

# VIRGINIA ACTS OF ASSEMBLY -- 2012 SESSION

## CHAPTER 668

*An Act to amend and reenact §§ 19.2-169.3, 37.2-903, and 37.2-904 of the Code of Virginia, relating to assessment of certain sexually violent predators; penalty.*

[S 314]

Approved April 6, 2012

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

**1. That §§ 19.2-169.3, 37.2-903, and 37.2-904 of the Code of Virginia are amended and reenacted as follows:**

§ 19.2-169.3. Disposition of the unrestorably incompetent defendant; capital murder charge; referral to Commitment Review Committee.

A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § 19.2-169.2, the director of the community services board or behavioral health authority or his designee or the director of the treating inpatient facility or his designee concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the board, authority, or inpatient facility director's or his designee's opinion, the defendant should be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, committed pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2, or certified pursuant to § 37.2-806 in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection E of § 19.2-169.1. If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be (i) released, (ii) committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or (iii) certified pursuant to § 37.2-806. However, if the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future and the defendant has been charged with a sexually violent offense, as defined in § 37.2-900, he shall be ~~reviewed for commitment~~ *screened* pursuant to ~~Chapter 9 (§ 37.2-900 et seq.) of Title 37.2~~ *the procedures set forth in §§ 37.2-903 and 37.2-904*. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A of § 19.2-169.2 if the defendant remains incompetent in the opinion of the board, authority, or inpatient facility director or his designee, the director or his designee shall so notify the court and make recommendations concerning disposition of the defendant as described in subsection A. The court shall hold a hearing according to the procedures specified in subsection E of § 19.2-169.1 and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described in subsection A. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § 19.2-169.2 for additional six-month periods, provided a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. If any defendant has been charged with a misdemeanor in violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or Article 5 (§ 18.2-119 et seq.) of Chapter 5 of Title 18.2, other than a misdemeanor charge pursuant to § 18.2-130 or Article 2 (§ 18.2-415 et seq.) of Chapter 9 of Title 18.2, and is being treated pursuant to subsection A of § 19.2-169.2, and after 45 days has not been restored to competency, the director of the community service board, behavioral health authority, or the director of the treating inpatient facility, or any of their designees, shall send a report indicating the defendant's status to the court. The report shall also indicate whether the defendant should be released or committed pursuant to § 37.2-817 or certified pursuant to § 37.2-806. Upon receipt of the report, if the court determines that the defendant is still incompetent, the court shall order that the defendant be released, committed, or certified, and may dismiss the charges against the defendant.

D. Unless an incompetent defendant is charged with capital murder or the charges against an incompetent criminal defendant have been previously dismissed, charges against an unrestorably incompetent defendant shall be dismissed on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest for such charges, whichever is sooner.

E. If the court orders an unrestorably incompetent defendant to be reviewed for commitment pursuant to § 37.2-904, it shall order the attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of Behavioral Health and Developmental Services to provide the ~~Commitment Review Committee established pursuant to § 37.2-902~~ *Director of the Department of Corrections* with any information relevant to the review, including, but not limited to: (i) a copy of the

warrant or indictment, (ii) a copy of the defendant's criminal record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to § 19.2-169.1, and (v) a copy of the report prepared by the director of the defendant's community services board, behavioral health authority, or treating inpatient facility or his designee pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Behavioral Health and Developmental Services for secure confinement and treatment until the Commitment Review Committee's and Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice that the Attorney General has declined to file a petition for the commitment of an unrestorably incompetent defendant as a sexually violent predator after conducting a review pursuant to § 37.2-905, the court shall order that the defendant be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or certified pursuant to § 37.2-806.

F. In any case when an incompetent defendant is charged with capital murder, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the capital murder case may order that the defendant receive continued treatment under subsection A of § 19.2-169.2 for additional six-month periods without limitation, provided that (i) a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others.

G. The attorney for the Commonwealth may bring charges that have been dismissed against the defendant when he is restored to competency.

§ 37.2-903. Database of prisoners convicted of sexually violent offenses; maintained by Department of Corrections; notice of pending release to CRC.

A. The Director shall establish and maintain a database of each prisoner in his custody who is (i) incarcerated for a sexually violent offense or (ii) serving or will serve concurrent or consecutive time for another offense in addition to time for a sexually violent offense. The database shall include the following information regarding each prisoner: (a) the prisoner's criminal record and (b) the prisoner's sentences and scheduled date of release. A prisoner who is serving or will serve concurrent or consecutive time for other offenses in addition to his time for a sexually violent offense, shall remain in the database until such time as he is released from the custody or supervision of the Department of Corrections or Virginia Parole Board for all of his charges. Prior to the initial assessment of a prisoner under subsection C, the Director shall order a national criminal history records check to be conducted on the prisoner.

B. Each month, the Director shall review the database and identify all such prisoners who are scheduled for release from prison within 10 months from the date of such review *or have been referred to the Director by the Virginia Parole Board under rules adopted by the Board* (i) who receive a score of five or more on the Static-99 or a similar score on a comparable, scientifically validated instrument designated by the Commissioner, ~~or~~ (ii) *who receive a score of four on the Static-99 or a similar score on a comparable, scientifically validated instrument if the sexually violent offense mandating the prisoner's evaluation under this section was a violation of § 18.2-61, 18.2-67.1, 18.2-67.2, or 18.2-67.3 where the victim was under the age of 13 and suffered physical bodily injury and any of the following where the victim was under the age of 13: § 18.2-61, 18.2-67.1, or 18.2-67.2, or* (iii) *whose records reflect such aggravating circumstances that the Director determines the offender appears to meet the definition of a sexually violent predator. The Director may exclude from referral prisoners who are so incapacitated by a permanent and debilitating medical condition or a terminal illness so as to represent no threat to public safety.*

C. If the Director and the Commissioner agree that no specific scientifically validated instrument exists to measure the risk assessment of a prisoner, the prisoner may instead be screened by a licensed psychiatrist, licensed clinical psychologist, or a licensed mental health professional certified by the Board of Psychology as a sex offender treatment provider pursuant to § 54.1-3600 for an initial determination of whether or not the prisoner may meet the definition of a sexually violent predator.

D. *The Commissioner shall forward to the Director the records of all defendants who have been charged with a sexually violent offense and found unrestorably incompetent to stand trial and ordered to be screened pursuant to § 19.2-169.3. The Director, applying the procedure identified in subsection B, shall identify those defendants who shall be referred to the CRC for assessment.*

~~D.~~ E. Upon the identification of such prisoners *and defendants screened pursuant to subsection B, C and D*, the Director shall forward their names, their scheduled dates of release, *court orders finding the defendants unrestorably incompetent*, and copies of their files to the CRC for assessment.

§ 37.2-904. CRC assessment of prisoners or defendants eligible for commitment as sexually violent predators; mental health examination; recommendation.

A. ~~Within 120~~ 180 days of receiving notice from the Director *the name of a prisoner or defendant who has been assessed by the Director pursuant to § 37.2-903 regarding a prisoner who is in the database, or from a court referring a defendant pursuant to § 19.2-169.3*, the CRC shall (i) complete its assessment of the prisoner or defendant for possible commitment pursuant to subsection B and (ii) forward its written recommendation regarding the prisoner or defendant to the Attorney General pursuant

to subsection C.

B. CRC assessments of eligible prisoners or defendants shall include a mental health examination, including a personal interview, of the prisoner or defendant by a licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC. If the prisoner's or defendant's name was forwarded to the CRC based upon an evaluation by a licensed psychiatrist or licensed clinical psychologist, a different licensed psychiatrist or licensed clinical psychologist shall perform the examination for the CRC. The licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner or defendant is a sexually violent predator, as defined in § 37.2-900, and forward the results of this evaluation and any supporting documents to the CRC for its review.

The CRC assessment may be based on:

An actuarial evaluation, clinical evaluation, or any other information or evaluation determined by the CRC to be relevant, including but not limited to a review of (i) the prisoner's or defendant's institutional history and treatment record, if any; (ii) his criminal background; and (iii) any other factor that is relevant to the determination of whether he is a sexually violent predator.

C. Following the examination and review conducted pursuant to subsection B, the CRC shall recommend that the prisoner or defendant (i) be committed as a sexually violent predator pursuant to this chapter; (ii) not be committed, but be placed in a conditional release program as a less restrictive alternative; or (iii) not be committed because he does not meet the definition of a sexually violent predator. To assist the Attorney General in his review, the Department of Corrections, the CRC, and the psychiatrist or psychologist who conducts the mental health examination pursuant to this section shall provide the Attorney General with all evaluation reports, prisoner records, criminal records, medical files, and any other documentation relevant to determining whether a prisoner or defendant is a sexually violent predator.

D. Pursuant to clause (ii) of subsection C, the CRC may recommend that a prisoner or defendant enter a conditional release program if it finds that (i) he does not need inpatient treatment, but needs outpatient treatment and monitoring to prevent his condition from deteriorating to a degree that he would need inpatient treatment; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that, if conditionally released, he would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety.

E. Notwithstanding any other provision of law, any mental health professional employed or appointed pursuant to subsection B or § 37.2-907 shall be permitted to copy and possess any presentence or postsentence reports and victim impact statements. The mental health professional shall not disseminate the contents of the reports or the actual reports to any person or entity and shall only utilize the reports for use in examinations, creating reports, and testifying in any proceedings pursuant to this article.

F. If the CRC deems it necessary to have the services of additional experts in order to complete its review of the prisoner or defendant, the Commissioner shall appoint such qualified experts as are needed.

**2. That the Director, in coordination with the Department, shall develop protocols to assess whether the individual meets the definition of a sexually violent predator and shall report to the General Assembly on protocol objectives, design, methodology, statistical considerations, embedded assumptions, risk assessments, and organization of the full assessment process. All measures shall be consistent with evidenced-based best practices. The primary tool of the protocols shall be a risk assessment instrument and corresponding reference score designated by the Commissioner. The Director shall submit the report to the Governor and the General Assembly by January 1, 2013.**

**3. That the provisions of this act shall become effective on January 1, 2013.**