

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 614

An Act to amend and reenact § 19.2-169.3 of the Code of Virginia, relating to disposition of the unrestorably incompetent defendant; aggravated murder charge; sexually violent offense charge.

[H 1959]

Approved March 26, 2023

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-169.3 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-169.3. (Effective October 1, 2022) Disposition of the unrestorably incompetent defendant; aggravated murder charge; sexually violent offense charge.

A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § 19.2-169.2, the director of the community services board or behavioral health authority or his designee or the director of the treating inpatient facility or his designee concludes that the defendant is likely to remain incompetent for the foreseeable future, *or if the initial evaluator has found that the defendant has an ongoing and irreversible medical condition causing him to likely remain incompetent for the foreseeable future or that the defendant has been found to be unrestorably incompetent in the past two years*, he shall send a report to the court so stating. The report shall also indicate whether, in the opinion of the director of the board, authority, or inpatient facility ~~director's or his designee's opinion~~ *designee or the evaluator*, the defendant should be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, committed pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2, or certified pursuant to § 37.2-806 in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection D or E of § 19.2-169.1. If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be (i) released, (ii) committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or (iii) certified pursuant to § 37.2-806. However, if the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future and the defendant has been charged with a sexually violent offense, as defined in § 37.2-900, he shall be screened pursuant to the procedures set forth in §§ 37.2-903 and 37.2-904. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A of § 19.2-169.2 if the defendant remains incompetent in the opinion of the board, authority, or inpatient facility director or his designee, the director or his designee shall so notify the court and make recommendations concerning disposition of the defendant as described in subsection A. The court shall hold a hearing according to the procedures specified in subsection E of § 19.2-169.1 and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described in subsection A. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § 19.2-169.2 for additional six-month periods, provided a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. If any defendant has been charged with a misdemeanor in violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or Article 5 (§ 18.2-119 et seq.) of Chapter 5 of Title 18.2, other than a misdemeanor charge pursuant to § 18.2-130 or Article 2 (§ 18.2-415 et seq.) of Chapter 9 of Title 18.2, and is being treated pursuant to subsection A of § 19.2-169.2, and after 45 days has not been restored to competency, the director of the community service board, behavioral health authority, or the director of the treating inpatient facility, or any of their designees, shall send a report indicating the defendant's status to the court. The report shall also indicate whether the defendant should be released or committed pursuant to § 37.2-817 or 37.2-817.01 or certified pursuant to § 37.2-806. Upon receipt of the report, if the court determines that the defendant is still incompetent, the court shall order that the defendant be released, committed, or certified, and may dismiss the charges against the defendant.

D. Unless an incompetent defendant is charged with aggravated murder or the charges against an incompetent criminal defendant have been previously dismissed, charges against an unrestorably incompetent defendant shall be dismissed on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest for such charges, whichever is sooner.

E. If the court orders an unrestorably incompetent defendant to be screened pursuant to the procedures set forth in §§ 37.2-903 and 37.2-904, it shall order the attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of Behavioral Health and

Developmental Services to provide the Director of the Department of Corrections with any information relevant to the review, including, but not limited to: (i) a copy of the warrant or indictment, (ii) a copy of the defendant's criminal record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to § 19.2-169.1, and (v) a copy of the report prepared by the director of the defendant's community services board, behavioral health authority, or treating inpatient facility or his designee pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Behavioral Health and Developmental Services for secure confinement and treatment until the Commitment Review Committee's and Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice that the Attorney General has declined to file a petition for the commitment of an unrestorably incompetent defendant as a sexually violent predator after conducting a review pursuant to § 37.2-905, the court shall order that the defendant be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or certified pursuant to § 37.2-806.

F. In any case when an incompetent defendant is charged with aggravated murder and has been determined to be unrestorably incompetent, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the aggravated murder case may order that the defendant receive continued treatment under subsection A of § 19.2-169.2 in a secure facility determined by the Commissioner of the Department of Behavioral Health and Developmental Services where the defendant shall remain until further order of the court, provided that (i) a hearing pursuant to subsection E of § 19.2-169.1 is held at yearly intervals for five years and at biennial intervals thereafter, or at any time that the director of the treating facility or his designee submits a competency report to the court in accordance with subsection D of § 19.2-169.1 that the defendant's competency has been restored, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others. No unrestorably incompetent defendant charged with aggravated murder shall be released except pursuant to a court order.

G. The attorney for the Commonwealth may bring charges that have been dismissed against the defendant when he is restored to competency.