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HOUSE BILL NO. 194

Offered January 13, 2016

Prefiled December 27, 2015

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; capital murder; 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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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. An audiovisual recording of any interview conducted by an evaluator for the purposes of*
62 *evaluating a defendant's competency to stand trial in any prosecution under § 18.2-31 shall be made by*
63 *the evaluator conducting such interview, and the location where such evaluation is conducted shall*
64 *permit such recording to be made. Except as otherwise provided in subsection E of § 19.2-169.5 or §*
65 *19.2-169.7, such recording shall be made available only to any other evaluator appointed pursuant to*
66 *this section or any evaluator appointed by the court or expert obtained by the defendant for the*
67 *purposes of evaluating the defendant's sanity pursuant to § 19.2-169.5, and the court shall keep its copy*
68 *of the recording confidential. The defendant may waive the confidentiality of such recording. The*
69 *Executive Secretary of the Supreme Court and anyone acting on his behalf shall be provided access to*
70 *the recording upon request, and the recording shall not be subject to the Virginia Freedom of*
71 *Information Act (§ 2.2-3700 et seq.).*

72 **§ 19.2-169.5. Evaluation of sanity at the time of the offense; disclosure of evaluation results.**

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

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

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

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

107 E. Disclosure of evaluation results. — The report described in subsection D shall be sent solely to
108 the attorney for the defendant and shall be deemed to be protected by the lawyer-client privilege.
109 However, the Commonwealth shall be given the report in all felony cases, the results of any other
110 evaluation of the defendant's sanity at the time of the offense, and copies of psychiatric, psychological,
111 medical, or other records obtained during the course of any such evaluation, after the attorney for the
112 defendant gives notice of an intent to present psychiatric or psychological evidence pursuant to
113 § 19.2-168.

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

117 *G. An audiovisual recording of any interview conducted by an evaluator appointed by the court or*
118 *an expert obtained by the defendant for the purposes of evaluating a defendant's sanity in any*
119 *prosecution under § 18.2-31 shall be made by the evaluator or expert conducting such interview, and*
120 *the location where such evaluation is conducted shall permit such recording to be made. Except as*

121 otherwise provided in subsection E or § 19.2-169.7, such recording shall be made available only to any
122 evaluator appointed pursuant to § 19.2-169.1 or any evaluator appointed by the court or expert
123 obtained by the defendant for the purposes of evaluating the defendant's sanity pursuant to this section,
124 and the court shall keep its copy of the recording confidential. The defendant may waive the
125 confidentiality of such recording. The Executive Secretary of the Supreme Court and anyone acting on
126 his behalf shall be provided access to the recording upon request, and the recording shall not be subject
127 to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

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