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HOUSE BILL NO. 1434

Offered January 14, 2015

Prefiled December 24, 2014

A BILL to amend and reenact §§ 19.2-169.1 and 19.2-169.5 of the Code of Virginia, relating to competency and sanity evaluations; audiovisual recording.

Patron—O'Bannon

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-169.1 and 19.2-169.5 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-169.1. Raising question of competency to stand trial or plead; evaluation and determination of competency.

A. Raising competency issue; appointment of evaluators. - If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant, whether a juvenile transferred pursuant to § 16.1-269.1 or adult, lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who is qualified by training and experience in forensic evaluation.

B. Location of evaluation. - The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless the court specifically finds that outpatient evaluation services are unavailable or unless the results of outpatient evaluation indicate that hospitalization of the defendant for evaluation on competency is necessary. If the court finds that hospitalization is necessary, the court, under authority of this subsection, may order the defendant sent to a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for evaluations of persons under criminal charge. The defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the defendant's competency, but not to exceed 30 days from the date of admission to the hospital.

C. Provision of information to evaluators. - The court shall require the attorney for the Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) a copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the evaluation request. The court shall require the attorney for the defendant to provide any available psychiatric records and other information that is deemed relevant. The court shall require that information be provided to the evaluator within 96 hours of the issuance of the court order pursuant to this section.

D. The competency report. - Upon completion of the evaluation, the evaluators shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for treatment in the event he is found incompetent but restorable, or incompetent for the foreseeable future. If a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient or outpatient treatment is recommended. No statements of the defendant relating to the time period of the alleged offense shall be included in the report.

E. The competency determination. - After receiving the report described in subsection D, the court shall promptly determine whether the defendant is competent to stand trial. A hearing on the defendant's competency is not required unless one is requested by the attorney for the Commonwealth or the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be hospitalized under § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right to personally participate in and introduce evidence at the hearing.

The fact that the defendant claims to be unable to remember the time period surrounding the alleged offense shall not, by itself, bar a finding of competency if the defendant otherwise understands the charges against him and can assist in his defense. Nor shall the fact that the defendant is under the

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HB1434

59 influence of medication bar a finding of competency if the defendant is able to understand the charges
60 against him and assist in his defense while medicated.

61 *F. If practicable, an audiovisual recording of any interview conducted by an evaluator for the*
62 *purposes of evaluating the defendant's competency to stand trial shall be made by the evaluator*
63 *conducting such interview. The failure of the evaluator to make such an audiovisual recording shall not*
64 *affect the admissibility of the evaluator's report or testimony regarding the defendant's competency to*
65 *stand trial, but the court may consider such failure in determining the weight given to such evidence.*

66 **§ 19.2-169.5. Evaluation of sanity at the time of the offense; disclosure of evaluation results.**

67 A. Raising issue of sanity at the time of offense; appointment of evaluators. - If, at any time before
68 trial, the court finds, upon hearing evidence or representations of counsel for the defendant, that there is
69 probable cause to believe that the defendant's sanity will be a significant factor in his defense and that
70 the defendant is financially unable to pay for expert assistance, the court shall appoint one or more
71 qualified mental health experts to evaluate the defendant's sanity at the time of the offense and, where
72 appropriate, to assist in the development of an insanity defense. Such mental health expert shall be (i) a
73 psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who
74 has successfully completed forensic evaluation training as approved by the Commissioner of Behavioral
75 Health and Developmental Services and (ii) qualified by specialized training and experience to perform
76 forensic evaluations. The defendant shall not be entitled to a mental health expert of his own choosing
77 or to funds to employ such expert.

78 B. Location of evaluation. - The evaluation shall be performed on an outpatient basis, at a mental
79 health facility or in jail, unless the court specifically finds that outpatient services are unavailable, or
80 unless the results of the outpatient evaluation indicate that hospitalization of the defendant for further
81 evaluation of his sanity at the time of the offense is necessary. If either finding is made, the court, under
82 authority of this subsection, may order that the defendant be sent to a hospital designated by the
83 Commissioner of Behavioral Health and Developmental Services as appropriate for evaluation of the
84 defendant under criminal charge. The defendant shall be hospitalized for such time as the director of the
85 hospital deems necessary to perform an adequate evaluation of the defendant's sanity at the time of the
86 offense, but not to exceed 30 days from the date of admission to the hospital.

87 C. Provision of information to evaluator. - The court shall require the party making the motion for
88 the evaluation, and such other parties as the court deems appropriate, to provide to the evaluators
89 appointed under subsection A any information relevant to the evaluation, including, but not limited to (i)
90 copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth,
91 the attorney for the defendant and the judge who appointed the expert; (iii) information pertaining to the
92 alleged crime, including statements by the defendant made to the police and transcripts of preliminary
93 hearings, if any; (iv) a summary of the reasons for the evaluation request; (v) any available psychiatric,
94 psychological, medical or social records that are deemed relevant; and (vi) a copy of the defendant's
95 criminal record, to the extent reasonably available.

96 D. The evaluators shall prepare a full report concerning the defendant's sanity at the time of the
97 offense, including whether he may have had a significant mental disease or defect which rendered him
98 insane at the time of the offense. The report shall be prepared within the time period designated by the
99 court, said period to include the time necessary to obtain and evaluate the information specified in
100 subsection C.

101 E. Disclosure of evaluation results. - The report described in subsection D shall be sent solely to the
102 attorney for the defendant and shall be deemed to be protected by the lawyer-client privilege. However,
103 the Commonwealth shall be given the report in all felony cases, the results of any other evaluation of
104 the defendant's sanity at the time of the offense, *any audiovisual recording made pursuant to subsection*
105 *G, and copies of psychiatric, psychological, medical, or other records obtained during the course of any*
106 *such evaluation, after the attorney for the defendant gives notice of an intent to present psychiatric or*
107 *psychological evidence pursuant to § 19.2-168.*

108 F. In any case where the defendant obtains his own expert to evaluate the defendant's sanity at the
109 time of the offense, the provisions of subsections D and E, relating to the disclosure of the evaluation
110 results, shall apply.

111 *G. If practicable, an audiovisual recording of any interview conducted by an evaluator appointed by*
112 *the court or an expert obtained by the defendant for the purposes of evaluating the defendant's sanity*
113 *shall be made by the evaluator or expert conducting such interview. The failure of the evaluator or*
114 *expert to make such an audiovisual recording shall not affect the admissibility of the evaluator's or*
115 *expert's report or testimony regarding the defendant's sanity, but the court may consider such failure in*
116 *determining the weight given to such evidence.*