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SENATE BILL NO. 1275

Offered January 12, 2011

Prefiled January 12, 2011

A *BILL to amend and reenact §§ 37.2-901, 37.2-906, 37.2-907, and 37.2-909 of the Code of Virginia, relating to sexually violent predators.*

Patron—Obenshain

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-901, 37.2-906, 37.2-907, and 37.2-909 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

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59 the court and the attorney for the Commonwealth within 30 days of the retention or appointment of
60 counsel, and the probable cause hearing shall be stayed until 30 days after receipt of the mental health
61 examiner's report. The mental health examination shall be conducted in accordance with subsection B of
62 § 37.2-904. Results of the evaluation shall be filed with the court and copies of the results shall be
63 provided to counsel for the parties. The mental health examiner's itemized account of expenses, duly
64 sworn to, shall be presented to the court and, when allowed, shall be certified to the Supreme Court for
65 payment out of the state treasury and shall be charged against the appropriations made to pay criminal
66 charges.

67 In the event that a respondent refuses to cooperate with the mental health examination required by
68 § 37.2-904 or fails or refuses to cooperate with the mental health examination following rescission of
69 his refusal pursuant to subsection C, the court shall admit evidence of such failure or refusal and shall
70 bar the respondent from introducing his own expert psychiatric and psychological evidence.

71 D. At the probable cause hearing, the judge shall (i) verify the respondent's identity and (ii)
72 determine whether probable cause exists to believe that he is a sexually violent predator. The existence
73 of any prior convictions or charges may be shown with affidavits or documentary evidence. The details
74 underlying the commission of an offense or behavior that led to a prior conviction or charge may be
75 shown by affidavits or documentary evidence, including but not limited to, hearing and/or trial
76 transcripts, probation and parole and sentencing reports, police and sheriffs' reports, and mental health
77 evaluations. If he meets the qualifications set forth in subsection B of § 37.2-904, the expert witness
78 may be permitted to testify at the probable cause hearing as to his diagnosis, his opinion as to whether
79 the respondent meets the definition of a sexually violent predator, his recommendations as to treatment,
80 and the basis for his opinions. Such opinions shall not be dispositive of whether the respondent is a
81 sexually violent predator.

82 D-E. In the case of a prisoner in the custody of the Department of Corrections, if the judge finds that
83 there is not probable cause to believe that the respondent is a sexually violent predator, the judge shall
84 dismiss the petition, and the respondent shall remain in the custody of the Department of Corrections
85 until his scheduled date of release from prison. In the case of a defendant, if the judge finds that there is
86 not probable cause to believe the respondent is a sexually violent predator, the judge shall dismiss the
87 petition and order that the respondent be discharged, involuntarily admitted pursuant to §§ 37.2-814
88 through 37.2-819, or certified for admission pursuant to § 37.2-806.

89 § 37.2-907. Right to assistance of experts; compensation.

90 A. Upon a finding of probable cause the judge shall ascertain if the respondent is requesting expert
91 assistance. If the respondent requests expert assistance and has not employed an expert at his own
92 expense, the judge shall appoint such experts as he deems necessary; ~~however,~~ However, if the
93 respondent refused to cooperate pursuant to § 37.2-901 with the mental health examination required
94 pursuant to § 37.2-904 or failed or refused to cooperate with a mental health examination following
95 rescission of a refusal pursuant to § 37.2-906, any expert appointed to assist the respondent shall not be
96 permitted to testify at trial nor shall any report of any such expert be admissible. Any expert employed
97 or appointed pursuant to this section shall be a licensed psychiatrist or licensed clinical psychologist who
98 is skilled in the diagnosis, treatment, and risk assessment of sex offenders and who is not a member of
99 the CRC. Any expert employed or appointed pursuant to this section shall have reasonable access to all
100 relevant medical and psychological records and reports pertaining to the respondent. No such expert
101 shall be permitted to testify as a witness on behalf of the respondent unless that expert has prepared a
102 written report detailing his findings and conclusions and has submitted his report, along with all
103 supporting data, to the court, the Attorney General, and counsel for the respondent. Such report shall be
104 submitted no less than 45 days prior to the trial of the matter unless a different time period is agreed to
105 by the parties.

106 B. Each psychiatrist, psychologist, or other expert appointed by the court to render professional
107 service pursuant to this chapter who is not regularly employed by the Commonwealth, except by the
108 University of Virginia School of Medicine and the Virginia Commonwealth University School of
109 Medicine, shall receive a reasonable fee for such service. The fee shall be determined in each instance
110 by the court that appointed the expert, in accordance with guidelines established by the Supreme Court
111 after consultation with the Department. The fee shall not exceed \$5,000. However, in addition, if any
112 such expert is required to appear as a witness in any hearing held pursuant to this chapter, he shall
113 receive mileage and a fee of \$750 for each day during which he is required to serve. An itemized
114 account of expenses, duly sworn to, shall be presented to the court, and, when allowed, shall be certified
115 to the Supreme Court for payment out of the state treasury, and shall be charged against the
116 appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized
117 shall also be made by order of the court, duly certified to the Supreme Court, for payment out of the
118 appropriation to pay criminal charges.

119 § 37.2-909. Placement of committed respondents.

120 A. Any respondent committed pursuant to this chapter shall be placed in the custody of the

121 Department for control, care, and treatment until such time as the respondent's mental abnormality or
122 personality disorder has so changed that the respondent will not present an undue risk to public safety.
123 The Department shall provide such control, care, and treatment at a secure facility operated by it or may
124 contract with private or public entities, in or outside of the Commonwealth, or with other states to
125 provide comparable control, care, or treatment. At all times, respondents committed for control, care,
126 and treatment by the Department pursuant to this chapter shall be kept in a secure facility. Respondents
127 committed under this chapter shall be segregated by sight and sound at all times from prisoners in the
128 custody of a correctional facility, *except that a sheriff transporting a respondent committed pursuant to*
129 *this chapter for purposes of an annual review or other hearing or housing a respondent committed*
130 *pursuant to this chapter pending an annual review or other hearing shall not be required to segregate*
131 *such respondent by sight and sound from other prisoners in his custody.* The Commissioner may make
132 treatment and management decisions regarding committed respondents in his custody without obtaining
133 prior approval of or review by the committing court.

134 B. Prior to the siting of a new facility or the designation of an existing facility to be operated by the
135 Department for the control, care, and treatment of committed respondents, the Commissioner shall notify
136 the state elected officials for and the local governing body of the jurisdiction of the proposed location,
137 designation, or expansion of the facility. Upon receiving such notice, the local governing body of the
138 jurisdiction of the proposed site or where the existing facility is located may publish a descriptive notice
139 concerning the proposed site or existing facility in a newspaper of general circulation in the jurisdiction.

140 The Commissioner also shall establish an advisory committee relating to any facility for which notice
141 is required by this subsection or any facility being operated for the purpose of the control, care, and
142 treatment of committed respondents. The advisory committee shall consist of state and local elected
143 officials and representatives of community organizations serving the jurisdiction in which the facility is
144 proposed to be or is located. Upon request, the members of the appropriate advisory committee shall be
145 notified whenever the Department increases the number of beds in the relevant facility.

146 C. Notwithstanding any other provision of law, when any respondent is committed under this article,
147 the Department of Corrections and the Office of the Attorney General shall provide to the Department
148 of Behavioral Health and Developmental Services, a copy of all relevant criminal history information,
149 medical and mental health records, presentence or postsentence reports and victim impact statements,
150 and the mental health evaluations performed pursuant to subsection B of § 37.2-904 and § 37.2-907, for
151 use in the treatment and evaluation of the committed respondent.