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SENATE BILL NO. 198

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on _____)

(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 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 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-

26 169.2, 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
27 Chapter 8 of Title 37.2.

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

36 D. The competency report. — Upon completion of the evaluation, the evaluators shall promptly
37 submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity
38 to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for
39 treatment in the event he is found incompetent but restorable, or incompetent for the foreseeable future. If
40 a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient
41 or outpatient treatment (community-based or jail-based) is recommended. Outpatient treatment may occur
42 in a local correctional facility or at a location determined by the appropriate community services board or
43 behavioral health authority. In cases where a defendant is likely to remain incompetent for the foreseeable
44 future due to an ongoing and irreversible medical condition, and where prior medical or educational
45 records are available to support the diagnosis, or if the defendant was previously determined to be
46 unrestorably incompetent in the past two years, the report may recommend that the court find the
47 defendant unrestorably incompetent to stand trial and the court may proceed with the disposition of the
48 case in accordance with § 19.2-169.3. In cases where a defendant has been charged with a misdemeanor
49 violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or § 18.2-119 or 18.2-415 and is
50 incompetent, the report may recommend that the court find the defendant incompetent and that the
51 defendant should be committed pursuant to the provisions of Article 5 (§ 37.2-814 et seq.) of Chapter 8
52 of Title 37.2. No statements of the defendant relating to the time period of the alleged offense shall be

53 included in the report. The evaluator shall also send a redacted copy of the report removing references to
54 the defendant's name, date of birth, case number, and court of jurisdiction to the Commissioner of
55 Behavioral Health and Developmental Services for the purpose of peer review to establish and maintain
56 the list of approved evaluators described in subsection A.

57 E. The competency determination. — After receiving the report described in subsection D, the
58 court shall promptly determine whether the defendant is competent to stand trial. A hearing on the
59 defendant's competency is not required unless one is requested by the attorney for the Commonwealth or
60 the 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 to
64 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
66 alleged 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 influence
68 of medication bar a finding of competency if the defendant is able to understand the charges against him
69 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 incompetent
72 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 E or F of § 19.2-169.1 that the defendant, including a
75 juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court shall order that the defendant
76 receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that
77 the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of
78 Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal
79 charge. Outpatient treatment may occur in a local correctional facility or at a location determined by the

80 appropriate community services board or behavioral health authority. Notwithstanding the provisions of
81 § 19.2-178, if the court orders inpatient hospital treatment, the defendant shall be transferred to and
82 accepted by the hospital designated by the Commissioner as soon as practicable, but no later than 10 days,
83 from the receipt of the court order requiring treatment to restore the defendant's competency. If the 10-
84 day period expires on a Saturday, Sunday, or other legal holiday, the 10 days shall be extended to the next
85 day that is not a Saturday, Sunday, or legal holiday. Any psychiatric records and other information that
86 have been deemed relevant and submitted by the attorney for the defendant pursuant to subsection C of §
87 19.2-169.1 and any reports submitted pursuant to subsection D of § 19.2-169.1 shall be made available to
88 the director of the community services board or behavioral health authority or his designee or to the
89 director of the treating inpatient facility or his designee within 96 hours of the issuance of the court order
90 requiring treatment to restore the defendant's competency. If the 96-hour period expires on a Saturday,
91 Sunday, or other legal holiday, the 96 hours shall be extended to the next day that is not a Saturday,
92 Sunday, or legal holiday.

93 B. If, at any time after the defendant is ordered to undergo treatment under subsection A ~~of this~~
94 ~~section~~, the director of the community services board or behavioral health authority or his designee or the
95 director of the treating inpatient facility or his designee believes the defendant's competency is restored,
96 the director or his designee shall immediately send a report to the court as prescribed in subsection D of §
97 19.2-169.1. The court shall make a ruling on the defendant's competency according to the procedures
98 specified in subsection E of § 19.2-169.1.

99 C. Notwithstanding the provisions of subsection A, upon finding pursuant to subsection E or F of
100 § 19.2-169.1 that the defendant is incompetent, if such defendant has been charged with a misdemeanor
101 violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or § 18.2-119 or 18.2-415 and the
102 competency report described in subsection D of § 19.2-169.1 recommends the defendant be committed
103 pursuant to the provisions of Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, the court may, with
104 the concurrence of the Commonwealth, order the community services board or behavioral health authority
105 to petition for an order of involuntary commitment pursuant to the provisions of Article 5 (§ 37.2-814 et

106 seq.) of Chapter 8 of Title 37.2 in lieu of ordering that the defendant receive treatment to restore his
107 competency and dismiss the charges without prejudice against the defendant.

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

111 **2. That the provisions of this act shall expire on July 1, 2023.**

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