

VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

CHAPTER 446

An Act to amend and reenact §§ 37.2-901, 37.2-906, 37.2-907, and 37.2-910 of the Code of Virginia, relating to sexually violent predators.

[S 1275]

Approved March 24, 2011

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-901, 37.2-906, 37.2-907, and 37.2-910 of the Code of Virginia are amended and reenacted as follows:

§ 37.2-901. Civil proceeding; rights of respondents; discovery.

In hearings and trials held pursuant to this chapter, respondents 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 respondent 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 no event shall a respondent be permitted to raise defenses or objections based on defects in the institution of proceedings under this chapter unless such defenses or objections have been raised in a written motion to dismiss, stating the legal and factual grounds therefor, filed with the court at least 14 days before the hearing or trial.

~~In the event the respondent 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 respondent from introducing his own expert psychiatric or psychological evidence.~~

All proceedings conducted hereunder are civil proceedings. However, no discovery shall be allowed prior to the probable cause hearing. After the probable cause hearing, no discovery other than that provided in this section shall be allowed without prior leave of the court. Counsel for the respondent and any expert employed or appointed pursuant to this chapter may possess and copy the victim impact statement or presentence or postsentence report. In no event shall the respondent be permitted to retain or copy a victim impact statement or presentence or postsentence report.

§ 37.2-906. Probable cause hearing; procedures.

A. Upon the filing of a petition alleging that 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 90 days to determine whether probable cause exists to believe that the respondent is a sexually violent predator. The respondent may waive his right to a hearing under this section. 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. The clerk shall mail a copy of the petition to the attorney appointed or retained for the respondent and to the person in charge of the facility in which the respondent is then confined. The person in charge of the facility shall cause the petition to be delivered to the 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 respondent at the time the petition is delivered.

B. Prior to any hearing under this section, the judge shall ascertain if the 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 respondent requests an opportunity to employ counsel, the court shall give him a reasonable opportunity to employ counsel at his own expense.

C. *A respondent who has refused to cooperate with a mental health examination required pursuant to § 37.2-904 may, within 21 days of the retention of counsel or appointment of counsel, rescind his refusal and elect to cooperate with the mental health examination. Counsel for the respondent shall provide written notice of the respondent's election to cooperate with the mental health examination to the court and the attorney for the Commonwealth within 30 days of the retention or appointment of counsel, and the probable cause hearing shall be stayed until 30 days after receipt of the mental health examiner's report. The mental health examination shall be conducted in accordance with subsection B of § 37.2-904. Results of the evaluation shall be filed with the court and copies of the results shall be*

provided to counsel for the parties. The mental health examiner's itemized account of expenses, duly sworn to, 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.

In the event that a respondent refuses to cooperate with the mental health examination required by § 37.2-904 or fails or refuses to cooperate with the mental health examination following rescission of his refusal pursuant to this subsection, the court shall admit evidence of such failure or refusal and shall bar the respondent from introducing his own expert psychiatric and psychological evidence.

D. At the probable cause hearing, the judge shall (i) verify the respondent's identity and (ii) determine whether probable cause exists to believe that 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.~~ E. 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 respondent is a sexually violent predator, the judge shall dismiss the petition, and the 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 respondent is a sexually violent predator, the judge shall dismiss the petition and order that the 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. 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; ~~however,~~ *However,* if the respondent refused to cooperate pursuant to ~~§ 37.2-904~~ *with the mental health examination required pursuant to § 37.2-904 or failed or refused to cooperate with a mental health examination following rescission of a refusal pursuant to § 37.2-906,* any expert appointed to assist the respondent shall not be permitted to testify at trial nor shall any report of any such expert be admissible. Any expert employed or appointed pursuant to this section shall be a licensed psychiatrist or licensed clinical psychologist who is skilled in the diagnosis, treatment, and risk assessment of 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 respondent. No such expert shall be permitted to testify as a witness on behalf of the respondent unless that expert has prepared a written report detailing his findings and conclusions and has submitted his report, along with all supporting data, to the court, the Attorney General, and counsel for the respondent. Such report shall be submitted no less than 45 days prior to the trial of the matter unless a different time period is agreed to by the parties.

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, 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.

§ 37.2-910. 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 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. *Whenever practicable, the*

hearing for assessment shall be conducted using a two-way electronic video and audio communication system that meets the standards set forth in subsection B of § 19.2-3.1.

B. Prior to the hearing, the Commissioner shall provide to the court a report reevaluating the respondent's condition and recommending treatment. The report shall be prepared by a licensed psychiatrist or a licensed clinical psychologist skilled in the diagnosis, treatment and risk assessment of sex offenders. If the Commissioner's report recommends discharge or the respondent requests discharge, the 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 respondent. Any professional person who conducts a second evaluation of a 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 respondent remains a sexually violent predator.

D. If the court finds, based upon the report and other evidence provided at the hearing, that the respondent is no longer a sexually violent predator, the court shall release the respondent from secure inpatient treatment. If the court finds that the 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 respondent shall be conditionally released, the court shall determine if the respondent meets the criteria for conditional release set forth in § 37.2-912. If the court orders that the 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 respondent, including but not limited to, therapy or counseling, access to medications, availability of travel, location of residence, and regular psychological monitoring of the 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 respondent on conditional release, the court shall order the 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.