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## SENATE BILL NO. 683

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice  
on February 19, 2020)

(Patron Prior to Substitute—Senator Mason)

A BILL to amend and reenact §§ 19.2-169.1 and 19.2-169.2 of the Code of Virginia, relating to competency to stand trial; outpatient treatment.

Be it enacted by the General Assembly of Virginia:

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

§ 19.2-169.1. Raising question of competency to stand trial or plead; evaluation and determination of competency.

A. Raising competency issue; appointment of evaluators. — If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant, whether a juvenile transferred pursuant to § 16.1-269.1 or adult, lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who (i) has performed forensic evaluations; (ii) has successfully completed forensic evaluation training recognized by the Commissioner of Behavioral Health and Developmental Services; (iii) has demonstrated to the Commissioner competence to perform forensic evaluations; and (iv) is included on a list of approved evaluators maintained by the Commissioner.

B. Location of evaluation. — The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless an outpatient evaluation has been conducted and the outpatient evaluator opines that a hospital-based evaluation is needed to reliably reach an opinion or unless the defendant is in the custody of the Commissioner of Behavioral Health and Developmental Services pursuant to § 19.2-169.2, 19.2-169.6, 19.2-182.2, 19.2-182.3, 19.2-182.8, 19.2-182.9, or Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2.

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

D. The competency report. — Upon completion of the evaluation, the evaluators shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for treatment in the event he is found incompetent but restorable, or incompetent for the foreseeable future. If a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient or outpatient treatment is recommended. *Outpatient treatment may occur in a local correctional facility or at a location determined by the appropriate community services board or behavioral health authority.* No statements of the defendant relating to the time period of the alleged offense shall be included in the report. The evaluator shall also send a redacted copy of the report removing references to the defendant's name, date of birth, case number, and court of jurisdiction to the Commissioner of Behavioral Health and Developmental Services for the purpose of peer review to establish and maintain the list of approved evaluators described in subsection A.

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

The fact that the defendant claims to be unable to remember the time period surrounding the alleged

60 offense shall not, by itself, bar a finding of competency if the defendant otherwise understands the  
61 charges against him and can assist in his defense. Nor shall the fact that the defendant is under the  
62 influence of medication bar a finding of competency if the defendant is able to understand the charges  
63 against him and assist in his defense while medicated.

64 **§ 19.2-169.2. Disposition when defendant found incompetent.**

65 A. Upon finding pursuant to subsection E of § 19.2-169.1 that the defendant, including a juvenile  
66 transferred pursuant to § 16.1-269.1, is incompetent, the court shall order that the defendant receive  
67 treatment to restore his competency on an outpatient basis or, if the court specifically finds that the  
68 defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of  
69 Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal  
70 charge. *Outpatient treatment may occur in a local correctional facility or at a location determined by*  
71 *the appropriate community services board or behavioral health authority.* Notwithstanding the provisions  
72 of § 19.2-178, if the court orders inpatient hospital treatment, the defendant shall be transferred to and  
73 accepted by the hospital designated by the Commissioner as soon as practicable, but no later than 10  
74 days, from the receipt of the court order requiring treatment to restore the defendant's competency. If the  
75 10-day period expires on a Saturday, Sunday, or other legal holiday, the 10 days shall be extended to  
76 the next day that is not a Saturday, Sunday, or legal holiday. Any psychiatric records and other  
77 information that have been deemed relevant and submitted by the attorney for the defendant pursuant to  
78 subsection C of § 19.2-169.1 and any reports submitted pursuant to subsection D of § 19.2-169.1 shall  
79 be made available to the director of the community services board or behavioral health authority or his  
80 designee or to the director of the treating inpatient facility or his designee within 96 hours of the  
81 issuance of the court order requiring treatment to restore the defendant's competency. If the 96-hour  
82 period expires on a Saturday, Sunday, or other legal holiday, the 96 hours shall be extended to the next  
83 day that is not a Saturday, Sunday, or legal holiday.

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

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