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SENATE BILL NO. 528
AMENDMENT IN THE NATURE OF A SUBSTITUTE
 (Proposed by the House Committee for Courts of Justice
 on _____)

(Patron Prior to Substitute—Senator Stanley)

A BILL to amend and reenact §§ 19.2-169.1, 19.2-169.2, 19.2-169.3, and 37.2-808, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to competency treatment in misdemeanor proceedings.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-169.1, 19.2-169.2, 19.2-169.3, and 37.2-808, as it is currently effective and as it shall become effective, 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 § 19.2-169.2, 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) the defendant's ability to assist his attorney; *and* (iii) 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. No statements of the defendant relating to the time period of the alleged offense shall be included in the report. The evaluator shall also send a redacted copy of the report removing references to the defendant's name, date of birth, case number, and court of jurisdiction to the Commissioner of Behavioral Health and Developmental Services for the purpose of peer review to establish and maintain the list of approved evaluators described in subsection A.

E. The competency determination. — After receiving the report described in subsection D, the court shall

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promptly determine whether the defendant is competent to stand trial. A hearing on the defendant's competency is not required unless one is requested by the attorney for the Commonwealth or the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be hospitalized under § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right to personally participate in and introduce evidence at the hearing.

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

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

§ 19.2-169.2. Disposition when defendant found incompetent.

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

B. *When a defendant is charged with misdemeanors only, upon a finding pursuant to subsection E or F of § 19.2-169.1 that the defendant, including a juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court may (i) order that the defendant receive restoration treatment to restore his competency on an outpatient basis in a local correctional facility or at a location determined by the appropriate community services board or behavioral health authority, (ii) order that the defendant receive restoration treatment at an inpatient hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal charge, (iii) order that the defendant's charges be dismissed and he be placed under an emergency custody order pursuant to § 37.2-808 for evaluation to determine whether he meets the criteria for temporary detention pursuant to § 37.2-809, or (iv) dismiss the charges and release the defendant. Notwithstanding the provisions of § 19.2-178, if the court orders inpatient hospital treatment, the defendant shall be transferred to and accepted by the hospital designated by the Commissioner of Behavioral Health and Developmental Services as soon as practicable, but no later than 10 days, from the receipt of the court order requiring treatment to restore the defendant's competency. If the 10-day period expires on a Saturday, Sunday, or other legal holiday, the 10 days shall be extended to the next day that is not a Saturday, Sunday, or legal holiday. Any psychiatric records and other information that have been deemed relevant and submitted by the attorney for the defendant pursuant to subsection C of § 19.2-169.1 and any reports submitted pursuant to subsection D of § 19.2-169.1 shall be made available to the director of the community services board or behavioral health authority or his designee or to the director of the treating inpatient facility or his designee within 96 hours of the issuance of the court order requiring treatment to restore the defendant's competency. If the 96-hour period expires on a Saturday, Sunday, or other legal holiday, the 96 hours shall be extended to the next day that is not a Saturday, Sunday, or legal holiday.*

C. If, at any time after the defendant is ordered to undergo treatment under subsection A or B, 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 believes the defendant's competency is restored, the director or his designee shall immediately send a report to the court as prescribed in subsection D of § 19.2-169.1. The court shall make a ruling on the defendant's competency according to the procedures specified in subsection E of § 19.2-169.1.

C. Notwithstanding the provisions of subsection A, in cases in which (i) 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; (ii) the defendant has been found to be incompetent pursuant to subsection E or F of § 19.2-169.1; and (iii) the competency report described in subsection D of § 19.2-169.1 recommends that the defendant be evaluated to determine whether he meets the criteria for temporary detention pursuant to § 37.2-809, the court may order the community services board or behavioral 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 notify the court, in writing, within 72 hours of the 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 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 or B.

§ 19.2-169.3. 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 or B 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 or his designee or the evaluator, the defendant should be released, ~~committed~~ *screened for possible commitment* 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~~ *screened for possible commitment* 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 or B of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A or B 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 or B 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 or B of § 19.2-169.2, and after 45 days has not been restored to competency, the director of the community ~~service~~ *services* 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~~ *screened for possible commitment* pursuant to § 37.2-817 or 37.2-817.01 or certified pursuant to § 37.2-806. Upon receipt of the

184 report, if the court determines that the defendant is still incompetent, the court shall order that the defendant
185 be released, committed, or certified, and may dismiss the charges against the defendant.

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

191 E. If the court orders an unrestorably incompetent defendant to be screened pursuant to the procedures set
192 forth in §§ 37.2-903 and 37.2-904, it shall order the attorney for the Commonwealth in the jurisdiction
193 wherein the defendant was charged and the Commissioner of Behavioral Health and Developmental Services
194 to provide the Director of the Department of Corrections with any information relevant to the review,
195 including, but not limited to: (i) a copy of the warrant or indictment, (ii) a copy of the defendant's criminal
196 record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to
197 § 19.2-169.1, and (v) a copy of the report prepared by the director of the defendant's community services
198 board, behavioral health authority, or treating inpatient facility or his designee pursuant to this section. The
199 court shall further order that the defendant be held in the custody of the Department of Behavioral Health and
200 Developmental Services for secure confinement and treatment until the Commitment Review Committee's
201 and Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice
202 that the Attorney General has declined to file a petition for the commitment of an unrestorably incompetent
203 defendant as a sexually violent predator after conducting a review pursuant to § 37.2-905, the court shall
204 order that the defendant be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of
205 Title 37.2, or certified pursuant to § 37.2-806.

206 F. In any case when an incompetent defendant is charged with aggravated murder and has been
207 determined to be unrestorably incompetent, notwithstanding any other provision of this section, the charge
208 shall not be dismissed and the court having jurisdiction over the aggravated murder case may order that the
209 defendant receive continued treatment under subsection A of § 19.2-169.2 in a secure facility determined by
210 the Commissioner of the Department of Behavioral Health and Developmental Services where the defendant
211 shall remain until further order of the court, provided that (i) a hearing pursuant to subsection E of
212 § 19.2-169.1 is held at yearly intervals for five years and at biennial intervals thereafter, or at any time that
213 the director of the treating facility or his designee submits a competency report to the court in accordance
214 with subsection D of § 19.2-169.1 that the defendant's competency has been restored, (ii) the defendant
215 remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the
216 defendant presents a danger to himself or others. No unrestorably incompetent defendant charged with
217 aggravated murder shall be released except pursuant to a court order.

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

220 **§ 37.2-808. (Expires July 1, 2026) Emergency custody; issuance and execution of order.**

221 A. Any magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or
222 upon his own motion, or a court may issue pursuant to § 19.2-271.6 *or, in the case of an incompetent*
223 *misdemeanant, pursuant to subsection B of § 19.2-169.2*, an emergency custody order when he has probable
224 cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a
225 result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others
226 as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if
227 any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his
228 basic human needs; (ii) is in need of hospitalization or treatment; and (iii) is unwilling to volunteer or
229 incapable of volunteering for hospitalization or treatment. Any emergency custody order entered pursuant to
230 this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall
231 not preclude any other disclosures as required or permitted by law.

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

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

245 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 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 a certified evaluator, 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 or a certified evaluator; 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 or certified evaluator responsible for conducting the evaluation. The community services board or its designee or certified evaluator conducting the evaluation shall return a copy of the emergency custody order to the court designated by the magistrate or the court that issued the emergency custody order as soon as is practicable. Delivery of an order to a law-enforcement officer or alternative transportation provider and return of an order to the court may be accomplished electronically or by facsimile.

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

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

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

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

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

H. A law-enforcement officer who is transporting a person who has voluntarily consented to be transported to a facility for the purpose of assessment or evaluation and who is beyond the territorial limits of

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

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

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

K. The person shall remain in custody until (i) a temporary detention order is issued in accordance with § 37.2-809, (ii) an order for temporary detention for observation, testing, or treatment is entered in accordance with § 37.2-1104, ending law enforcement custody, (iii) the person is released, or (iv) the emergency custody order expires. An emergency custody order shall be valid for a period not to exceed eight hours from the time of execution. For any person who has received an evaluation or treatment while in emergency custody and for whom no temporary detention order is issued, the evaluator or treating health care professional shall consider, prior to the person's release or the expiration of the emergency custody order, whether referral of the person to a community-based outpatient stabilization program for voluntary treatment is appropriate.

L. Nothing in this section shall preclude the issuance of an order for temporary detention for testing, observation, or treatment pursuant to § 37.2-1104 for a person who is also the subject of an emergency custody order issued pursuant to this section. In any case in which an order for temporary detention for testing, observation, or treatment is issued for a person who is also the subject of an emergency custody order, the person may be detained by a hospital emergency room or other appropriate facility for testing, observation, and treatment for a period not to exceed 24 hours, unless extended by the court as part of an order pursuant to § 37.2-1101, in accordance with subsection C of § 37.2-1104. Upon completion of testing, observation, or treatment pursuant to § 37.2-1104, the hospital emergency room or other appropriate facility in which the person is detained shall notify the nearest community services board or certified evaluator, and the designee of the community services board or certified evaluator shall, as soon as is practicable and prior to the expiration of the order for temporary detention issued pursuant to § 37.2-1104, conduct an evaluation of the person to determine if he meets the criteria for temporary detention pursuant to § 37.2-809. The (i) certified evaluator conducting the evaluation pursuant to subsection B and § 37.2-809 or (ii) hospital emergency department and treating physician or other health care provider designated by the physician shall allow a family member or legal guardian of the individual subject to evaluation who is present, and who may provide support and supportive decision-making, to be present with the individual unless the individual objects or the evaluator or treating physician determines that the presence of any such person would create a medical, clinical, or safety risk to the patient or health care provider or interferes with patient care. No provision of this section shall delay the process of the patient receiving treatment.

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

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

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

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

Q. An employee or contractor of an entity providing alternative transportation services pursuant to a contract with the Department who has completed training approved by the Department in the proper and safe use of restraint may use restraint (i) if restraint is necessary to ensure the safety of the person or others or prevent escape and (ii) if less restrictive techniques have been determined to be ineffective to protect the person or others from harm or to prevent escape.

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

providing such alternative transportation.

S. For purposes of this section:

"Certified evaluator" means the same as that term is defined in § 37.2-809.

"Law-enforcement agency" includes an auxiliary police force established pursuant to § 15.2-1731.

"Law-enforcement officer" includes an auxiliary police officer appointed or provided for pursuant to §§ 15.2-1731 and 15.2-1733, except for the purposes of subsection G.

§ 37.2-808. (Effective July 1, 2026) Emergency custody; issuance and execution of order.

A. Any magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion, or a court may issue pursuant to § 19.2-271.6 or, *in the case of an incompetent misdemeanor, pursuant to subsection B of § 19.2-169.2*, 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 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 community services board or its designee conducting the evaluation shall return a copy of the emergency custody order to the court designated by the magistrate or the court that issued the emergency custody order as soon as is practicable. Delivery of an order to a law-enforcement officer or alternative transportation provider and return of an order to the court may be accomplished electronically or by facsimile.

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

D. In specifying the primary law-enforcement agency and jurisdiction for purposes of this section, the magistrate or court shall order the primary law-enforcement agency from the jurisdiction served by the community services board that designated the person to perform the evaluation required in subsection B to execute the order and, in cases in which transportation is ordered to be provided by the primary law-

431 enforcement agency, provide transportation. If the community services board serves more than one
432 jurisdiction, the magistrate or court shall designate the primary law-enforcement agency from the particular
433 jurisdiction within the community services board's service area where the person who is the subject of the
434 emergency custody order was taken into custody or, if the person has not yet been taken into custody, the
435 primary law-enforcement agency from the jurisdiction where the person is presently located to execute the
436 order and provide transportation.

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

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

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

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

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

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

473 K. The person shall remain in custody until (i) a temporary detention order is issued in accordance with
474 § 37.2-809, (ii) an order for temporary detention for observation, testing, or treatment is entered in
475 accordance with § 37.2-1104, ending law enforcement custody, (iii) the person is released, or (iv) the
476 emergency custody order expires. An emergency custody order shall be valid for a period not to exceed eight
477 hours from the time of execution. For any person who has received an evaluation or treatment while in
478 emergency custody and for whom no temporary detention order is issued, the evaluator or treating health care
479 professional shall consider, prior to the person's release or the expiration of the emergency custody order,
480 whether referral of the person to a community-based outpatient stabilization program for voluntary treatment
481 is appropriate.

482 L. Nothing in this section shall preclude the issuance of an order for temporary detention for testing,
483 observation, or treatment pursuant to § 37.2-1104 for a person who is also the subject of an emergency
484 custody order issued pursuant to this section. In any case in which an order for temporary detention for
485 testing, observation, or treatment is issued for a person who is also the subject of an emergency custody
486 order, the person may be detained by a hospital emergency room or other appropriate facility for testing,
487 observation, and treatment for a period not to exceed 24 hours, unless extended by the court as part of an
488 order pursuant to § 37.2-1101, in accordance with subsection C of § 37.2-1104. Upon completion of testing,
489 observation, or treatment pursuant to § 37.2-1104, the hospital emergency room or other appropriate facility
490 in which the person is detained shall notify the nearest community services board, and the designee of the
491 community services board shall, as soon as is practicable and prior to the expiration of the order for
492 temporary detention issued pursuant to § 37.2-1104, conduct an evaluation of the person to determine if he

meets the criteria for temporary detention pursuant to § 37.2-809. The (i) evaluator conducting the evaluation pursuant to subsection B and § 37.2-809 or (ii) hospital emergency department and treating physician or other health care provider designated by the physician shall allow a family member or legal guardian of the individual subject to evaluation who is present, and who may provide support and supportive decision-making, to be present with the individual unless the individual objects or the evaluator or treating physician determines that the presence of any such person would create a medical, clinical, or safety risk to the patient or health care provider or interferes with patient care. No provision of this section shall delay the process of the patient receiving treatment.

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

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

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

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

Q. An employee or contractor of an entity providing alternative transportation services pursuant to a contract with the Department who has completed training approved by the Department in the proper and safe use of restraint may use restraint (i) if restraint is necessary to ensure the safety of the person or others or prevent escape and (ii) if less restrictive techniques have been determined to be ineffective to protect the person or others from harm or to prevent escape.

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

S. For purposes of this section:

"Law-enforcement agency" includes an auxiliary police force established pursuant to § 15.2-1731.

"Law-enforcement officer" includes an auxiliary police officer appointed or provided for pursuant to §§ 15.2-1731 and 15.2-1733, except for the purposes of subsection G.

2. That the provisions of this act shall become effective on July 1, 2027.