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SENATE BILL NO. 973

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 13, 2023)

(Patron Prior to Substitute—Senator Peake)

A *BILL to amend and reenact §§ 37.2-906 and 37.2-912 of the Code of Virginia, relating to civil commitment of sexually violent predators; penalty.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-906 and 37.2-912 of the Code of Virginia are amended and reenacted as follows:

§ 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. Any hearing or proceeding under this section may be conducted using a two-way electronic video and audio communication system to provide for the appearance of any parties and witnesses. Any two-way electronic video and audio communication system shall meet the standards set forth in subsection B of § 19.2-3.1.

C. 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.

D. 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.

E. 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~~ 37.2-907, 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.

F. 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.

§ 37.2-912. Conditional release; criteria; conditions; reports; penalty.

A. At any time the court considers the respondent's need for secure inpatient treatment pursuant to this chapter, it shall place the respondent on conditional release if it finds that (i) he does not need secure inpatient treatment but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need secure inpatient treatment; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the respondent, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety. In making its determination, the court may consider ~~(i)~~ (a) the nature and circumstances of the sexually violent offense for which the respondent was charged or convicted, including the age and maturity of the victim; ~~(ii)~~ (b) the results of any actuarial test, including the likelihood of recidivism; ~~(iii)~~ (c) the results of any diagnostic tests previously administered to the respondent under this chapter; ~~(iv)~~ (d) the respondent's mental history, including treatments for mental illness or mental disorders, participation in and response to therapy or treatment, and any history of previous hospitalizations; ~~(v)~~ (e) the respondent's present mental condition; ~~(vi)~~ (f) the respondent's response to treatment while in secure inpatient treatment or on conditional release, including his disciplinary record and any infractions; ~~(vii)~~ (g) the respondent's living arrangements and potential employment if he were to be placed on conditional release; ~~(viii)~~ (h) the availability of transportation and appropriate supervision to ensure participation by the respondent in necessary treatment; and ~~(ix)~~ (i) any other factors that the court deems relevant. The court shall subject the respondent to the orders and conditions it deems will best meet his need for treatment and supervision and best serve the interests of justice and society. In all cases of 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.

The Department or, if the respondent is on parole or probation, the respondent's parole or probation officer shall implement the court's conditional release orders and shall submit written reports to the court on the respondent's progress and adjustment in the community no less frequently than every six months. The Department of Behavioral Health and Developmental Services is authorized to contract with the Department of Corrections to provide services for the monitoring and supervision of sexually violent predators who are on conditional release.

The Department or, if the respondent is on parole or probation, the respondent's parole or probation officer shall send a copy of each written report submitted to the court and copies of all correspondence with the court pursuant to this section to the Attorney General and the Commissioner.

B. Notwithstanding any other provision of law, when any respondent is placed on conditional release under this article, the Department of Corrections and the Office of the Attorney General shall provide to the Department, or if the respondent is on parole or probation, the respondent's parole or probation officer, all relevant criminal history information, medical and mental health records, presentence and postsentence reports and victim impact statements, and the mental health evaluations performed pursuant to this chapter, for use in the management and treatment of the respondent placed on conditional release. Any information or document provided pursuant to this subsection shall not be subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

C. Any person placed on conditional release pursuant to this chapter who tampers with or in any way attempts to circumvent the operation of his GPS equipment is guilty of a Class 6 felony.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the Acts of Assembly of 2022, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.