

# VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

## CHAPTER 946

*An Act to amend and reenact §§ 19.2-169.3, 19.2-174.1 and 37.1-134.21 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 2 of Title 37.1 an article numbered 1.1, consisting of sections numbered 37.1-70.1 through 37.1-70.19, relating to the civil commitment of sexually violent predators.*

[S 845]

Approved April 7, 1999

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

**1. That §§ 19.2-169.3, 19.2-174.1 and 37.1-134.21 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 2 of Title 37.1 an article numbered 1.1, consisting of sections numbered 37.1-70.1 through 37.1-70.19, as follows:**

§ 19.2-169.3. Disposition of the unrestorably incompetent defendant.

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 treating facility 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 director's opinion, the defendant should be released, committed pursuant to § 37.1-67.3, *committed pursuant to § 37.1-70.9*, or certified pursuant to § 37.1-65.1 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 § 37.1-67.3, (iii) *reviewed for commitment pursuant to § 37.1-70.6*, or ~~(iii)~~ (iv) certified pursuant to § 37.1-65.1. 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 director, the director shall so notify the court and make recommendations concerning disposition of the defendant as described above. 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 above. 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 not dismissed without prejudice at an earlier time, charges against an ~~unrestorable~~ *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.

D. *If the court orders an unrestorably incompetent defendant to be reviewed for commitment pursuant to § 37.1-70.6, it shall order the attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services to provide the Attorney General 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 treating facility pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for secure confinement and treatment until the 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 § 37.1-70.6, the court shall order that the defendant be released, committed pursuant to § 37.1-67.3, or certified pursuant to § 37.1-65.1.*

§ 19.2-174.1. Information required prior to admission to a mental health facility.

Prior to any person being placed into the custody of the Commissioner for evaluation or treatment pursuant to §§ 19.2-169.2, 19.2-169.3, 19.2-169.6, 19.2-176, 19.2-177.1, 19.2-182.2, and 19.2-182.3, and Article 1.1 (37.1-70.1 et seq.) of Chapter 2 of Title 37.1, the court or special justice shall provide the Commissioner with the following, if available: (i) the commitment order, (ii) the names and addresses for the attorney for the Commonwealth, the attorney for the person and the judge holding jurisdiction over the person, (iii) a copy of the warrant or indictment, and (iv) a copy of the criminal incident

information as defined in § 2.1-341 or a copy of the arrest report or a summary of the facts relating to the crime. The party requesting the placement into the Commissioner's custody or, in the case of admissions pursuant to §§ 19.2-169.3, 19.2-169.6, 19.2-176, and 19.2-177.1, and Article 1.1 (37.1-70.1 et seq.) of Chapter 2 of Title 37.1, the person having custody over the defendant shall gather the above information for submission to the court at the hearing. If the information is not available at the hearing, it shall be provided by the party requesting placement or the person having custody directly to the Commissioner within ninety-six hours of the person being placed into the Commissioner's custody.

*Article 1.1.*

*Civil Commitment of Sexually Violent Predators.*

*§ 37.1-70.1. Definitions.*

*The following words and phrases when used in this article shall have the following meanings, unless the context clearly indicates otherwise:*

*"Commissioner" means the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services.*

*"Defendant" means any person charged with a sexually violent offense who is deemed an unrestorably incompetent defendant pursuant to § 19.2-169.3 and is referred to the Attorney General for commitment review pursuant to § 37.1-70.6.*

*"Director" means the Director of the Department of Corrections.*

*"Mental abnormality" or "personality disorder" means a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.*

*"Sexually violent offense" means an instant violation of §§ 18.2-61, 18.2-67.1, or § 18.2-67.2 or subdivision A 1 of § 18.2-67.3.*

*"Sexually violent predator" means any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to § 19.2-169.3 and (ii) suffers from a mental abnormality or personality disorder.*

*§ 37.1-70.2. Rights of prisoners and defendants.*

*In hearings and trials held pursuant to this article, prisoners and defendants 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.*

*§ 37.1-70.3. Commitment Review Committee; membership.*

*A. The Director of the Department of Corrections shall establish a Commitment Review Committee (CRC) to screen, evaluate, and make recommendations regarding prisoners in the custody of the Department of Corrections for the purposes of this article. The CRC shall be under the supervision of the Department of Corrections.*

*B. The CRC shall consist of seven members to be appointed as follows: (i) three full-time employees of the Department of Corrections, appointed by the Director of the Department of Corrections; (ii) three full-time employees of the Department of Mental Health, Mental Retardation and Substance Abuse Services, appointed by the Commissioner, at least one of whom shall be a psychiatrist or psychologist licensed to practice in the Commonwealth of Virginia who is skilled in the diagnosis of mental abnormalities and personality disorders associated with violent sex offenders; and (iii) one assistant or deputy attorney general, appointed by the Attorney General. Initial appointments by the Director and the Commissioner shall be for terms as follows: one member each for two years, one member each for three years, and one member each for four years. The initial appointment by the Attorney General shall be for a term of four years. Thereafter, all appointments to the CRC shall be for terms of four years, and vacancies shall be filled for the unexpired terms. Five members shall constitute a quorum.*

*C. The CRC shall meet at least monthly and at other times as it deems appropriate. The CRC shall elect a chairman from its membership to preside during meetings.*

*§ 37.1-70.4. Treatment plans; 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 treatment program for prisoners convicted pursuant to Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 and committed to the custody of the Department of Corrections. Such program shall include a clinical assessment of all such prisoners upon receipt into the custody of the Department of Corrections and the development of appropriate treatment plans if indicated. This program shall be operated under the direction of a licensed clinical psychiatrist or licensed clinical psychologist who is experienced in the diagnosis and treatment of mental abnormalities and disorders associated with criminal sexual offenders.*

*B. The Director of the Department of Corrections shall establish and maintain a database of prisoners in his custody who are incarcerated for sexually violent offenses. The database shall include*

the following information regarding each prisoner: (i) the prisoner's criminal record, (ii) the prisoner's sentences and scheduled date of release, and (iii) the appropriate locality for a commitment petition.

C. Each month, the Director shall review the database of prisoners incarcerated for sexually violent offenses and identify all such prisoners who are scheduled for release from prison no earlier than ten months, but no later than eight months from the date of such review. Upon the identification of such prisoners, the Director shall forward their name, their scheduled date of release, and a copy of their file to the CRC for assessment.

§ 37.1-70.5. CRC assessment of prisoners eligible for commitment as sexually violent predators; mental health examination; recommendation to Attorney General.

A. Within forty-five days of receiving notice from the Director pursuant to § 37.1-70.4 regarding a prisoner who is incarcerated for a sexually violent offense, the CRC shall (i) complete its assessment of such prisoner for possible commitment pursuant to subsection B and (ii) forward its recommendation regarding the prisoner, in written form, to the Attorney General pursuant to subsection C.

B. CRC assessments of prisoners incarcerated for sexually violent offenses shall include a mental health examination, including a personal interview, of the prisoner by a licensed psychiatrist or a licensed clinical psychologist, designated by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services, who is skilled in the diagnosis and treatment of mental abnormalities and disorders associated with violent sex offenders, and who is not a member of the CRC. The licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner is a sexually violent predator as defined in § 37.1-70.1 and forward the results of this evaluation and any supporting documents to the CRC for its review. The CRC assessment shall also include a review of (i) the prisoner's institutional history and treatment record, if any; (ii) the prisoner's criminal background; and (iii) any other factor which is relevant to the determination of whether such prisoner is a sexually violent predator.

C. Following the examination and review of a prisoner conducted pursuant to subsection B, the CRC shall recommend that such prisoner (i) be committed as a sexually violent predator pursuant to this article; (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 is a sexually violent predator.

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

§ 37.1-70.6. Attorney General review of prisoners incarcerated for sexually violent offenses; unrestorably incompetent defendants charged with sexually violent offenses; petition for commitment; notice to Department of Corrections or referring court regarding disposition of review.

A. Upon receipt of a recommendation by the CRC regarding a prisoner incarcerated for a sexually violent offense or upon receipt of a court order referring an unrestorably incompetent defendant for review pursuant to § 19.2-169.3, the Attorney General shall have forty-five days to conduct a review of such prisoner or defendant and (i) file a petition for the civil commitment of such prisoner or defendant as a sexually violent predator and stating sufficient facts to support such allegation or (ii) notify the Director and Commissioner in the case of a prisoner, or the referring court and the Commissioner in the case of an unrestorably incompetent defendant, that he will not file a petition for commitment. Petitions for commitment shall be filed in the circuit court wherein the prisoner was last convicted of a sexually violent offense or wherein the defendant was deemed unrestorably incompetent and referred for commitment review pursuant to § 19.2-169.3.

B. In determining whether to file a petition to civilly commit a prisoner under this article, the Attorney General shall review (i) the CRC recommendation and its reasoning; (ii) the results of the mental health examination conducted pursuant to § 37.1-70.5; (iii) the prisoner's institutional history and treatment record, if any; (iv) the prisoner's criminal offense history; and (v) any other factor relevant to the determination of whether the prisoner should be civilly committed. Although the Attorney General shall consider the CRC recommendation as part of the review, the CRC recommendation is not binding upon the Attorney General.

C. In determining whether to file a petition to civilly commit a defendant under this article, the Attorney General shall review (i) the defendant's warrant or indictment, (ii) the competency report completed pursuant to § 19.2-169.1, (iii) the report and recommendations prepared by the director of the defendant's treating facility pursuant to § 19.2-169.3, (iv) the defendant's criminal offense history, (v)

information about the alleged crime, and (vi) any other factor relevant to the determination of whether the defendant should be civilly committed.

*§ 37.1-70.7. Probable cause hearing.*

A. Upon the filing of a petition alleging that a person is a sexually violent predator, the circuit court shall schedule a hearing within thirty days to determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. A copy of the petition shall be personally served on the person named in the petition, his attorney, and his guardian or committee, if applicable. 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 person at the time the petition is served.

B. Prior to any hearing under this section, the judge shall ascertain if the person whose commitment is sought is represented by counsel, and if he is not represented by counsel, the judge shall appoint an attorney-at-law to represent him. However, if such person requests an opportunity to employ counsel, the court shall give him a reasonable opportunity to employ counsel at his own expense.

C. At the probable cause hearing, the judge shall (i) verify the person's identity and (ii) determine whether probable cause exists to believe that the person is a sexually violent predator. 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 person is a sexually violent predator, the judge shall dismiss the petition and the person 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 defendant is a sexually violent predator, the judge shall dismiss the petition and order that the defendant be released, committed pursuant to § 37.1-67.3, or certified pursuant to § 37.1-65.1. If the judge finds that probable cause exists to believe that the prisoner or defendant is a sexually violent predator, the judge shall order that the prisoner remain in the secure custody of the Department of Corrections or the defendant remain in the secure custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services until a trial is conducted to determine whether he should be committed.

*§ 37.1-70.8. Right to assistance of experts; compensation.*

A. Any person who is the subject of a petition under this article shall have, prior to trial, the right to employ experts at his own expense to perform examinations and testify on his behalf. However, if a person has not employed an expert and requests expert assistance, the judge shall appoint such experts as he deems necessary to perform examinations and participate in the trial on the person's behalf. Any expert employed or appointed pursuant to this section shall have reasonable access to all relevant medical and psychological records and reports pertaining to the person he has been employed or appointed to represent.

B. Each psychiatrist, psychologist or other expert appointed by the court to render professional service pursuant to this article who is not regularly employed by the Commonwealth of Virginia, except by the University of Virginia School of Medicine and the Virginia Commonwealth University School of Medicine, shall receive a reasonable fee for such service. The fee shall be determined in each instance by the court that appointed the expert, in accordance with guidelines established by the Supreme Court after consultation with the Department of Mental Health, Mental Retardation and Substance Abuse Services. The fee shall not exceed \$5000; however, in addition, if any such expert is required to appear as a witness in any hearing held pursuant to this article, he shall receive mileage and a fee of \$750 for each day during which he is required to serve. An itemized account of expenses, duly sworn to, must be presented to the court, and when allowed shall be certified to the Supreme Court for payment out of the state treasury, and be charged against the appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized shall also be made by order of the court, duly certified to the Supreme Court for payment out of the appropriation to pay criminal charges.

*§ 37.1-70.9. Trial; right to trial by jury; standard of proof.*

A. Within forty-five days after the completion of the probable cause hearing held pursuant to § 37.1-70.7, the court shall conduct a trial to determine whether the person who is the subject of the petition is a sexually violent predator.

B. The Attorney General or the person who is the subject of the petition shall have the right to a trial by jury. Seven persons from a panel of thirteen shall constitute a jury in such cases. If a jury determines a person to be a violent sexual predator, a unanimous verdict shall be required. If no demand is made by either party for a trial by jury, the trial shall be before the court.

C. The court or jury shall determine whether, beyond a reasonable doubt, the person who is the subject of the petition is a sexually violent predator. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall, in the case of a prisoner, direct that he be returned to the custody of the Department of Corrections until his scheduled date of release, or that the prisoner be unconditionally released if his scheduled date of release has passed. In the case of a defendant, if the court or jury is not satisfied beyond a reasonable doubt that the defendant is a sexually violent predator, the court shall order that the defendant be released, committed pursuant to § 37.1-67.3, or certified pursuant to § 37.1-65.1.

*If the court or jury finds the person to be a sexually violent predator, the court shall then determine the nature of treatment the person is to receive. If the court finds, in its determination of treatment needs, that alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment, the judge shall by written order and specific findings so certify and order that the person be committed to the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for appropriate treatment and confinement in a secure facility designated by the Commissioner. Persons committed pursuant to this article are subject to the provisions of §§ 19.2-174.1 and 37.1-134.21.*

*However, if the court finds, in determining the treatment needs of a person found to be a sexually violent predator, that less restrictive alternatives to institutional confinement and treatment have been investigated and are deemed suitable, and if the judge finds specifically that the person meets the criteria for conditional release set forth in § 37.1-70.13, the judge shall order outpatient treatment, day treatment in a hospital, night treatment in a hospital, outpatient involuntary treatment with antipsychotic medication pursuant to § 37.1-134.21, or such other appropriate course of treatment as may be necessary to meet the needs of the individual. The community services board which serves the political subdivision in which the person resides shall recommend a specific course of treatment and programs for provision of such treatment. The community services board shall monitor the person's compliance with such treatment as may be ordered by the court under this section unless the person is on parole or probation, in which case the parole or probation officer shall monitor the person's compliance, and the person's failure to comply with involuntary outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held pursuant to the provisions of this article. Upon failure of the person to adhere to the terms of the outpatient treatment, the judge may revoke the same and, upon notice to the person undergoing outpatient treatment and after a hearing, order the person committed as a sexually violent predator for treatment at a hospital.*

*In the event of a mistrial, the court shall direct that the prisoner remain in the secure custody of the Department of Corrections or the defendant remain in the secure custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services until another trial is conducted. Any subsequent trial following a mistrial shall be held within forty-five days of the previous trial.*

*§ 37.1-70.10. Placement of committed persons.*

*Any person committed pursuant to this article shall be placed in the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person will not present an undue risk to public safety. Such control, care and treatment shall be provided at a facility operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services and located inside the secure perimeter of a Department of Corrections' facility. At all times, persons committed for control, care and treatment by the Department of Mental Health, Mental Retardation and Substance Abuse Services pursuant to this article shall be kept in a secure facility and such persons shall be segregated by sight and sound at all times from prisoners in the custody of the Director. The Commissioner may make treatment and management decisions regarding committed persons in his custody without obtaining prior approval of or review by the committing court.*

*§ 37.1-70.11. Review of continuation of confinement hearing; procedure and reports; disposition.*

*A. The committing court shall conduct a hearing twelve months after the date of commitment to assess each committed person's need for inpatient hospitalization. A hearing for assessment shall be conducted at yearly intervals for five years and at biennial intervals thereafter. The court shall schedule the matter for hearing as soon as possible after it becomes due, giving the matter priority over all pending matters before the court.*

*B. Prior to the hearing, the Commissioner shall provide to the court a report reevaluating the committed person's condition and recommending treatment, to be prepared by a licensed psychiatrist or a licensed clinical psychologist who shall be skilled in the diagnosis and treatment of mental abnormalities and personality disorders associated with violent sex offenders, and qualified by training and experience to perform forensic evaluations. If the Commissioner's report recommends release or the committed person requests release, the committed person's condition and need for inpatient hospitalization shall be evaluated by a second person with such credentials who is not currently treating the committed person. Any professional person who conducts a second evaluation of a committed person shall submit a report of his findings to the court and the Commissioner. A copy of any report submitted pursuant to this subsection shall be sent to the Attorney General.*

*C. The burden of proof at the hearing shall be upon the Commonwealth to prove to the court beyond a reasonable doubt that the committed person remains a sexually violent predator.*

*D. If the court finds, based upon the report and other evidence provided at the hearing, that the committed person's condition has so changed that he is no longer a sexually violent predator, the court shall (i) release the committed person from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in § 37.1-70.13, provided the court has approved a discharge plan prepared jointly by the hospital staff and the appropriate community services board or (ii) place the committed person on conditional release if he meets the criteria for conditional*

release, and the court has approved a conditional release plan prepared jointly by the hospital staff and the appropriate community services board. However, if the court finds that the committed person remains a sexually violent predator, it shall order that he remain in the custody of the Commissioner for secure inpatient hospitalization and treatment.

*§ 37.1-70.12. Petition for release; hearing; procedures.*

A. The Commissioner may petition the committing court for conditional or unconditional release of the committed person at any time he believes the committed person's condition has so changed that he is no longer a sexually violent predator in need of treatment and secure confinement. The petition shall be accompanied by a report of clinical findings supporting the petition and by a conditional release or discharge plan, as applicable, prepared jointly by the hospital and the appropriate community services board. The committed person may petition the committing court for release only once in each year in which no annual judicial review is required pursuant to § 37.1-70.11. The party petitioning for release shall transmit a copy of the petition to the Attorney General and to the Commissioner.

B. Upon the submission of a petition pursuant to this section, the committing court shall conduct the proceedings according to the procedures set forth in § 37.1-70.11.

*§ 37.1-70.13. Conditional release; criteria; conditions; reports.*

At any time the court considers the committed person's need for inpatient hospitalization pursuant to this article, it shall place the committed person on conditional release if it finds that (i) based on consideration of the factors which the court must consider in its commitment decision, he does not need inpatient hospitalization but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need inpatient hospitalization; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the committed person, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety. The court shall subject a conditionally released committed person to such orders and conditions it deems will best meet the committed person's need for treatment and supervision and best serve the interests of justice and society.

The community services board serving the locality in which the committed person will reside upon release, or if the person is on parole or probation, the person's parole or probation officer, shall implement the court's conditional release orders and shall submit written reports to the court on the committed person's progress and adjustment in the community no less frequently than every six months. The community services board or, if the person is on parole or probation, the person'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 to the Commissioner.

*§ 37.1-70.14. Emergency custody of conditionally released person; revocation of conditional release.*

A judicial officer may issue an emergency custody order, upon the sworn petition of any responsible person, or upon his own motion, based upon probable cause to believe that a person on conditional release within his judicial district has violated the conditions of his release and is no longer a proper subject for conditional release. The emergency custody order shall require a law-enforcement officer take the person into custody immediately and transport him to a convenient location specified in the order where a person designated by the community services board who is skilled in the diagnosis and treatment of mental abnormalities and personality disorders shall, as soon as practicable, evaluate him for the purpose of determining the nature and degree of violation of the conditions of his release.

The person on conditional release shall remain in custody until a hearing is held in the circuit court on the motion or petition to determine if he should be returned to the custody of the Commissioner. Such hearing shall be given priority on the court's docket. If upon hearing the evidence, the court finds that the person on conditional release has violated the conditions of his release and that the violation of conditions was sufficient to render him no longer suitable for conditional release, the court shall revoke his conditional release and order him returned to the custody of the Commissioner for inpatient treatment. The person may petition the original committing court for re-release pursuant to the conditions set forth in § 37.1-70.12 no sooner than six months from his return to custody. The party petitioning for re-release shall transmit a copy of the petition to the Attorney General and to the Commissioner.

*§ 37.1-70.15. Modification or removal of conditions; notice; objections; review.*

A. The committing court may modify conditions of release or remove conditions placed on release pursuant to § 37.1-70.13, upon petition of the supervising community services board, the supervising parole or probation officer, the Attorney General, or the person on conditional release, or upon its own motion based on reports of the supervising community services board or the supervising parole or probation officer. However, the person on conditional release may petition only annually commencing six months after the conditional release order is issued. Upon petition, the court shall require the supervising community services board, or, if the person is on parole or probation, the person's parole or probation officer, to provide a report on the person's progress while on conditional release. The party petitioning for release shall transmit a copy of the petition to the Attorney General and to the Commissioner.

*B. As it deems appropriate based on the community services board's or parole or probation officer's report and any other evidence provided to it, the court may issue a proposed order for modification or removal of conditions. The court shall provide notice of the order, and their right to object to it within ten days of its issuance, to the person, the supervising community services board or parole or probation officer, and the Attorney General. The proposed order shall become final if no objection is filed within ten days of its issuance. If an objection is so filed, the court shall conduct a hearing at which the person on conditional release, the Attorney General, and the supervising community services board or the parole or probation officer, have an opportunity to present evidence challenging the proposed order. At the conclusion of the hearing, the court shall issue an order specifying conditions of release or removing existing conditions of release.*

*§ 37.1-70.16. Representation of Commonwealth and person subject to commitment; nature of proceedings.*

*The Attorney General shall represent the Commonwealth in all proceedings held pursuant to this article, except in emergency commitment hearings held pursuant to § 37.1-70.14. The Attorney General shall receive prior written notice of all proceedings held under this article in which he is to represent the Commonwealth.*

*The court shall appoint counsel for the person subject to commitment or conditional release pursuant to subsection B of § 37.1-70.7 unless such person waives his right to counsel. The court shall consider appointment of the person who represented the person in previous proceedings.*

*All proceedings held under this article shall be civil proceedings.*

*§ 37.1-70.17. Authority of Commissioner; delegation to board; liability.*

*For the purposes of carrying out the duties of this article, the Commissioner may appoint an advisory board composed of persons with demonstrated expertise in such matters. The Department of Mental Health, Mental Retardation and Substance Abuse Services shall assist the board in its administrative and technical duties. The membership of the board shall include (i) a citizen appointed by the Commissioner, (ii) a psychiatrist or psychologist licensed to practice in the Commonwealth who is skilled in the diagnosis of mental abnormalities and personality disorders associated with violent sex offenders and who is a full-time employee of the Department of Corrections, to be appointed by its director, (iii) a member of the Department of State Police, and (iv) such other members as deemed appropriate by the Commissioner. Members of the board shall exercise their powers and duties without compensation, except that members of the board who are not state employees shall be reimbursed by the Department for their approved travel expenses to the meetings of this board at the approved state rate. Members of the board shall be immune from personal liability while acting within the scope of their duties except for intentional misconduct.*

*§ 37.1-70.18. Escape of persons placed or committed; penalty.*

*Any person committed to the custody of the Commissioner pursuant to this article who escapes from such custody shall be guilty of a Class 6 felony.*

*§ 37.1-70.19. Persons on conditional release leaving Commonwealth; penalty.*

*Any person placed on conditional release pursuant to this article who leaves the Commonwealth without permission from the court which conditionally released the person shall be guilty of a Class 6 felony.*

*§ 37.1-134.21. Judicial authorization of treatment and detention of certain persons.*

*A. An appropriate circuit court, or judge as defined in § 37.1-1, may authorize on behalf of an adult person, in accordance with this section, a specific treatment or course of treatment for a mental or physical disorder, if it finds upon clear and convincing evidence that (i) the person is either incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to a physical or mental disorder and (ii) the proposed treatment is in the best interest of the person.*

*B. For purposes of this section:*

*"Disorder" includes any physical or mental disorder or impairment, whether caused by injury, disease, genetics, or other cause.*

*"Incapable of making an informed decision" means unable to understand the nature, extent or probable consequences of a proposed treatment, or unable to make a rational evaluation of the risks and benefits of the proposed treatment as compared with the risks and benefits of alternatives to that treatment. Persons with dysphasia or other communication disorders who are mentally competent and able to communicate shall not be considered incapable of giving informed consent.*

*C. Any person may request authorization of a specific treatment, or course of treatment, for an adult person by filing a petition in the circuit court, or with a judge as defined in § 37.1-1, of the county or city in which the allegedly incapable person resides or is located, or in the county or city in which the proposed place of treatment is located. Upon filing such a petition, the petitioner or the court shall deliver or send a certified copy of the petition to the person for whom treatment is sought and, if the identity and whereabouts of the person's next of kin are known, to the next of kin.*

*D. As soon as reasonably possible after the filing of the petition, the court shall appoint an attorney to represent the interests of the allegedly incapable person at the hearing. However, such appointment shall not be required in the event that the person, or another interested person on behalf of the person,*

elects to retain private counsel at his own expense to represent the interests of the person at the hearing. If the allegedly incapable person is indigent, his counsel shall be paid by the Commonwealth as provided in § 37.1-89 from funds appropriated to reimburse expenses incurred in the involuntary mental commitment process. However, this provision shall not be construed to prohibit the direct payment of an attorney's fee either by the patient, or by an interested person on his behalf, which fee shall be subject to the review and approval of the court.

E. Following the appointment of an attorney pursuant to subsection D above, the court shall schedule an expedited hearing of the matter. The court shall notify the person who is the subject of the petition, his next of kin, if known, the petitioner, and their respective counsel of the date and time for the hearing. In scheduling such a hearing, the court shall take into account the type and severity of the alleged physical or mental disorder, as well as the need to provide the person's attorney with sufficient time to adequately prepare his client's case.

F. Notwithstanding the provisions of subsections C and E above regarding delivery or service of the petition and notice of the hearing to the next of kin of any person for whom consent to observation, testing or treatment is sought, if such person is a patient in any hospital at the time the petition is filed, the court, in its discretion, may dispense with the requirement of any notice to the next of kin.

G. Evidence presented at the hearing may be submitted by affidavit in the absence of objection by the person who is the subject of the petition, the petitioner, either of their respective counsel, or by any other interested party. Prior to the hearing, the attorney shall investigate the risks and benefits of the treatment decision for which authorization is sought and of alternatives to the proposed decision. The attorney shall make a reasonable effort to inform the person of this information and to ascertain the person's religious beliefs and basic values and the views and preferences of the person's next of kin.

H. Prior to authorizing treatment pursuant to this section, the court shall find:

1. That there is no legally authorized person available to give consent;
2. That the person who is the subject of the petition is incapable either of making an informed decision regarding a specific treatment or course of treatment or is physically or mentally incapable of communicating such a decision;

3. That the person who is the subject of the petition is unlikely to become capable of making an informed decision or of communicating an informed decision within the time required for decision; and

4. That the proposed treatment or course of treatment is in the best interest of the patient. However, the court shall not authorize a proposed treatment or course of treatment which is proven by a preponderance of the evidence to be contrary to the person's religious beliefs or basic values unless such treatment is necessary to prevent death or a serious irreversible condition. The court shall take into consideration the right of the person to rely on nonmedical, remedial treatment in the practice of religion in lieu of medical treatment.

I. The court may not authorize the following under this section:

1. Nontherapeutic sterilization, abortion, or psychosurgery.
2. Admission to a mental retardation facility or a psychiatric hospital, as defined in § 37.1-1. However, the court may issue an order under this section authorizing a specific treatment or course of treatment of a person whose admission to such facility has been or is simultaneously being authorized under §§ 37.1-65, 37.1-65.1, 37.1-65.2, 37.1-65.3, or § 37.1-67.1, or of a person who is subject to an order of involuntary commitment previously or simultaneously issued under § 37.1-67.3 or *Article 1.1* (§ 37.1-70.1 et seq.) of Chapter 2 of Title 37.1.

3. Administration of antipsychotic medication for a period to exceed 180 days or electroconvulsive therapy for a period to exceed sixty days pursuant to any petition filed under this section. The court may authorize electroconvulsive therapy only if it is demonstrated by clear and convincing evidence, which shall include the testimony of a licensed psychiatrist, that all other reasonable forms of treatment have been considered and that electroconvulsive therapy is the most effective treatment for the person. Even if the court has authorized administration of antipsychotic medication or electroconvulsive therapy hereunder, these treatments may be administered over the person's objection only if he is subject to an order of involuntary commitment, including outpatient involuntary commitment, previously or simultaneously issued under § 37.1-67.3 or *Article 1.1* (§ 37.1-70.1 et seq.) of Chapter 2 of Title 37.1, or the provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.

4. Restraint or transportation of the person, unless it finds upon clear and convincing evidence that restraint or transportation is necessary to the provision of an authorized treatment for a physical disorder.

J. Any order authorizing treatment pursuant to subsection A shall describe the treatment or course of treatment authorized and may authorize generally such related examinations, tests, or services as the court may determine to be reasonably related to the treatment authorized. The order shall require the treating physician to review and document the appropriateness of the continued admission of antipsychotic medications not less frequently than every thirty days. Such order shall require the treating physician or other service provider to report to the court and the person's attorney any change in the person's condition resulting in probable restoration or development of the person's capacity to make and to communicate an informed decision prior to completion of the authorized treatment and related services. The order may further require the treating physician or other service provider to report to the



court and the person's attorney any change in circumstances regarding the authorized treatment or related services which may indicate that such authorization is no longer in the person's best interests. Upon receipt of such report, or upon the petition of any interested party, the court may enter such order withdrawing or modifying its prior authorization as it deems appropriate. Any petition or order under this section may be orally presented or entered, provided a written order shall be subsequently executed.

K. Any order hereunder of a judge, or of a judge or magistrate under subsection M, may be appealed de novo within ten days to the circuit court for the jurisdiction where the order was entered, and any such order of a circuit court hereunder, either originally or on appeal, may be appealed within ten days to the Court of Appeals.

L. Any licensed health professional or licensed hospital providing treatment, testing or detention pursuant to the court's or magistrate's authorization as provided in this section shall have no liability arising out of a claim to the extent it is based on lack of consent to such treatment, testing or detention. Any such professional or hospital providing, withholding or withdrawing treatment with the consent of the person receiving or being offered treatment shall have no liability arising out of a claim to the extent it is based on lack of capacity to consent if a court or a magistrate has denied a petition hereunder to authorize such treatment, and such denial was based on an affirmative finding that the person was capable of making and communicating an informed decision regarding the proposed provision, withholding or withdrawal of treatment.

M. Upon the advice of a licensed physician who has attempted to obtain consent and upon a finding of probable cause to believe that an adult person within the court's or a magistrate's jurisdiction is incapable of making an informed decision regarding treatment of a physical or mental disorder, or is incapable of communicating such a decision due to a physical or mental disorder, and that the medical standard of care calls for testing, observation or treatment of the disorder within the next twenty-four hours to prevent death, disability, or a serious irreversible condition, the court or, if the court is unavailable, a magistrate may issue an order authorizing temporary detention of the person by a hospital emergency room or other appropriate facility and authorizing such testing, observation or treatment. The detention may not be for a period exceeding twenty-four hours unless extended by the court as part of an order authorizing treatment under subsection A. If before completion of authorized testing, observation or treatment, the physician determines that a person subject to an order under this subsection has become capable of making and communicating an informed decision, the physician shall rely on the person's decision on whether to consent to further observation, testing or treatment. If before issuance of an order under this subsection or during its period of effectiveness, the physician learns of an objection by a member of the person's immediate family to the testing, observation or treatment, he shall so notify the court or magistrate, who shall consider the objection in determining whether to issue, modify or terminate the order.

N. The provisions of § 37.1-89 relating to payment by the Commonwealth shall not apply to the cost of detention, testing or treatment under this section.

O. Nothing in this section shall be deemed to affect the right to use, and the authority conferred by, any other applicable statutory or regulatory procedure relating to consent, or to diminish any common law authority of a physician or other treatment provider to provide, withhold or withdraw services to a person unable to give or to communicate informed consent to those actions, with or without the consent of the person's relative, including but not limited to common law or other authority to provide treatment in an emergency situation; nor shall anything in this section be construed to affect the law defining the conditions under which consent shall be obtained for medical treatment, or the nature of the consent required.

**2. That the provisions of this act may result in a net increase in periods of imprisonment in state correctional facilities. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0.**

**3. That the effective date of this act is January 1, 2001.**