

SENATE BILL NO. 198

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary

on \_\_\_\_\_)

(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-

27 169.2, 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  
28 Chapter 8 of Title 37.2.

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

37 D. The competency report. — Upon completion of the evaluation, the evaluators shall promptly  
38 submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity  
39 to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for  
40 treatment in the event he is found incompetent but restorable, or incompetent for the foreseeable future. If  
41 a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient  
42 or outpatient treatment (community-based or jail-based) is recommended. Outpatient treatment may occur  
43 in a local correctional facility or at a location determined by the appropriate community services board or  
44 behavioral health authority. In cases where a defendant is likely to remain incompetent for the foreseeable  
45 future due to an ongoing and irreversible medical condition, and where prior medical or educational  
46 records are available to support the diagnosis, or if the defendant was previously determined to be  
47 unrestorably incompetent in the past two years, the report may recommend that the court find the  
48 defendant unrestorably incompetent to stand trial and the court may proceed with the disposition of the  
49 case in accordance with § 19.2-169.3. No statements of the defendant relating to the time period of the  
50 alleged offense shall be included in the report. The evaluator shall also send a redacted copy of the report  
51 removing references to the defendant's name, date of birth, case number, and court of jurisdiction to the  
52 Commissioner of Behavioral Health and Developmental Services for the purpose of peer review to  
53 establish and maintain the list of approved evaluators described in subsection A.

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

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

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

70 **§ 19.2-169.2. Disposition when defendant found incompetent.**

71 A. Upon finding pursuant to ~~subsection~~ subsections E and F of § 19.2-169.1 that the defendant,  
72 including a juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court ~~shall~~ may (i) upon  
73 motion from the attorney for the Commonwealth or counsel for the defendant order a preadmission  
74 screening report to be completed pursuant to § 37.2-816 and after the preadmission screening report has  
75 been completed, without objection by counsel for the defendant as to the defendant's competency to stand  
76 trial and upon motion of the attorney for the Commonwealth, if the attorney for the Commonwealth is  
77 involved in the prosecution of the case, or upon its own motion, the court may permit the community  
78 services board or behavioral health authority to petition for involuntary admission of the defendant  
79 pursuant to § 37.2-809 and proceed in accordance with § 37.2-817 and enter an order of nolle prosequi or  
80 dismissed without prejudice for the criminal charge or (ii) order that the defendant receive treatment to

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

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

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

105 **§ 37.2-809. Involuntary temporary detention; issuance and execution of order.**

106 A. For the purposes of this section:

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

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

117 "Investment interest" means the ownership or holding of an equity or debt security, including  
118 shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity  
119 or debt instruments.

120 B. A magistrate or judge shall issue, upon the sworn petition of any responsible person, treating  
121 physician, or upon his own motion and only after an evaluation conducted in-person or by means of a two-  
122 way electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or  
123 a designee of the local community services board to determine whether the person meets the criteria for  
124 temporary detention, a temporary detention order if it appears from all evidence readily available,  
125 including any recommendation from a physician, clinical psychologist, or clinical social worker treating  
126 the person, that the person (i) has a mental illness and that there exists a substantial likelihood that, as a  
127 result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or  
128 others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant  
129 information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or  
130 to provide for his basic human needs; (ii) is in need of hospitalization or treatment; and (iii) is unwilling  
131 to volunteer or incapable of volunteering for hospitalization or treatment. The magistrate or judge shall  
132 also consider, if available, (a) information provided by the person who initiated emergency custody and  
133 (b) the recommendations of any treating or examining physician licensed in Virginia either verbally or in

134 writing prior to rendering a decision. Any temporary detention order entered pursuant to this section shall  
135 provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude  
136 any other disclosures as required or permitted by law.

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

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

149 E. An employee or a designee of the local community services board shall determine the facility  
150 of temporary detention in accordance with the provisions of § 37.2-809.1 for all individuals detained  
151 pursuant to this section. An employee or designee of the local community services board may change the  
152 facility of temporary detention and may designate an alternative facility for temporary detention at any  
153 point during the period of temporary detention if it is determined that the alternative facility is a more  
154 appropriate facility for temporary detention of the individual given the specific security, medical, or  
155 behavioral health needs of the person. In cases in which the facility of temporary detention is changed  
156 following transfer of custody to an initial facility of temporary custody, transportation of the individual to  
157 the alternative facility of temporary detention shall be provided in accordance with the provisions of §  
158 37.2-810. The initial facility of temporary detention shall be identified on the preadmission screening  
159 report and indicated on the temporary detention order; however, if an employee or designee of the local  
160 community services board designates an alternative facility, that employee or designee shall provide

161 written notice forthwith, on a form developed by the Executive Secretary of the Supreme Court of  
162 Virginia, to the clerk of the issuing court of the name and address of the alternative facility. Subject to the  
163 provisions of § 37.2-809.1, if a facility of temporary detention cannot be identified by the time of the  
164 expiration of the period of emergency custody pursuant to § 37.2-808, the individual shall be detained in  
165 a state facility for the treatment of individuals with mental illness and such facility shall be indicated on  
166 the temporary detention order. Except as provided in § 37.2-811 for inmates requiring hospitalization in  
167 accordance with subdivision A 2 of § 19.2-169.6, the person shall not be detained in a jail or other place  
168 of confinement for persons charged with criminal offenses and shall remain in the custody of law  
169 enforcement until the person is either detained within a secure facility or custody has been accepted by  
170 the appropriate personnel designated by either the initial facility of temporary detention identified in the  
171 temporary detention order or by the alternative facility of temporary detention designated by the employee  
172 or designee of the local community services board pursuant to this subsection. The person detained or in  
173 custody pursuant to this section shall be given a written summary of the temporary detention procedures  
174 and the statutory protections associated with those procedures.

175 F. Any facility caring for a person placed with it pursuant to a temporary detention order is  
176 authorized to provide emergency medical and psychiatric services within its capabilities when the facility  
177 determines that the services are in the best interests of the person within its care. The costs incurred as a  
178 result of the hearings and by the facility in providing services during the period of temporary detention  
179 shall be paid and recovered pursuant to § 37.2-804. The maximum costs reimbursable by the  
180 Commonwealth pursuant to this section shall be established by the State Board of Medical Assistance  
181 Services based on reasonable criteria. The State Board of Medical Assistance Services shall, by regulation,  
182 establish a reasonable rate per day of inpatient care for temporary detention.

183 G. The employee or the designee of the local community services board who is conducting the  
184 evaluation pursuant to this section shall determine, prior to the issuance of the temporary detention order,  
185 the insurance status of the person. Where coverage by a third party payor exists, the facility seeking  
186 reimbursement under this section shall first seek reimbursement from the third party payor. The

187 Commonwealth shall reimburse the facility only for the balance of costs remaining after the allowances  
188 covered by the third party payor have been received.

189 H. The duration of temporary detention shall be sufficient to allow for completion of the  
190 examination required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-  
191 816, and initiation of mental health treatment to stabilize the person's psychiatric condition to avoid  
192 involuntary commitment where possible, but shall not exceed 72 hours prior to a hearing. If the 72-hour  
193 period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is  
194 lawfully closed, the person may be detained, as herein provided, until the close of business on the next  
195 day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed. The person  
196 may be released, pursuant to § 37.2-813, before the 72-hour period herein specified has run.

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

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

211 K. For purposes of this section, a health care provider or designee of a local community services  
212 board or behavioral health authority shall not be required to encrypt any email containing information or



213 medical records provided to a magistrate or judge unless there is reason to believe that a third party will  
214 attempt to intercept the email.

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

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

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