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SENATE BILL NO. 198

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary
on February 7, 2022)

(Patron Prior to Substitute—Senator Mason)

*A BILL to amend and reenact §§ 19.2-169.1, 19.2-169.2, and 37.2-809 of the Code of Virginia, relating to disposition when defendant found incompetent; involuntary admission of the defendant.***Be it enacted by the General Assembly of Virginia:****1. That §§ 19.2-169.1, 19.2-169.2, and 37.2-809 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 (community-based or jail-based) 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. In cases where a defendant is likely to remain incompetent for the foreseeable future due to an ongoing and irreversible medical condition, and where prior medical or educational records are available to support the diagnosis, or if the defendant was previously determined to be unrestorably incompetent in the past two years, the report may recommend that the court find the defendant unrestorably incompetent to stand trial and the court may proceed with the disposition of the case in accordance with § 19.2-169.3. 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

60 attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be
61 hospitalized under § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent
62 shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The
63 defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right
64 to personally participate in and introduce evidence at the hearing.

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

70 *F. Finding. — If the court finds the defendant competent to stand trial, the case shall be set for trial*
71 *or a preliminary hearing. If the court finds the defendant either incompetent but restorable or*
72 *incompetent for the foreseeable future, the court shall proceed pursuant to § 19.2-169.2.*

73 **§ 19.2-169.2. Disposition when defendant found incompetent.**

74 A. Upon finding pursuant to ~~subsection~~ subsections E and F of § 19.2-169.1 that the defendant,
75 including a juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court ~~shall~~ may (i) upon
76 motion from the attorney for the Commonwealth or counsel for the defendant order a preadmission
77 screening report to be completed pursuant to § 37.2-816 and after the preadmission screening report
78 has been completed, without objection by counsel for the defendant as to the defendant's competency to
79 stand trial and upon motion of the attorney for the Commonwealth, if the attorney for the
80 Commonwealth is involved in the prosecution of the case, or upon its own motion, the court may permit
81 the community services board or behavioral health authority to petition for involuntary admission of the
82 defendant pursuant to § 37.2-809 and proceed in accordance with § 37.2-817 and enter an order of
83 nolle prosequi or dismissed without prejudice for the criminal charge or (ii) order that the defendant
84 receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that
85 the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of
86 Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal
87 charge. Outpatient treatment may occur in a local correctional facility or at a location determined by the
88 appropriate community services board or behavioral health authority. Notwithstanding the provisions of
89 § 19.2-178, if the court orders inpatient hospital treatment, the defendant shall be transferred to and
90 accepted by the hospital designated by the Commissioner as soon as practicable, but no later than 10
91 days, from the receipt of the court order requiring treatment to restore the defendant's competency. If the
92 10-day period expires on a Saturday, Sunday, or other legal holiday, the 10 days shall be extended to
93 the next day that is not a Saturday, Sunday, or legal holiday. Any psychiatric records and other
94 information that have been deemed relevant and submitted by the attorney for the defendant pursuant to
95 subsection C of § 19.2-169.1 and any reports submitted pursuant to subsection D of § 19.2-169.1 shall
96 be made available to the director of the community services board or behavioral health authority or his
97 designee or to the director of the treating inpatient facility or his designee within 96 hours of the
98 issuance of the court order requiring treatment to restore the defendant's competency. If the 96-hour
99 period expires on a Saturday, Sunday, or other legal holiday, the 96 hours shall be extended to the next
100 day that is not a Saturday, Sunday, or legal holiday.

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

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

109 **§ 37.2-809. Involuntary temporary detention; issuance and execution of order.**

110 A. For the purposes of this section:

111 "Designee of the local community services board" means an examiner designated by the local
112 community services board who (i) is skilled in the assessment and treatment of mental illness, (ii) has
113 completed a certification program approved by the Department, (iii) is able to provide an independent
114 examination of the person, (iv) is not related by blood or marriage to the person being evaluated, (v) has
115 no financial interest in the admission or treatment of the person being evaluated, (vi) has no investment
116 interest in the facility detaining or admitting the person under this article, and (vii) except for employees
117 of state hospitals and of the U.S. Department of Veterans Affairs, is not employed by the facility.

118 "Employee" means an employee of the local community services board who is skilled in the
119 assessment and treatment of mental illness and has completed a certification program approved by the
120 Department.

121 "Investment interest" means the ownership or holding of an equity or debt security, including shares

of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments.

B. A magistrate *or judge* shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion and only after an evaluation 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 a designee of the local community services board to determine whether the person meets the criteria for temporary detention, a temporary detention order if it appears from all evidence readily available, including any recommendation from a physician, clinical psychologist, or clinical social worker treating the person, that the person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person 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; (ii) is in need of hospitalization or treatment; and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment. The magistrate *or judge* shall also consider, if available, (a) information provided by the person who initiated emergency custody and (b) the recommendations of any treating or examining physician licensed in Virginia either verbally or in writing prior to rendering a decision. Any temporary detention order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.

C. When considering whether there is probable cause to issue a temporary detention order, the magistrate *or judge* may, in addition to the petition, consider (i) the recommendations of any treating or examining physician, psychologist, or clinical social worker licensed in Virginia, if available, (ii) any past actions of the person, (iii) any past mental health treatment of the person, (iv) any relevant hearsay evidence, (v) any medical records available, (vi) any affidavits submitted, if the witness is unavailable and it so states in the affidavit, and (vii) any other information available that the magistrate *or judge* considers relevant to the determination of whether probable cause exists to issue a temporary detention order.

D. A magistrate *or judge* may issue a temporary detention order without an emergency custody order proceeding. A magistrate *or judge* may issue a temporary detention order without a prior evaluation pursuant to subsection B if (i) the person has been personally examined within the previous 72 hours by an employee or a designee of the local community services board or (ii) there is a significant physical, psychological, or medical risk to the person or to others associated with conducting such evaluation.

E. An employee or a designee of the local community services board shall determine the facility of temporary detention in accordance with the provisions of § 37.2-809.1 for all individuals detained pursuant to this section. An employee or designee of the local community services board may change the facility of temporary detention and may designate an alternative facility for temporary detention at any point during the period of temporary detention if it is determined that the alternative facility is a more appropriate facility for temporary detention of the individual given the specific security, medical, or behavioral health needs of the person. In cases in which the facility of temporary detention is changed following transfer of custody to an initial facility of temporary custody, transportation of the individual to the alternative facility of temporary detention shall be provided in accordance with the provisions of § 37.2-810. The initial facility of temporary detention shall be identified on the preadmission screening report and indicated on the temporary detention order; however, if an employee or designee of the local community services board designates an alternative facility, that employee or designee shall provide written notice forthwith, on a form developed by the Executive Secretary of the Supreme Court of Virginia, to the clerk of the issuing court of the name and address of the alternative facility. Subject to the provisions of § 37.2-809.1, if a facility of temporary detention cannot be identified by the time of the expiration of the period of emergency custody pursuant to § 37.2-808, the individual shall be detained in a state facility for the treatment of individuals with mental illness and such facility shall be indicated on the temporary detention order. Except as provided in § 37.2-811 for inmates requiring hospitalization in accordance with subdivision A 2 of § 19.2-169.6, the person shall not be detained in a jail or other place of confinement for persons charged with criminal offenses and shall remain in the custody of law enforcement until the person is either detained within a secure facility or custody has been accepted by the appropriate personnel designated by either the initial facility of temporary detention identified in the temporary detention order or by the alternative facility of temporary detention designated by the employee or designee of the local community services board pursuant to this subsection. The person detained or in custody pursuant to this section shall be given a written summary of the temporary detention procedures and the statutory protections associated with those procedures.

F. Any facility caring for a person placed with it pursuant to a temporary detention order is authorized to provide emergency medical and psychiatric services within its capabilities when the facility

determines that the services are in the best interests of the person within its care. The costs incurred as a result of the hearings and by the facility in providing services during the period of temporary detention shall be paid and recovered pursuant to § 37.2-804. The maximum costs reimbursable by the Commonwealth pursuant to this section shall be established by the State Board of Medical Assistance Services based on reasonable criteria. The State Board of Medical Assistance Services shall, by regulation, establish a reasonable rate per day of inpatient care for temporary detention.

G. The employee or the designee of the local community services board who is conducting the evaluation pursuant to this section shall determine, prior to the issuance of the temporary detention order, the insurance status of the person. Where coverage by a third party payor exists, the facility seeking reimbursement under this section shall first seek reimbursement from the third party payor. The Commonwealth shall reimburse the facility only for the balance of costs remaining after the allowances covered by the third party payor have been received.

H. The duration of temporary detention shall be sufficient to allow for completion of the examination required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-816, and initiation of mental health treatment to stabilize the person's psychiatric condition to avoid involuntary commitment where possible, but shall not exceed 72 hours prior to a hearing. If the 72-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the person may be detained, as herein provided, until the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed. The person may be released, pursuant to § 37.2-813, before the 72-hour period herein specified has run.

I. If a temporary detention order is not executed within 24 hours of its issuance, or within a shorter period as is specified in the order, the order shall be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if the office is not open, to any magistrate *or judge* serving the jurisdiction of the issuing court. Subsequent orders may be issued upon the original petition within 96 hours after the petition is filed. However, a magistrate *or judge* must again obtain the advice of an employee or a designee of the local community services board prior to issuing a subsequent order upon the original petition. Any petition for which no temporary detention order or other process in connection therewith is served on the subject of the petition within 96 hours after the petition is filed shall be void and shall be returned to the office of the clerk of the issuing court.

J. The Executive Secretary of the Supreme Court of Virginia shall establish and require that a magistrate *or judge*, as provided by this section, be available seven days a week, 24 hours a day, for the purpose of performing the duties established by this section. Each community services board shall provide to each general district court and magistrate's office within its service area a list of its employees and designees who are available to perform the evaluations required herein.

K. For purposes of this section, a health care provider or designee of a local community services board or behavioral health authority shall not be required to encrypt any email containing information or medical records provided to a magistrate *or judge* unless there is reason to believe that a third party will attempt to intercept the email.

L. If the employee or designee of the community services board who is conducting the evaluation pursuant to this section recommends that the person should not be subject to a temporary detention order, such employee or designee shall (i) inform the petitioner, the person who initiated emergency custody if such person is present, and an onsite treating physician of his recommendation; (ii) promptly inform such person who initiated emergency custody that the community services board will facilitate communication between the person and the magistrate *or judge* if the person disagrees with recommendations of the employee or designee of the community services board who conducted the evaluation and the person who initiated emergency custody so requests; and (iii) upon prompt request made by the person who initiated emergency custody, arrange for such person who initiated emergency custody to communicate with the magistrate *or judge* as soon as is practicable and prior to the expiration of the period of emergency custody. The magistrate *or judge* shall consider any information provided by the person who initiated emergency custody and any recommendations of the treating or examining physician and the employee or designee of the community services board who conducted the evaluation and consider such information and recommendations in accordance with subsection B in making his determination to issue a temporary detention order. The individual who is the subject of emergency custody shall remain in the custody of law enforcement or a designee of law enforcement and shall not be released from emergency custody until communication with the magistrate *or judge* pursuant to this subsection has concluded and the magistrate *or judge* has made a determination regarding issuance of a temporary detention order.

M. For purposes of this section, "person who initiated emergency custody" means any person who initiated the issuance of an emergency custody order pursuant to § 37.2-808 or a law-enforcement officer who takes a person into custody pursuant to subsection G of § 37.2-808.