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HOUSE BILL NO. 1908

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on January 23, 2023)

(Patron Prior to Substitute—Delegate Hope)

A BILL to amend and reenact §§ 19.2-169.1, as it is currently effective, and 19.2-169.2, as it is currently effective, of the Code of Virginia and to repeal the second enactment of Chapter 508 of the Acts of Assembly of 2022, relating to criminal proceedings; disposition when defendant found incompetent; evaluation for temporary detention.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-169.1, as it is currently effective, and 19.2-169.2, as it is currently effective, of the Code of Virginia are amended and reenacted as follows:

§ 19.2-169.1. (Effective until July 1, 2023) 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 the defendant's ability to assist his attorney; and (iii) his the defendant's need for treatment in the event he is found incompetent but restorable; or incompetent for the foreseeable future; and (iv) if the defendant has been charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128, whether the defendant should be evaluated to determine whether he meets the criteria for temporary detention pursuant to § 37.2-809 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. In cases where a defendant has been charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a

60 misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128 and is incompetent, the
61 report may recommend that the court direct the community services board or behavioral health authority
62 for the jurisdiction in which the defendant is located to (a) conduct an evaluation of the defendant in
63 accordance with subsection B of § 37.2-808 to determine whether the defendant meets the criteria for
64 temporary detention and (b) upon determining that the defendant does meet the criteria for temporary
65 detention, file a petition for issuance of an order for temporary detention of the defendant in accordance
66 with § 37.2-809. No statements of the defendant relating to the time period of the alleged offense shall
67 be included in the report. The evaluator shall also send a redacted copy of the report removing
68 references to the defendant's name, date of birth, case number, and court of jurisdiction to the
69 Commissioner of Behavioral Health and Developmental Services for the purpose of peer review to
70 establish and maintain the list of approved evaluators described in subsection A.

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

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

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

87 **§ 19.2-169.2. (Effective until July 1, 2023) Disposition when defendant found incompetent.**

88 A. Upon finding pursuant to subsection E or F of § 19.2-169.1 that the defendant, including a
89 juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court shall order that the defendant
90 receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that
91 the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of
92 Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal
93 charge. Outpatient treatment may occur in a local correctional facility or at a location determined by the
94 appropriate community services board or behavioral health authority. Notwithstanding the provisions of
95 § 19.2-178, if the court orders inpatient hospital treatment, the defendant shall be transferred to and
96 accepted by the hospital designated by the Commissioner as soon as practicable, but no later than 10
97 days, from the receipt of the court order requiring treatment to restore the defendant's competency. If the
98 10-day period expires on a Saturday, Sunday, or other legal holiday, the 10 days shall be extended to
99 the next day that is not a Saturday, Sunday, or legal holiday. Any psychiatric records and other
100 information that have been deemed relevant and submitted by the attorney for the defendant pursuant to
101 subsection C of § 19.2-169.1 and any reports submitted pursuant to subsection D of § 19.2-169.1 shall
102 be made available to the director of the community services board or behavioral health authority or his
103 designee or to the director of the treating inpatient facility or his designee within 96 hours of the
104 issuance of the court order requiring treatment to restore the defendant's competency. If the 96-hour
105 period expires on a Saturday, Sunday, or other legal holiday, the 96 hours shall be extended to the next
106 day that is not a Saturday, Sunday, or legal holiday.

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

113 C. Notwithstanding the provisions of subsection A, in cases in which (i) the defendant has been
114 charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a
115 misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128; (ii) the defendant has
116 been found to be incompetent pursuant to subsection E or F of § 19.2-169.1; and (iii) the competency
117 report described in subsection D of § 19.2-169.1 recommends that the defendant be temporarily detained
118 *evaluated to determine whether he meets the criteria for temporary detention* pursuant to § 37.2-809, the
119 court may ~~dismiss the charges without prejudice against the defendant and, in lieu of ordering the~~
120 ~~defendant receive treatment to restore his competency,~~ order the community services board or behavioral
121 health authority serving the jurisdiction in which the defendant is located to (a) conduct an evaluation of

the defendant and (b) if the community services board or behavioral health authority determines that the defendant meets the criteria for temporary detention, file a petition for issuance of an order for temporary detention pursuant to § 37.2-809. *The community services board or behavioral health authority shall within 72 hours notify the court, in writing, upon completion of the evaluation and, if appropriate, file a petition for issuance of an order for temporary detention. Upon receipt of such notice, the court may dismiss the charges without prejudice against the defendant.* However, the court shall not ~~dismiss charges and~~ enter an order *or dismiss charges against a defendant* pursuant to this subsection if the attorney for the Commonwealth is involved in the prosecution of the case and the attorney for the Commonwealth does not concur in the motion.

D. *If a defendant for whom an evaluation has been ordered pursuant to subsection C fails or refuses to appear for the evaluation, the community services board or behavioral health authority shall notify the court and the court shall issue a mandatory examination order and capias directing the primary law-enforcement agency for the jurisdiction in which the defendant resides to transport the defendant to the location designated by the community services board or behavioral health authority for examination.*

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

2. That the second enactment of Chapter 508 of the Acts of Assembly of 2022 is repealed.