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SENATE BILL NO. 342

Offered January 13, 2016

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A *BILL to amend and reenact §§ 19.2-168.1, 19.2-169.1, 19.2-169.2, 19.2-169.5, and 19.2-169.6 of the Code of Virginia, relating to orders for mental health evaluations and treatment of certain criminal defendants.*

 Patron—Lucas

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-168.1, 19.2-169.1, 19.2-169.2, 19.2-169.5, and 19.2-169.6 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-168.1. Evaluation on motion of the Commonwealth after notice.

A. If the attorney for the defendant gives notice pursuant to § 19.2-168, and the Commonwealth thereafter seeks an evaluation of the defendant's sanity at the time of the offense, the court shall appoint one or more qualified mental health experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A of § 19.2-169.5. The location of the evaluation shall be governed by subsection B of § 19.2-169.5. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in subsection C of § 19.2-169.5. *Upon entry of an order for an evaluation of a defendant's sanity at the time of the offense, the clerk of the court shall provide a copy of the order to the appointed evaluator or hospital as soon as practicable but no later than the close of business on the next business day following entry of the order. Upon receipt, the appointed evaluator or hospital shall acknowledge receipt of the order to the clerk of the court on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia.* After performing their evaluation, the experts shall report their findings and opinions; and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense.

B. If the court finds, after hearing evidence presented by the parties, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, it may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting expert psychiatric or psychological evidence at trial on the issue of his sanity at the time of the offense.

§ 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. *Upon entry of an order for a competency evaluation, the clerk of the court shall provide a copy of the order to the appointed evaluator as soon as practicable but no later than the close of business on the next business day following entry of the order. Upon receipt, the appointed evaluator shall acknowledge receipt of the order to the clerk of the court on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia.*

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. *Upon entry of an order for a competency evaluation in a hospital, the clerk of the court shall provide a copy of the order to the hospital designated by the Commissioner as soon as practicable but no later than the close of business on the next business day following entry of the order. Upon receipt, the hospital shall acknowledge receipt of the order to the clerk of the court on*

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59 *a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia.* The
60 defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform
61 an adequate evaluation of the defendant's competency, but not to exceed 30 days from the date of
62 admission to the hospital.

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

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

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

87 The fact that the defendant claims to be unable to remember the time period surrounding the alleged
88 offense shall not, by itself, bar a finding of competency if the defendant otherwise understands the
89 charges against him and can assist in his defense. Nor shall the fact that the defendant is under the
90 influence of medication bar a finding of competency if the defendant is able to understand the charges
91 against him and assist in his defense while medicated.

92 **§ 19.2-169.2. Disposition when defendant found incompetent.**

93 A. Upon finding pursuant to subsection E of § 19.2-169.1 that the defendant, including a juvenile
94 transferred pursuant to § 16.1-269.1, is incompetent, the court shall order that the defendant receive
95 treatment to restore his competency on an outpatient basis or, if the court specifically finds that the
96 defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of
97 Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal
98 charge. *Upon entry of an order for competency restoration, the clerk of the court shall provide a copy*
99 *of the order to the director of the community services board or behavioral health authority or to the*
100 *Commissioner, as appropriate, as soon as practicable but no later than the close of business on the next*
101 *business day following entry of the order. Upon receipt, the director or the Commissioner shall*
102 *acknowledge receipt of the order to the clerk of the court on a form developed by the Office of the*
103 *Executive Secretary of the Supreme Court of Virginia.* Any psychiatric records and other information
104 that have been deemed relevant and submitted by the attorney for the defendant pursuant to subsection
105 C of § 19.2-169.1 and any reports submitted pursuant to subsection D of § 19.2-169.1 shall be made
106 available to the director of the community services board or behavioral health authority or his designee
107 or to the director of the treating inpatient facility or his designee within 96 hours of the issuance of the
108 court order requiring treatment to restore the defendant's competency. If the 96-hour period expires on a
109 Saturday, Sunday, or other legal holiday, the 96 hours shall be extended to the next day that is not a
110 Saturday, Sunday, or legal holiday.

111 B. If, at any time after the defendant is ordered to undergo treatment under subsection A of this
112 section, the director of the community services board or behavioral health authority or his designee or
113 the director of the treating inpatient facility or his designee believes the defendant's competency is
114 restored, the director or his designee shall immediately send a report to the court as prescribed in
115 subsection D of § 19.2-169.1. The court shall make a ruling on the defendant's competency according to
116 the procedures specified in subsection E of § 19.2-169.1.

117 C. The clerk of court shall certify and forward forthwith to the Central Criminal Records Exchange,
118 on a form provided by the Exchange, a copy of an order for treatment issued pursuant to subsection A.

119 **§ 19.2-169.5. Evaluation of sanity at the time of the offense; disclosure of evaluation results.**

120 A. Raising issue of sanity at the time of offense; appointment of evaluators. — If, at any time before

trial, the court finds, upon hearing evidence or representations of counsel for the defendant, that there is probable cause to believe that the defendant's sanity will be a significant factor in his defense and that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant's sanity at the time of the offense and, where appropriate, to assist in the development of an insanity defense. Such mental health expert shall be (i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Behavioral Health and Developmental Services and (ii) qualified by specialized training and experience to perform forensic evaluations. The defendant shall not be entitled to a mental health expert of his own choosing or to funds to employ such expert. *Upon entry of an order for an evaluation of a defendant's sanity at the time of the offense, the clerk of the court shall provide a copy of the order to the appointed evaluator or hospital as soon as practicable but no later than the close of business on the next business day following entry of the order. Upon receipt, the appointed evaluator or hospital shall acknowledge receipt of the order to the clerk of the court on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia.*

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 services are unavailable, or unless the results of the outpatient evaluation indicate that hospitalization of the defendant for further evaluation of his sanity at the time of the offense is necessary. If either finding is made, the court, under authority of this subsection, may order that the defendant be sent to a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for evaluation of the defendant under criminal charge. *Upon entry of an order for an evaluation of a defendant's sanity at the time of the offense in a hospital, the clerk of the court shall provide a copy of the order to the hospital designated by the Commissioner as soon as practicable but no later than the close of business on the next business day following entry of the order. Upon receipt, the hospital shall acknowledge receipt of the order to the clerk of the court on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia.* 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 sanity at the time of the offense, but not to exceed 30 days from the date of admission to the hospital.

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

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

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

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

§ 19.2-169.6. Inpatient psychiatric hospital admission from local correctional facility.

A. Any inmate of a local correctional facility who is not subject to the provisions of § 19.2-169.2 may be hospitalized for psychiatric treatment at a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal charge if:

1. The court with jurisdiction over the inmate's case, if it is still pending, on the petition of the person having custody over an inmate or on its own motion, holds a hearing at which the inmate is represented by counsel and finds by clear and convincing evidence that (i) the inmate has a mental

182 illness; (ii) there exists a substantial likelihood that, as a result of a mental illness, the inmate will, in
183 the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior
184 causing, attempting, or threatening harm and any other relevant information or (b) suffer serious harm
185 due to his lack of capacity to protect himself from harm as evidenced by recent behavior and any other
186 relevant information; and (iii) the inmate requires treatment in a hospital rather than the local
187 correctional facility. Prior to making this determination, the court shall consider the examination
188 conducted in accordance with § 37.2-815 and the preadmission screening report prepared in accordance
189 with § 37.2-816 and conducted in-person or by means of a two-way electronic video and audio
190 communication system as authorized in § 37.2-804.1 by an employee or designee of the local
191 community services board or behavioral health authority who is skilled in the assessment and treatment
192 of mental illness, who is not providing treatment to the inmate, and who has completed a certification
193 program approved by the Department of Behavioral Health and Developmental Services as provided in
194 § 37.2-809. The examiner appointed pursuant to § 37.2-815, if not physically present at the hearing, shall
195 be available whenever possible for questioning during the hearing through a two-way electronic video
196 and audio or telephonic communication system as authorized in § 37.2-804.1. Any employee or designee
197 of the local community services board or behavioral health authority, as defined in § 37.2-809,
198 representing the board or authority that prepared the preadmission screening report shall attend the
199 hearing in person or, if physical attendance is not practicable, shall participate in the hearing through a
200 two-way electronic video and audio communication system as authorized in § 37.2-804.1. When the
201 hearing is held outside the service area of the community services board or behavioral health authority
202 that prepared the preadmission screening report, and it is not practicable for a representative of the board
203 or authority to attend or participate in the hearing, arrangements shall be made by the board or authority
204 for an employee or designee of the board or authority serving the area in which the hearing is held to
205 attend or participate on behalf of the board or authority that prepared the preadmission screening report;
206 or

207 2. Upon petition by the person having custody over an inmate, a magistrate finds probable cause to
208 believe that (i) the inmate has a mental illness; (ii) there exists a substantial likelihood that, as a result
209 of a mental illness, the inmate will, in the near future, (a) cause serious physical harm to himself or
210 others as evidenced by recent behavior causing, attempting, or threatening harm and any other relevant
211 information or (b) suffer serious harm due to his lack of capacity to protect himself from harm as
212 evidenced by recent behavior and any other relevant information; and (iii) the inmate requires treatment
213 in a hospital rather than a local correctional facility, and the magistrate issues a temporary detention
214 order for the inmate. Prior to the filing of the petition, the person having custody shall arrange for an
215 evaluation of the inmate conducted in-person or by means of a two-way electronic video and audio
216 communication system as authorized in § 37.2-804.1 by an employee or designee of the local
217 community services board or behavioral health authority who is skilled in the assessment and treatment
218 of mental illness and who has completed a certification program approved by the Department as
219 provided in § 37.2-809. After considering the evaluation of the employee or designee of the local
220 community services board or behavioral health authority, and any other information presented, and
221 finding that probable cause exists to meet the criteria, the magistrate may issue a temporary detention
222 order in accordance with the applicable procedures specified in §§ 37.2-809 through 37.2-813. The
223 person having custody over the inmate shall notify the court having jurisdiction over the inmate's case,
224 if it is still pending, and the inmate's attorney prior to the detention pursuant to a temporary detention
225 order or as soon thereafter as is reasonable.

226 Upon detention pursuant to this subdivision, a hearing shall be held either before the court having
227 jurisdiction over the inmate's case or before a district court judge or a special justice, as defined in
228 § 37.2-100, in accordance with the provisions of §§ 37.2-815 through 37.2-821, in which case the inmate
229 shall be represented by counsel as specified in § 37.2-814. The hearing shall be held within 72 hours of
230 execution of the temporary detention order issued pursuant to this subdivision. If the 72-hour period
231 terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the
232 inmate may be detained until the close of business on the next day that is not a Saturday, Sunday, legal
233 holiday, or day on which the court is lawfully closed. Any employee or designee of the local
234 community services board or behavioral health authority, as defined in § 37.2-809, representing the
235 board or authority that prepared the preadmission screening report shall attend the hearing in person or,
236 if physical attendance is not practicable, shall participate in the hearing through a two-way electronic
237 video and audio communication system as authorized in § 37.2-804.1. When the hearing is held outside
238 the service area of the community services board or behavioral health authority that prepared the
239 preadmission screening report, and it is not practicable for a representative of the board or authority to
240 attend or participate in the hearing, arrangements shall be made by the board or authority for an
241 employee or designee of the board or authority serving the area in which the hearing is held to attend or
242 participate on behalf of the board or authority that prepared the preadmission screening report. The
243 judge or special justice conducting the hearing may order the inmate hospitalized if, after considering

the examination conducted in accordance with § 37.2-815, the preadmission screening report prepared in accordance with § 37.2-816, and any other available information as specified in subsection C of § 37.2-817, he finds by clear and convincing evidence that (1) the inmate has a mental illness; (2) there exists a substantial likelihood that, as a result of a mental illness, the inmate will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and any other relevant information or (b) suffer serious harm due to his lack of capacity to protect himself from harm as evidenced by recent behavior and any other relevant information; and (3) the inmate requires treatment in a hospital rather than a local correctional facility. The examiner appointed pursuant to § 37.2-815, if not physically present at the hearing, shall be available whenever possible for questioning during the hearing through a two-way electronic video and audio or telephonic communication system as authorized in § 37.2-804.1. The examination and the preadmission screening report shall be admitted into evidence at the hearing.

B. In no event shall an inmate have the right to make application for voluntary admission as may be otherwise provided in § 37.2-805 or 37.2-814 or be subject to an order for mandatory outpatient treatment as provided in § 37.2-817.

C. *An order for hospitalization for psychiatric treatment issued pursuant to this section shall be filed by the judge or special justice with the clerk of the court as soon as practicable but no later than the close of business on the next business day following the completion of the hearing. Upon receipt of an order for hospitalization for psychiatric treatment, the clerk of the court shall provide a copy of the order to the appropriate state facility as soon as practicable but no later than the close of business on the next business day following entry of the order. Upon receipt, the state facility shall acknowledge receipt of the order to the clerk of the court on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia.*

D. If an inmate is hospitalized pursuant to this section and his criminal case is still pending, the court having jurisdiction over the inmate's case may order that the admitting hospital evaluate the inmate's competency to stand trial and his mental state at the time of the offense pursuant to §§ 19.2-169.1 and 19.2-169.5.

~~D.~~ E. An inmate may not be hospitalized longer than 30 days under subsection A unless the court which has criminal jurisdiction over him or a district court judge or a special justice, as defined in § 37.2-100, holds a hearing and orders the inmate's continued hospitalization in accordance with the provisions of subdivision A 2. If the inmate's hospitalization is continued under this subsection by a court other than the court which has jurisdiction over his criminal case, the facility at which the inmate is hospitalized shall notify the court with jurisdiction over his criminal case and the inmate's attorney in the criminal case, if the case is still pending.

~~E.~~ F. Hospitalization may be extended in accordance with subsection ~~D~~ E for periods of 60 days for inmates awaiting trial, but in no event may such hospitalization be continued beyond trial, nor shall such hospitalization act to delay trial, as long as the inmate remains competent to stand trial. Hospitalization may be extended in accordance with subsection ~~D~~ E for periods of 180 days for an inmate who has been convicted and not yet sentenced, or for an inmate who has been convicted of a crime and is in the custody of a local correctional facility after sentencing, but in no event may such hospitalization be continued beyond the date upon which his sentence would have expired had he received the maximum sentence for the crime charged. Any inmate who has not completed service of his sentence upon discharge from the hospital shall serve the remainder of his sentence.

~~F.~~ G. For any inmate who has been convicted and not yet sentenced, or who has been convicted of a crime and is in the custody of a local correctional facility after sentencing, the time the inmate is confined in a hospital for psychiatric treatment shall be deducted from any term for which he may be sentenced to any penal institution, reformatory or elsewhere.

~~G.~~ H. Any health care provider, as defined in § 32.1-127.1:03, or other provider rendering services to an inmate who is the subject of a proceeding under this section, upon request, shall disclose to a magistrate, the court, the inmate's attorney, the inmate's guardian ad litem, the examiner appointed pursuant to § 37.2-815, the community service board or behavioral health authority preparing the preadmission screening pursuant to § 37.2-816, or the sheriff or administrator of the local correctional facility any and all information that is necessary and appropriate to enable each of them to perform his duties under this section. These health care providers and other service providers shall disclose to one another health records and information where necessary to provide care and treatment to the inmate and to monitor that care and treatment. Health records disclosed to a sheriff or administrator of the local correctional facility shall be limited to information necessary to protect the sheriff or administrator of the local correctional facility and his employees, the inmate, or the public from physical injury or to address the health care needs of the inmate. Information disclosed to a law-enforcement officer shall not be used for any other purpose, disclosed to others, or retained.

Any health care provider disclosing records pursuant to this section shall be immune from civil

305 liability for any harm resulting from the disclosure, including any liability under the federal Health
306 Insurance Portability and Accountability Act (42 U.S.C. § 1320d et seq.), as amended, unless the person
307 or provider disclosing such records intended the harm or acted in bad faith.

308 ~~H.~~ *I.* Any order entered where an inmate is the subject of proceedings under this section shall
309 provide for the disclosure of medical records pursuant to subsection ~~G~~ *H*. This subsection shall not
310 preclude any other disclosures as required or permitted by law.