



# COMMONWEALTH of VIRGINIA

NELSON SMITH  
COMMISSIONER

DEPARTMENT OF  
BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

Post Office Box 1797  
Richmond, Virginia 23218-1797

Telephone (804) 786-3921  
Fax (804) 371-6638  
www.dbhds.virginia.gov

TO: Forensic Evaluators approved by DBHDS to complete adult pretrial evaluations

FROM: Elizabeth Hunt, Ph.D., ABPP  
Forensic Evaluation Manager  
DBHDS

DATE: August 31, 2023

SUBJECT: Additional Information on SB1507/HB1908 (DBHDS Guidance FOR 06)

The 2023 Session of the Virginia General Assembly passed [SB1507/HB1908](#), which modifies Code of Virginia §§ [19.2-169.1](#) and [19.2-169.2](#), specifically the portions of the bill that were established under [SB198](#) (2022). As a reminder, the changes from SB198 allowed for, in certain misdemeanor cases when a defendant is found incompetent to stand trial, the court to dismiss the charge(s) and refer the individual for the community services board or behavioral health authority (CSB) for an evaluation to determine whether the defendant meets criteria for temporary detention.

## Overview of Changes under SB1507/HB1908

In § 19.2-169.1 (D), the modifications from SB1507/HB1908 are in bold and the code now states that “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; (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.**”

While code language for SB198 indicated that the report “may” recommend that the court direct the CSB to conduct an evaluation to determine whether the defendant meets criteria for temporary detention, SB1507/HB1908 code language now indicates that the report “shall” include whether the defendant should be evaluated to determine whether he meets the criteria for temporary detention. Thus, evaluators are *required* to include this recommendation in their opinion for applicable cases.

In § 19.2-169.2, the modifications from SB1507/HB1908 apply to sections C and D.

For Section C, the code now states, “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.

For Section D, the code now states, **“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.”**

The language in SB198 indicated that the court could dismiss the charge(s) against the defendant in lieu of ordering restoration and order the CSB to conduct an evaluation to determine whether the defendant meets criteria for temporary detention. Thus, the dismissal and order to the CSB were occurring at the same time. SB1507/HB1908 provides clarification that these steps now occur in a sequential manner and the charge(s) are not dismissed until the CSB files notice to the court that a temporary detention petition is being filed. The language in section D was completely changed to include the use of law enforcement in transporting individuals who refuse or do not show for the temporary detention evaluation.

#### Application to Evaluations

**These modifications went into effect on July 1, 2023.** As a reminder, these modifications apply to misdemeanor charges of larceny, trespassing, property/monument damage, disorderly conduct, failure to appear, or drunk in public.

Evaluators are now required to provide an opinion about whether or not the defendant should be evaluated to determine whether he meets the criteria for temporary detention whenever a defendant is opined incompetent for the above-mentioned misdemeanor charges. The following steps may be considered when completing competence to stand trial evaluations, though evaluators should also carefully read the Code.

Step 1: Formulate an opinion of the defendant’s competence to stand trial

Step 2: If the defendant is incompetent to stand trial, make a determination regarding restorability. Refer to § 19.2-169.1(D) regarding situations when an unrestorable opinion may be offered in at the point of the initial competence to stand trial evaluation, such as when the

competency is due to an irreversible medical condition or if the defendant has been found unrestorable within the last two years.

If the opinion is that the defendant is incompetent and likely to remain incompetent for the foreseeable future (unrestorably incompetent to stand trial, URIST), then make recommendations pursuant to § 19.2-169.3 (A) and standard procedures apply.

Step 3: If the opinion is that the defendant is incompetent, but restorable, review the defendant's charges.

Unless the defendant's charges are solely the misdemeanor charges listed in the Code change, make a recommendation regarding restoration, including whether restoration should occur on an outpatient or inpatient basis. Standard procedures apply.

Step 4: [SB1507/HB1908 Revision] If the charges are one or more of the misdemeanor charges listed in the Code change, then review the civil commitment code sections, as well as § 19.2-169.1 (D) and § 19.2-169.2 (C) and (D). *Your opinion is now required to include whether the defendant should be evaluated to determine whether he/she meets the criteria for temporary detention.*

If your opinion is that the defendant meets criteria for temporary detention, then include a statement in your opinion which notifies the court that the defendant should be evaluated to determine whether he/she meets criteria for temporary detention (you may also consider citing § 19.2-169.1 (D) and § 19.2-169.2 (C) and (D)).

\*In cases in which the opinion is that the defendant meets criteria for temporary detention, evaluators are also reminded of their ethical obligation to ensure the individual is safe and should take any additional steps and notify the appropriate entities as soon as possible.

If your opinion is that the defendant does not meet criteria for temporary detention, then standard procedures apply.

In summary, your opinion should include the following (per the referenced code sections):

1. Opinion on whether the defendant is competent or incompetent.
2. Restoration recommendation (outpatient or inpatient).
3. Your opinion regarding whether or not the defendant meets temporary detention criteria and whether he/she should be evaluated to determine whether he/she meets criteria for temporary detention.

cc: DBHDS Facility Directors and Forensic Coordinators  
Community Services Boards Executive Directors and Forensic Coordinators  
Institute of Law, Psychiatry and Public Policy/University of Virginia  
Virginia Association of Community Services Boards