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SENATE BILL NO. 645

Offered January 17, 2022

A *BILL to amend and reenact § 37.2-808 of the Code of Virginia and to repeal § 19.2-271.6 of the Code of Virginia and the second enactment of Chapter 523 and the second enactment of Chapter 540 of the Acts of Assembly of 2021, Special Session I, relating to criminal proceedings; evidence of defendant's mental condition.*

Patron—Cosgrove

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:**1. That § 37.2-808 of the Code of Virginia is amended and reenacted as follows:****§ 37.2-808. Emergency custody; issuance and execution of order.**

A. Any magistrate shall issue, upon the sworn petition of any responsible person, *or* treating physician, or upon his own motion, ~~or a court may issue pursuant to § 19.2-271.6,~~ an emergency custody order when he has probable cause to believe that any 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. Any emergency custody 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.

When considering whether there is probable cause to issue an emergency custody order, the magistrate may, in addition to the petition, ~~or the court may pursuant to § 19.2-271.6,~~ consider (1) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (2) any past actions of the person, (3) any past mental health treatment of the person, (4) any relevant hearsay evidence, (5) any medical records available, (6) any affidavits submitted, if the witness is unavailable and it so states in the affidavit, and (7) any other information available that the magistrate ~~or the court~~ considers relevant to the determination of whether probable cause exists to issue an emergency custody order.

B. Any person for whom an emergency custody order is issued shall be taken into custody and transported to a convenient location to be evaluated to determine whether the person meets the criteria for temporary detention pursuant to § 37.2-809 and to assess the need for hospitalization or treatment. The evaluation shall be made by a person designated by the community services board who is skilled in the diagnosis and treatment of mental illness and who has completed a certification program approved by the Department.

C. The magistrate ~~or court~~ issuing an emergency custody order shall specify the primary law-enforcement agency and jurisdiction to execute the emergency custody order and provide transportation. However, the magistrate ~~or court~~ shall consider any request to authorize transportation by an alternative transportation provider in accordance with this section, whenever an alternative transportation provider is identified to the magistrate ~~or court~~, which may be a person, facility, or agency, including a family member or friend of the person who is the subject of the order, a representative of the community services board, or other transportation provider with personnel trained to provide transportation in a safe manner, upon determining, following consideration of information provided by the petitioner; the community services board or its designee; the local law-enforcement agency, if any; the person's treating physician, if any; or other persons who are available and have knowledge of the person, and, when the magistrate ~~or court~~ deems appropriate, the proposed alternative transportation provider, either in person or via two-way electronic video and audio or telephone communication system, that the proposed alternative transportation provider is available to provide transportation, willing to provide transportation, and able to provide transportation in a safe manner. When transportation is ordered to be provided by an alternative transportation provider, the magistrate ~~or court~~ shall order the specified primary law-enforcement agency to execute the order, to take the person into custody, and to transfer custody of the person to the alternative transportation provider identified in the order. In such cases, a copy of the emergency custody order shall accompany the person being transported pursuant to this section at all times and shall be delivered by the alternative transportation provider to the community services board or its designee responsible for conducting the evaluation. The

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59 community services board or its designee conducting the evaluation shall return a copy of the
60 emergency custody order to the court designated by the magistrate ~~or the court that issued the~~
61 ~~emergency custody order~~ as soon as is practicable. Delivery of an order to a law-enforcement officer or
62 alternative transportation provider and return of an order to the court may be accomplished electronically
63 or by facsimile.

64 Transportation under this section shall include transportation to a medical facility as may be
65 necessary to obtain emergency medical evaluation or treatment that shall be conducted immediately in
66 accordance with state and federal law. Transportation under this section shall include transportation to a
67 medical facility for a medical evaluation if a physician at the hospital in which the person subject to the
68 emergency custody order may be detained requires a medical evaluation prior to admission.

69 D. In specifying the primary law-enforcement agency and jurisdiction for purposes of this section,
70 the magistrate ~~or court~~ shall order the primary law-enforcement agency from the jurisdiction served by
71 the community services board that designated the person to perform the evaluation required in
72 subsection B to execute the order and, in cases in which transportation is ordered to be provided by the
73 primary law-enforcement agency, provide transportation. If the community services board serves more
74 than one jurisdiction, the magistrate ~~or court~~ shall designate the primary law-enforcement agency from
75 the particular jurisdiction within the community services board's service area where the person who is
76 the subject of the emergency custody order was taken into custody or, if the person has not yet been
77 taken into custody, the primary law-enforcement agency from the jurisdiction where the person is
78 presently located to execute the order and provide transportation.

79 E. The law-enforcement agency or alternative transportation provider providing transportation
80 pursuant to this section may transfer custody of the person to the facility or location to which the person
81 is transported for the evaluation required in subsection B, G, or H if the facility or location (i) is
82 licensed to provide the level of security necessary to protect both the person and others from harm, (ii)
83 is actually capable of providing the level of security necessary to protect the person and others from
84 harm, and (iii) in cases in which transportation is provided by a law-enforcement agency, has entered
85 into an agreement or memorandum of understanding with the law-enforcement agency setting forth the
86 terms and conditions under which it will accept a transfer of custody, provided, however, that the
87 facility or location may not require the law-enforcement agency to pay any fees or costs for the transfer
88 of custody.

89 F. A law-enforcement officer may lawfully go or be sent beyond the territorial limits of the county,
90 city, or town in which he serves to any point in the Commonwealth for the purpose of executing an
91 emergency custody order pursuant to this section.

92 G. A law-enforcement officer who, based upon his observation or the reliable reports of others, has
93 probable cause to believe that a person meets the criteria for emergency custody as stated in this section
94 may take that person into custody and transport that person to an appropriate location to assess the need
95 for hospitalization or treatment without prior authorization. A law-enforcement officer who takes a
96 person into custody pursuant to this subsection or subsection H may lawfully go or be sent beyond the
97 territorial limits of the county, city, or town in which he serves to any point in the Commonwealth for
98 the purpose of obtaining the assessment. Such evaluation shall be conducted immediately. The period of
99 custody shall not exceed eight hours from the time the law-enforcement officer takes the person into
100 custody.

101 H. A law-enforcement officer who is transporting a person who has voluntarily consented to be
102 transported to a facility for the purpose of assessment or evaluation and who is beyond the territorial
103 limits of the county, city, or town in which he serves may take such person into custody and transport
104 him to an appropriate location to assess the need for hospitalization or treatment without prior
105 authorization when the law-enforcement officer determines (i) that the person has revoked consent to be
106 transported to a facility for the purpose of assessment or evaluation, and (ii) based upon his
107 observations, that probable cause exists to believe that the person meets the criteria for emergency
108 custody as stated in this section. The period of custody shall not exceed eight hours from the time the
109 law-enforcement officer takes the person into custody.

110 I. Nothing herein shall preclude a law-enforcement officer or alternative transportation provider from
111 obtaining emergency medical treatment or further medical evaluation at any time for a person in his
112 custody as provided in this section.

113 J. A representative of the primary law-enforcement agency specified to execute an emergency
114 custody order or a representative of the law-enforcement agency employing a law-enforcement officer
115 who takes a person into custody pursuant to subsection G or H shall notify the community services
116 board responsible for conducting the evaluation required in subsection B, G, or H as soon as practicable
117 after execution of the emergency custody order or after the person has been taken into custody pursuant
118 to subsection G or H.

119 K. The person shall remain in custody until (i) a temporary detention order is issued in accordance
120 with § 37.2-809, (ii) an order for temporary detention for observation, testing, or treatment is entered in

121 accordance with § 37.2-1104, ending law enforcement custody, (iii) the person is released, or (iv) the
122 emergency custody order expires. An emergency custody order shall be valid for a period not to exceed
123 eight hours from the time of execution.

124 L. Nothing in this section shall preclude the issuance of an order for temporary detention for testing,
125 observation, or treatment pursuant to § 37.2-1104 for a person who is also the subject of an emergency
126 custody order issued pursuant to this section. In any case in which an order for temporary detention for
127 testing, observation, or treatment is issued for a person who is also the subject of an emergency custody
128 order, the person may be detained by a hospital emergency room or other appropriate facility for testing,
129 observation, and treatment for a period not to exceed 24 hours, unless extended by the court as part of
130 an order pursuant to § 37.2-1101, in accordance with subsection C of § 37.2-1104. Upon completion of
131 testing, observation, or treatment pursuant to § 37.2-1104, the hospital emergency room or other
132 appropriate facility in which the person is detained shall notify the nearest community services board,
133 and the designee of the community services board shall, as soon as is practicable and prior to the
134 expiration of the order for temporary detention issued pursuant to § 37.2-1104, conduct an evaluation of
135 the person to determine if he meets the criteria for temporary detention pursuant to § 37.2-809.

136 M. Any person taken into emergency custody pursuant to this section shall be given a written
137 summary of the emergency custody procedures and the statutory protections associated with those
138 procedures.

139 N. If an emergency custody order is not executed within eight hours of its issuance, the order shall
140 be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if such office
141 is not open, to any magistrate serving the jurisdiction of the issuing court.

142 O. In addition to the eight-hour period of emergency custody set forth in subsection G, H, or K, if
143 the individual is detained in a state facility pursuant to subsection E of § 37.2-809, the state facility and
144 an employee or designee of the community services board as defined in § 37.2-809 may, for an
145 additional four hours, continue to attempt to identify an alternative facility that is able and willing to
146 provide temporary detention and appropriate care to the individual.

147 P. Payments shall be made pursuant to § 37.2-804 to licensed health care providers for medical
148 screening and assessment services provided to persons with mental illnesses while in emergency custody.

149 Q. No person who provides alternative transportation pursuant to this section shall be liable to the
150 person being transported for any civil damages for ordinary negligence in acts or omissions that result
151 from providing such alternative transportation.

152 **2. That § 19.2-271.6 of the Code of Virginia and the second enactment of Chapter 523 and the**
153 **second enactment of Chapter 540 of the Acts of Assembly of 2021, Special Session I, are repealed.**