primary reason for determining that less restrictive alternatives are appropriate pursuant to this  
66 chapter. If the judge finds that the respondent meets the criteria for conditional release set forth in  
67 § 37.2-912, the judge shall order that the respondent be returned to the custody of the Department of  
68 Corrections to be processed for conditional release as a sexually violent predator, pursuant to his  
69 conditional release plan. The court shall also order the respondent to be subject to electronic monitoring  
70 of his location by means of a GPS (Global Positioning System) tracking device, or other similar device,  
71 at all times while he is on conditional release.

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

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

85 H. All proceedings conducted hereunder are civil proceedings. However, no discovery shall be  
86 allowed prior to the probable cause hearing. After the probable cause hearing, no discovery other than  
87 that provided in § 37.2-901 shall be allowed without prior leave of the court, which may deny or limit  
88 discovery in any such proceeding. No less than 30 days prior to the trial of the matter, any expert  
89 employed or appointed pursuant to this chapter shall prepare a written report detailing his findings and  
90 conclusions and shall submit the report, along with all supporting data, to the court, the Attorney  
91 General, and counsel for the respondent. Counsel for the respondent and any expert employed or  
92 appointed pursuant to this chapter may possess and copy the victim impact statement or presentence or  
93 postsentence report; however, neither counsel for the respondent nor any expert shall disseminate the  
94 contents of the reports or the actual reports to any person or entity and shall only utilize the reports in  
95 examinations, creating reports, and testifying in any proceedings pursuant to this chapter. In no event  
96 shall the respondent be permitted to possess or copy a victim impact statement or presentence or  
97 postsentence report.