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HOUSE BILL NO. 1193

Offered January 10, 2018

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A BILL to amend and reenact §§ 19.2-169.6, 19.2-182.3, and 53.1-40.2 of the Code of Virginia, relating to persons acquitted by reason of insanity; commitment; sentencing.

Patron—Bell, Robert B.

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-169.6, 19.2-182.3, and 53.1-40.2 of the Code of Virginia are amended and reenacted as follows:

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

A. Any inmate of a local correctional facility 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 illness; (ii) 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 (iii) the inmate requires treatment in a hospital rather than the local correctional facility. Prior to making this determination, the court shall consider the examination conducted in accordance with § 37.2-815 and the preadmission screening report prepared in accordance with § 37.2-816 and conducted in-person or by means of a two-way electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or designee of the local community services board or behavioral health authority who is skilled in the assessment and treatment of mental illness, who is not providing treatment to the inmate, and who has completed a certification program approved by the Department of Behavioral Health and Developmental Services as provided in § 37.2-809. 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. Any employee or designee of the local community services board or behavioral health authority, as defined in § 37.2-809, representing the board or authority that prepared the preadmission screening report shall attend the hearing in person or, if physical attendance is not practicable, shall participate in the hearing through a two-way electronic video and audio communication system as authorized in § 37.2-804.1. When the hearing is held outside the service area of the community services board or behavioral health authority that prepared the preadmission screening report, and it is not practicable for a representative of the board or authority to attend or participate in the hearing, arrangements shall be made by the board or authority for an employee or designee of the board or authority serving the area in which the hearing is held to attend or participate on behalf of the board or authority that prepared the preadmission screening report; or

2. Upon petition by the person having custody over an inmate, a magistrate finds probable cause to believe that (i) the inmate has a mental illness; (ii) 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 (iii) the inmate requires treatment in a hospital rather than a local correctional facility, and the magistrate issues a temporary detention order for the inmate. Prior to the filing of the petition, the person having custody shall arrange for an evaluation of the inmate conducted in-person or by means of a two-way electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or designee of the local community services board or behavioral health authority who is skilled in the assessment and treatment of mental illness and who has completed a certification program approved by the Department as provided in § 37.2-809. After considering the evaluation of the employee or designee of the local community services board or behavioral health authority, and any other information presented, and

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59 finding that probable cause exists to meet the criteria, the magistrate may issue a temporary detention
60 order in accordance with the applicable procedures specified in §§ 37.2-809 through 37.2-813. The
61 person having custody over the inmate shall notify the court having jurisdiction over the inmate's case,
62 if it is still pending, and the inmate's attorney prior to the detention pursuant to a temporary detention
63 order or as soon thereafter as is reasonable.

64 Upon detention pursuant to this subdivision, a hearing shall be held either before the court having
65 jurisdiction over the inmate's case or before a district court judge or a special justice, as defined in
66 § 37.2-100, in accordance with the provisions of §§ 37.2-815 through 37.2-821, in which case the inmate
67 shall be represented by counsel as specified in § 37.2-814. The hearing shall be held within 72 hours of
68 execution of the temporary detention order issued pursuant to this subdivision. If the 72-hour period
69 terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the
70 inmate may be detained until the close of business on the next day that is not a Saturday, Sunday, legal
71 holiday, or day on which the court is lawfully closed. Any employee or designee of the local
72 community services board or behavioral health authority, as defined in § 37.2-809, representing the
73 board or authority that prepared the preadmission screening report shall attend the hearing in person or,
74 if physical attendance is not practicable, shall participate in the hearing through a two-way electronic
75 video and audio communication system as authorized in § 37.2-804.1. When the hearing is held outside
76 the service area of the community services board or behavioral health authority that prepared the
77 preadmission screening report, and it is not practicable for a representative of the board or authority to
78 attend or participate in the hearing, arrangements shall be made by the board or authority for an
79 employee or designee of the board or authority serving the area in which the hearing is held to attend or
80 participate on behalf of the board or authority that prepared the preadmission screening report. The
81 judge or special justice conducting the hearing may order the inmate hospitalized if, after considering
82 the examination conducted in accordance with § 37.2-815, the preadmission screening report prepared in
83 accordance with § 37.2-816, and any other available information as specified in subsection C of
84 § 37.2-817, he finds by clear and convincing evidence that (1) the inmate has a mental illness; (2) there
85 exists a substantial likelihood that, as a result of a mental illness, the inmate will, in the near future, (a)
86 cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or
87 threatening harm and any other relevant information or (b) suffer serious harm due to his lack of
88 capacity to protect himself from harm as evidenced by recent behavior and any other relevant
89 information; and (3) the inmate requires treatment in a hospital rather than a local correctional facility.
90 The examiner appointed pursuant to § 37.2-815, if not physically present at the hearing, shall be
91 available whenever possible for questioning during the hearing through a two-way electronic video and
92 audio or telephonic communication system as authorized in § 37.2-804.1. The examination and the
93 preadmission screening report shall be admitted into evidence at the hearing.

94 *B. The person having custody over an inmate shall petition for an order pursuant to subdivision A 2*
95 *if a court has found pursuant to § 19.2-182.2 that such inmate is in need of inpatient hospitalization.*

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

99 *C. D. If an inmate is hospitalized pursuant to this section and his criminal case is still pending, the*
100 *court having jurisdiction over the inmate's case may order that the admitting hospital evaluate the*
101 *inmate's competency to stand trial and his mental state at the time of the offense pursuant to*
102 *§§ 19.2-169.1 and 19.2-169.5.*

103 *D. E. An inmate may not be hospitalized longer than 30 days under subsection A unless the court*
104 *which has criminal jurisdiction over him or a district court judge or a special justice, as defined in*
105 *§ 37.2-100, holds a hearing and orders the inmate's continued hospitalization in accordance with the*
106 *provisions of subdivision A 2. If the inmate's hospitalization is continued under this subsection by a*
107 *court other than the court which has jurisdiction over his criminal case, the facility at which the inmate*
108 *is hospitalized shall notify the court with jurisdiction over his criminal case and the inmate's attorney in*
109 *the criminal case, if the case is still pending.*

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

119 *F. G. For any inmate who has been convicted and not yet sentenced, or who has been convicted of a*
120 *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 liability for any harm resulting from the disclosure, including any liability under the federal Health Insurance Portability and Accountability Act (42 U.S.C. § 1320d et seq.), as amended, unless the person or provider disclosing such records intended the harm or acted in bad faith.

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

I. J. If the person having custody over an inmate files a petition pursuant to this section, such person shall ensure that the appropriate community services board or behavioral health authority is advised of the need for a preadmission screening. If the community services board or behavioral health authority does not respond upon being advised of the need for a preadmission screening or fails to complete the preadmission screening, the person having custody over the inmate shall contact the director or other senior management at the community services board or behavioral health authority.

J. K. As used in this section, "person having custody over an inmate" means the sheriff or other person in charge of the local correctional facility where the inmate is incarcerated at the time of the filing of a petition for the psychiatric treatment of the inmate.

§ 19.2-182.3. Commitment; civil proceedings.

Upon receipt of the evaluation report and, if applicable, a conditional release or discharge plan, the court shall schedule the matter for hearing on an expedited basis, giving the matter priority over other civil matters before the court, to determine the appropriate disposition of the acquittee. Except as otherwise ordered by the court, the attorney who represented the defendant at the criminal proceedings shall represent the acquittee through the proceedings pursuant to this section. The matter may be continued on motion of either party for good cause shown. The acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. The hearing is a civil proceeding.

At the conclusion of the hearing, the court shall commit the acquittee if it finds that he has mental illness or intellectual disability and is in need of inpatient hospitalization. For the purposes of this chapter, mental illness includes any mental illness, as defined in § 37.2-100, in a state of remission when the illness may, with reasonable probability, become active. The decision of the court shall be based upon consideration of the following factors:

1. To what extent the acquittee has mental illness or intellectual disability, as those terms are defined in § 37.2-100;

2. The likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to other persons or to himself in the foreseeable future;

3. The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and

4. Such other factors as the court deems relevant.

If the court determines that an acquittee does not need inpatient hospitalization solely because of treatment or habilitation he is currently receiving, but the court is not persuaded that the acquittee will continue to receive such treatment or habilitation, it may commit him for inpatient hospitalization. The court shall order the acquittee released with conditions pursuant to §§ 19.2-182.7, 19.2-182.8, and 19.2-182.9 if it finds that he is not in need of inpatient hospitalization but that he meets the criteria for conditional release set forth in § 19.2-182.7. If the court finds that the acquittee does not need inpatient hospitalization nor does he meet the criteria for conditional release, it shall release him without conditions, provided the court has approved a discharge plan prepared by the appropriate community

services board or behavioral health authority in consultation with the appropriate hospital staff.

If a person is convicted of any offense for which he is sentenced to a term of incarceration and, in the same proceeding in which he is convicted, such person is acquitted by reason of insanity of any other offense and the court determines that the person is in need of inpatient hospitalization pursuant to this section, the court shall order that such person be committed for inpatient hospitalization and shall suspend the imposition of the sentence for the person's conviction for the duration of the person's inpatient hospitalization. Except as otherwise ordered by the court, a person committed to inpatient hospitalization whose sentence has been suspended pursuant to this section may be released or discharged from inpatient hospitalization only into the custody of the correctional facility where the person is to serve his sentence; however, such person may be transferred to another facility for inpatient hospitalization if the Commissioner determines that the other facility is a more appropriate placement for such person. The time such person is committed for inpatient hospitalization shall not be deducted from any term of incarceration for which he was sentenced.

§ 53.1-40.2. Involuntary admission of prisoners with mental illness.

A. Upon the petition of the Director or his designee, any district court judge or any special justice, as defined by § 37.2-100, of the county or city where the prisoner is located may issue an order authorizing involuntary admission of a prisoner who is sentenced and committed to the Department of Corrections and who is alleged or reliably reported to have a mental illness to a degree that warrants hospitalization. *The Director or his designee shall petition for an order authorizing involuntary admission of a prisoner if a court has found pursuant to § 19.2-182.2 that such prisoner is in need of inpatient hospitalization.*

B. Such prisoner may be involuntarily admitted to a hospital or facility for the care and treatment of persons with mental illness by complying with the following admission procedures:

1. A hearing on the petition shall be scheduled as soon as possible, allowing the prisoner an opportunity to prepare any defenses which he may have, obtain independent evaluation and expert opinion at his own expense, and summons other witnesses.

2. Prior to such hearing, the judge or special justice shall fully inform the prisoner of the allegations of the petition, the standard upon which he may be admitted involuntarily, the right of appeal from such hearing to the circuit court, and the right to jury trial on appeal. The judge or special justice shall ascertain if the prisoner is represented by counsel, and, if he is not represented by counsel, the judge or special justice shall appoint an attorney to represent the prisoner.

3. The judge or special justice shall require an examination of such prisoner by a psychiatrist who is licensed in Virginia or a clinical psychologist who is licensed in Virginia or, if such psychiatrist or clinical psychologist is not available, a physician or psychologist who is licensed in Virginia and who is qualified in the diagnosis of mental illness. The judge or special justice shall summons the examiner, who shall certify that he has personally examined the individual and has probable cause to believe that the prisoner does or does not have mental illness, that there does or does not exist a substantial likelihood that, as a result of mental illness, the prisoner will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, and that the prisoner does or does not require involuntary hospitalization. The judge or special justice may accept written certification of the examiner's findings if the examination has been personally made within the preceding five days and if there is no objection to the acceptance of such written certification by the prisoner or his attorney.

4. If the judge or special justice, after observing the prisoner and obtaining the necessary positive certification and other relevant evidence, finds specifically that (i) the prisoner has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the prisoner 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 other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, and (ii) alternatives to involuntary admission have been investigated and deemed unsuitable and there is no less restrictive alternative to such admission, the judge or special justice shall by written order and specific findings so certify and order that the prisoner be placed in a hospital or other facility designated by the Director for a period not to exceed 180 days from the date of the court order. Such placement shall be in a hospital or other facility for the care and treatment of persons with mental illness that is licensed or operated by the Department of Behavioral Health and Developmental Services.

5. The judge or special justice shall also order that the relevant medical records of such prisoner be released to the hospital, facility, or program in which he is placed upon request of the treating physician or director of the hospital, facility, or program.

6. The Department shall prepare the forms required in procedures for admission as approved by the Attorney General. These forms, which shall be the legal forms used in such admissions, shall be distributed by the Department to the clerks of the general district courts of the various counties and cities of the Commonwealth and to the directors of the respective state hospitals.