CHAPTER 6 - EMERGENCY CUSTODY AND TEMPORARY DETENTION ORDERS

I. INTRODUCTION

A. Authority; Distinction Between Adults and Juveniles

1. Authority. The Code of Virginia authorizes judicial intervention to order law enforcement personnel to take into custody and transport for needed mental health evaluation and care or medical evaluation and care a person who is unwilling or unable to volunteer for such care. A magistrate is authorized, as discussed in this chapter, to order such custody or involuntary detention on an emergency basis for short periods.

2. Distinction between adults and juveniles. Different emergency custody and temporary detention statutes apply to adults than apply to juveniles.

3. Juvenile ECO and TDO authority:

   a. In general

      1) A magistrate is authorized to issue a mental health ECO or TDO in the case of a minor of any age.

      2) Minor in detention or shelter care. The scope of the authority includes a minor who is in detention or shelter care when the ECO or TDO is requested.

   b. Minor Defined

      Virginia Code § 16.1-336 defines the term "minor" to mean "a person less than eighteen years of age."

B. Applicable Statutes

1. Mental Health ECOs and TDOs

   a. Adults

      1) In general

         - Emergency custody order (ECO): Va. Code § 37.2-808
         - Temporary detention order (TDO): Va. Code §§ 37.2-809 and 37.2-810

2) Inmates

Temporary detention order (TDO): Va. Code § 19.2-169.6

3) Conditionally released acquittees

- Emergency custody order (ECO): Va. Code § 19.2-182.9
- Temporary detention order (TDO): Va. Code § 19.2-182.9

4) Conditionally released sexually violent predator: Va. Code § 37.2-913

b. Minors

1) Emergency custody order (ECO): Va. Code § 16.1-340
2) Temporary detention order (TDO): Va. Code §§ 16.1-340.1 and 16.1-340.2

2. Post TDO duties

a. Adults

1) Virginia Code § 37.2-817.1, relating to issuance of an ECO or TDO in relation to a mandatory outpatient treatment plan or a discharge plan for an adult.
2) Virginia Code § 37.2-817.2, relating to enforcement of a mandatory examination order issued by the court in the case of an adult.

b. Minors

1) Virginia Code § 16.1-345.3, relating to issuance of an ECO or TDO in relation to a mandatory outpatient treatment plan for a minor.
2) Virginia Code § 16.1-345.4, relating to enforcement of a mandatory examination order issued by the court in the case of a minor.

3. Medical ECOs and TDOs (adults only)

a. Medical emergency custody order (Medical ECO): Va. Code § 37.2-1103
b. Medical temporary detention order (Medical TDO): Va. Code § 37.2-1104
c. Medical temporary detention order (Medical TDO) for inmate serving a sentence in a State correctional facility: Va. Code § 53.1-40.1

C. Orders and Petitions Concerning Magistrates

A magistrate uses the following forms for emergency custody or temporary detention for mental health evaluation and care:

1. Mental health evaluation and care

   a. DC-4001, PETITION FOR INVOLUNTARY ADMISSION FOR TREATMENT

   b. DC-492, EMERGENCY CUSTODY ORDER

   c. DC-592, EMERGENCY CUSTODY ORDER –JUVENILE

   d. DC-894A, TEMPORARY DETENTION ORDER –MAGISTRATE

   e. DC-895, TEMPORARY DETENTION ORDER –MAGISTRATE (JUVENILE)

   f. DC-4000, ORDER FOR ALTERNATIVE TRANSPORTATION PROVIDER

   g. DC-4046, ORDER FOR TRANSPORTATION TO ALTERNATIVE FACILITY OF TEMPORARY DETENTION

   h. DC-4026, CAPIAS: TRANSPORT AND MANDATORY EXAMINATION ORDER

   i. CC-1495, EMERGENCY CUSTODY ORDER –VIOLATION OF CONDITIONAL RELEASE, RELATING TO CONDITIONALLY RELEASED SEXUALLY VIOLENT PREDATOR

   j. CC-1494, PETITION FOR EMERGENCY CUSTODY ORDER –VIOLATION OF CONDITIONAL RELEASE SEXUAL PREDATOR

2. Medical care

   a. DC-488, MEDICAL EMERGENCY CUSTODY ORDER

   b. DC-491, MEDICAL EMERGENCY CUSTODY PETITION

   c. DC-490, MEDICAL EMERGENCY TEMPORARY DETENTION ORDER

   d. DC-489, MEDICAL EMERGENCY TEMPORARY DETENTION PETITION

II. ECO: IN GENERAL

A. Statutory Authority; Forms

1. Statutory authority

   a. Adult: Va. Code § 37.2-808

   b. Minor: Va. Code § 16.1-340

2. Forms

   a. DC-4001, PETITION FOR INVOLUNTARY ADMISSION FOR TREATMENT

   b. For an adult: DC-492, EMERGENCY CUSTODY ORDER, informally referred to as "ECO"

   c. For a minor: DC-592, EMERGENCY CUSTODY ORDER –JUVENILE

   d. DC-4000, ORDER FOR ALTERNATIVE TRANSPORTATION PROVIDER

B. Purpose

The purpose of emergency custody is to obtain a face-to-face meeting between a professional mental health evaluator (specifically, an employee or designee of the local community services board or behavioral health authority) and a person thought to be mentally ill (referred to as the "respondent") in order for the evaluator to form an opinion and provide expert evidence as to whether the respondent needs hospitalization or treatment for a mental illness and otherwise meets statutory criteria for issuance of a temporary detention order (DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE for an adult or a DC-895, TEMPORARY DETENTION ORDER – MAGISTRATE (JUVENILE) for a minor).

ECO In Context: Potential Outcomes

An evaluation of a respondent pursuant to an ECO could have any of the following results:

1. Temporary detention for further evaluation and care pursuant to a temporary detention order issued by a magistrate, as follows:

   a. For an adult: DC-894A, TEMPORARY DETENTION ORDER –MAGISTRATE
   b. For minor: DC-895, TEMPORARY DETENTION ORDER – MAGISTRATE (JUVENILE)

2. Release of the respondent for any of the following reasons:

   a. A finding that the respondent does not meet the statutory criteria for temporary detention.
   b. Expiration of the statutory period of emergency custody under the ECO.

3. Voluntary acceptance of mental health care services by the respondent.

C. Unique Authority of Magistrate

A magistrate is the only judicial officer authorized to issue an ECO for the following:

1. An adult under Va. Code § 37.2-808
2. A minor under Va. Code § 16.1-340

D. Jurisdiction; Venue

1. Jurisdiction

   a. Adult: In the case of an ECO for a respondent who is an adult, the ECO is returnable to the General District Court.

   b. Minor: In the case of an ECO for a respondent who is a minor, the ECO is returnable to the Juvenile and Domestic Relations District Court.

   NOTE: The foregoing statements on jurisdiction concern the jurisdiction of the court to which the process is returned. The magistrate acquires jurisdiction to issue an ECO when the respondent is currently located in or last known to be in the magistrate's region.

2. Venue – Adult

   Under Va. Code § 8.01-262, proper venue for an ECO for an adult is any one of the following places:

   a. Where the respondent resides.

   b. Where the cause of action, or any part of the cause of action, arose.

      1) This would be anywhere the mental health emergency is occurring.

      2) For example, suppose a family member is requesting a magistrate to issue an ECO for an adult respondent on the basis of conduct seen at home in Roanoke City and, by the time the ECO is issued, the respondent is known to have fled the city to a location in Roanoke County. The cause of action initially arose in Roanoke City. The mental health emergency is continuing in Roanoke County, so "part of the cause of action" arose in Roanoke County. Venue is proper in both Roanoke City and Roanoke County. If choosing a venue on the basis of where the cause of action or any part of the cause of action arose, the magistrate may designate either the Roanoke City General District Court or the Roanoke County General District Court as the returnable court. Of course, if determining venue on the basis of where the respondent

resides, the magistrate would choose the Roanoke City General District Court.

3. Venue – Minor

Under Va. Code § 16.1-243, proper venue for an ECO for a minor is either of the following:

a. Where the minor resides.

b. Where the minor is located when the proceedings are commenced.

III. ECO PROCEDURES

A. Case Initiation

1. Adults

Under Va. Code § 37.2-808, a proceeding for issuance of an ECO for an adult may be initiated in either of two ways, as follows:

a. On the magistrate's own motion.

b. On sworn petition of a treating physician or any other responsible person.

1) Responsible person. The term "responsible person" is defined in Va. Code § 37.2-800 to include the following persons:

- A family member, as defined in Va. Code § 37.2-100
- A community services board or behavioral health authority
- A treating physician of the respondent
- A law enforcement officer

2) Other responsible persons. A magistrate may find that another person not in a category listed above is a responsible person for purposes of the statute. The magistrate would base that finding on appropriate factors such as maturity, education, experience, judgment, powers of observation, powers of discernment, and, of course, reliability and credibility. Other responsible persons could include, for example, a pastor, a neighbor, a work supervisor, a co-worker, and a roommate.

2. Minors

Under Va. Code § 16.1-340, a proceeding for issuance of an ECO for a minor may be initiated in either of two ways, as follows:

a. On the magistrate's own motion.

b. On sworn petition of a person who is eligible to petition.

1) Absolute eligibility. The following persons are always eligible to petition for an ECO for a minor:

- A treating physician
- A parent

2) Contingent eligibility.

If each of the minor's parents is unavailable, unable, or unwilling to petition for an ECO for the minor, then any responsible adult is eligible to petition for the ECO.

- This would be any adult whom the magistrate finds to be responsible on the basis of such factors as maturity, education, experience, judgment, powers of observation, powers of discernment, and, of course, reliability and credibility. A responsible adult could include, for example, an adult who is a CSB screener, a pastor, a neighbor, a work supervisor, a co-worker, or a roommate.
- An adult person having custody over a minor in detention or shelter care pursuant to an order of a juvenile and domestic relations district court always qualifies as a responsible adult.

3) Required content of petition.

If the minor is in a detention home or shelter care facility, the petition is to contain, to the extent possible, the following information obtained from the director of the home or facility:

- The charges against the minor that are the basis of the detention.
- The names and addresses of the minor's parents.
- The juvenile and domestic relations district court that ordered the minor's placement in detention or shelter care.

3. Form of petition

   DC-4001, PETITION FOR INVOLUNTARY ADMISSION FOR TREATMENT

4. Electronic filing

   Electronic filing of a petition is permitted. Virginia Code § 37.2-804.1 for adults, and Va. Code § 16.1-345.1 for minors, provide that petitions and orders for emergency custody and temporary detention "may be filed, issued, served, or executed by electronic means, with or without the use of two-way electronic video and audio communication, and returned in the same manner with the same force, effect, and authority as an original document. All signatures thereon shall be treated as original signatures."

B. Requirement to Issue

A magistrate is required by subsection A of Va. Code § 37.2-808 for adults, and by subsection A of Va. Code § 16.1-340 for minors, to issue an ECO in the case of a respondent if the magistrate finds that the respondent satisfies the applicable statutory criteria discussed in the section "Findings For ECO And TDO" below. The magistrate has no discretion to deny an ECO upon making such findings.

C. Findings Required

1. To issue an ECO, a magistrate must find probable cause to believe that all of the applicable statutory criteria are met.

2. The statutory criteria for adults and the statutory criteria for minors are set forth and discussed in the section "Findings For ECO And TDO" below.

D. Who Performs the Evaluation

1. Employee or designee of local community services board

   The person performing the mental health evaluation under an ECO must be professionally qualified to provide informed expert evidence on whether, as the next step in providing the respondent with access to mental health services, a temporary detention order should be issued under Va. Code § 37.2-809 (for an adult) or Va. Code § 16.1-340.1 (for a minor). The statute requires the evaluator to be an "employee" or "designee" of a "local community services board" who is skilled in the assessment and treatment of mental illness, who has completed a certification program approved by the Department of Behavioral Health and Developmental Services, and who (in the case of a designee) meets other qualification standards specified in Va. Code §§ 37.2-809 and 16.1-336.

2. Local community services board defined

   a. A local community services board is established by a county, city, or combination of counties and cities under Va. Code § 37.2-500 and is funded by the Department of Behavioral Health and Developmental Services. A local community services board provides "individualized services and supports to persons with mental illnesses, mental retardation, or substance abuse" in the locality.

   b. In some localities the entity is called a "behavioral health authority." In this chapter, just like in the applicable statute, a reference to a community services board is deemed to refer also to a behavioral health authority.

3. Practice note

   a. A magistrate ordinarily knows in advance the employees and designees of the local community services board who are the professional mental health evaluators qualified to provide expert evidence to the magistrate on the factual issues that the magistrate must determine in deciding whether to issue a temporary detention order.

   b. Each community services board is required to provide to each general district court and magistrate's office within its service area a list of its employees and designees who are available to perform the required evaluations. The requirement is set forth in the following provisions of law:

      – Subsection J of Va. Code § 37.2-809, relating to adults.
      – Subsection K of Va. Code § 16.1-340.1, relating to minors.

E. Location of Mental Evaluation

1. Convenient location

   The statutes do not specifically state where an evaluation is to take place. Subsection B of Va. Code § 37.2-808 (for adults) and subsection B of Va. Code § 16.1-340 (for minors) merely state that the law enforcement officer taking custody of the respondent is required to take the person to a "convenient location" to be evaluated.

2. Location to be specified in ECO

   The magistrate does specify the location for evaluation in the ECO. The DC-492, EMERGENCY CUSTODY ORDER and DC-592, EMERGENCY CUSTODY ORDER – JUVENILE each includes a place for that entry. Local practice guides the selection of location.

F. Associated Medical Services

The magistrate is required by subsection C of Va. Code § 37.2-808 (relating to adults) and subsection C of Va. Code § 16.1-340 (relating to minors) to include in an ECO a directive to transport the respondent to a medical facility that the magistrate specifies in the order (which may be different from the location for the mental evaluation), as follows:

1. For necessary emergency medical care, if any is needed.

2. For medical evaluation whenever "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." Most public facilities and many private facilities require a medical evaluation of a respondent before admission. Therefore, the magistrate, acting on that prerequisite, should usually include in the ECO a directive for the transportation provider to transport the respondent to a specified facility for a medical evaluation.

G. Selecting a Law Enforcement Agency to Execute ECO

1. Designation in ECO

   The magistrate designates and specifies in the ECO a law enforcement agency to serve the order on the respondent and to take the respondent into custody. Unless the magistrate authorizes alternative transportation as discussed below, the designated law enforcement agency would also transport the respondent to the location where the mental health evaluation is to take place and, if required in the order, also to the location where a medical evaluation or treatment is to be provided.

2. Statutory guidance

   Under subsections C and D of Va. Code § 37.2-808 (relating to adults) and subsections C and D of Va. Code § 16.1-340 (relating to minors), the magistrate specifies in the ECO the primary law enforcement agency for the area served by the local community services board that designates the evaluator for the case, as follows:

   a. If the local community services board serves only one jurisdiction, the magistrate designates the primary law enforcement agency for that jurisdiction.

   b. If the local community services board serves more that one jurisdiction, the law enforcement agency to be designated is determined as follows:

1) In the case of a respondent already in custody, the magistrate designates the primary law enforcement agency for the jurisdiction in which the respondent was taken into custody.

2) In the case of a respondent not already in custody, the magistrate designates the primary law enforcement agency for the jurisdiction where the respondent is presently located.

3. Primary law enforcement agency

a. The Attorney General has provided guidance on determining which law enforcement agency of a jurisdiction is the so-called "primary" law enforcement agency for the jurisdiction. *See* Attorney General Opinion to Mullins, dated 10/21/2011 Va. AG S-57 (11-123); *meaning of 'primary law-enforcement agency' and 'jurisdiction' as those terms relate to execution of emergency custody and temporary detention orders and transportation of patients pursuant to such orders*.

1) If the respondent is located within the corporate limits of a town, then the magistrate should specify the police department of the town as the "primary law-enforcement agency of the jurisdiction" when the town is served by its own police department.

2) If a town is not served by its own police department, then the sheriff's office of the surrounding county shall be responsible for the execution of such orders and transportation of respondents located within the limits of a town.

3) The Attorney General opined that the term "jurisdiction", as used in these statutes, means "any locality or political subdivision" that has "organized its own police department."

b. The Attorney General goes on to reaffirm an earlier opinion of the Attorney General that states that "any law-enforcement officer requested by a court to execute an emergency custody or a temporary detention order should do so, without delay."

4. Statewide authority to execute ECO

Under subsection F of Va. Code § 37.2-808 (relating to adults) and subsection F of Va. Code § 16.1-340 (relating to minors), a law enforcement officer may go anywhere in Virginia to execute an ECO. Virginia Code § 15.2-1724 reinforces this authority.

H. Alternative Transportation Provider (ATP)

1. MINORS: Under subsection C of Va. Code § 16.1-340 (relating to minors), a magistrate shall consider any request to authorize transportation of a respondent by a person or persons other than a law enforcement officer whenever such person is identified to the magistrate. A person so authorized is known as an "alternative transportation provider" or "ATP."

   Magistrates are not responsible for finding a person or entity willing to serve as an ATP. Any potential ATP should be identified to the magistrate during the ECO hearing.

   ADULTS: Under subsection C of Va. Code § 37.2-808 (relating to adults), a magistrate shall determine if an Eligible ATP has been identified, and whether the proposed Eligible ATP can meet the required findings (that the proposed ATP is available to provide transportation, the proposed ATP is willing to provide transportation, and the proposed ATP is able to transport the respondent safely). A legislative change effective July 1, 2023, mandates that the magistrate "shall authorize" the use of the Eligible ATP if the above criteria are met.

2. Eligible ATPs

   a. An ATP may be a person, facility, or agency and may include the following parties:

      1) A member of the respondent's family.

         Note that, in the case of a respondent who is a minor, subsection C of Va. Code § 16.1-340 specifically emphasizes that a parent of a juvenile respondent is eligible to serve as an alternative transportation provider.

      2) A friend of the respondent.

      3) A representative of the community services board (CSB).

      4) A transportation provider with personnel trained to provide transportation in a safe manner.

   b. The above list is not exclusive. The magistrate may authorize another party not in a category listed above to serve as the ATP if the magistrate finds that such party is available, willing, and able to transport the respondent safely.

3. Findings. To authorize transportation by an alternative transportation provider, a magistrate must make all of the following findings:

a. Available. The proposed ATP is available to provide the transportation.
b. Willing. The proposed ATP is willing to provide the transportation.
c. Able. The proposed ATP is able to transport the respondent safely.

4. Evidence.

a. Sources of evidence. To make the findings, the magistrate considers information that is provided by any of the following persons:
   1) The petitioner, if any
   2) The community services board (CSB) or its designee
   3) The local law enforcement agency, if any is involved 4) The respondent's treating physician
   4) Any other person who is available and has knowledge of the respondent
   5) When the magistrate deems it appropriate, the proposed alternative transportation provider

b. Means for providing evidence. The magistrate may accept information that is submitted by any of the following means:

   1) In person
   2) By means of a two-way electronic video and audio communication system
   3) By means of a telephone communication system

5. Procedures

a. To authorize transportation by an alternative transportation provider, a magistrate issues the ECO to an officer of the law enforcement agency selected as described above and checks the box on the emergency custody order indicating that transportation by an alternative transportation provider is authorized.

b. The magistrate issues a DC-4000, ORDER FOR ALTERNATIVE TRANSPORTATION PROVIDER and attaches it to the DC-492, EMERGENCY CUSTODY ORDER or DC-592, EMERGENCY CUSTODY ORDER – JUVENILE issued in the case.

c. The ECO directs the law enforcement officer to execute the order, to take custody of the respondent, and to transfer custody to the alternative transportation provider.

d. The ATP is required to deliver the ECO and associated papers to the CSB to which transportation is ordered.

e. The CSB is required to return the papers to the court.

f. Delivery of the ECO to a law-enforcement officer or ATP and return of the ECO may be accomplished electronically or by facsimile.

I. Time Limits; Extension Authority

1. Executed order

   a. Subsection J of Va. Code § 37.2-808 (relating to adults) and subsection J of Va. Code § 16.1-340 (relating to minors) each limits the period for which an ECO is valid after the order is executed.

   b. Emergency custody under an ECO may be maintained for a period not to exceed eight hours after the law enforcement officer executes the order (or, if earlier, such time as a TDO is issued).

   c. As of July 1, 2014, magistrates do not have authority to extend the period of emergency custody beyond the eight-hour period referenced above.

2. Unexecuted order

   a. Subsection K of Va. Code § 37.2-808 (relating to adults) and subsection K of Va. Code § 16.1-340 (relating to minors) each provides that an ECO is void eight hours after issuance if it is not executed by then.

   b. A void ECO is to be returned 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 (the court to which the order is returnable). Although the statute does not say what the magistrate is to do with the void ECO, it is recommended that the magistrate deliver it to the court designated as the returnable court on the ECO.

J. Successive ECOs Not Authorized

1. Prohibition: executed order

   After a respondent is taken into custody under an ECO, a magistrate may not issue a successive emergency custody order for the purpose of extending or reinstating emergency custody in order to provide more time for completing compliance with procedural requirements that are applicable to a person who is in emergency custody under an ECO.

2. Opinion of Attorney General

   a. The Attorney General issued an opinion in 1996 that, although specifically addressing temporary detention orders, states the principle on the basis of

reasoning that would be equally applicable to emergency custody orders. In the opinion of the Attorney General, a magistrate may not issue successive temporary detention orders when statutory actions required as rights of the respondent or for protection of the respondent (e.g., physician examination, attorney employment, witness subpoenas, independent evaluation, preparation of prescreening report) are not completed within the maximum time permitted under the statute. *See* Attorney General Opinion to Morris, dated 07/01/96 (1996, page 166); *magistrate may not issue successive TDOs should all statutorily created rights of temporarily detained person not be met within 48 hours or extended weekend or legal holiday periods*.

b. In the context of the opinion, it appears that the principle is designed to prevent issuance of a successive order for the purpose of extending the initial order when statutorily required actions have not been completed in time.

3. Inapplicability to unexecuted order. The prohibition does not apply to an ECO that lapses, and is therefore void, because it was not executed within eight hours after issuance.

K. Emergency Custody Initiated by Law Enforcement Without ECO

1. Authority for orderless emergency custody

a. In general

b. If a law enforcement officer, based upon the officer's observation or the reliable reports of others, has probable cause to believe that a person meets the same criteria for emergency custody that a magistrate would apply in an ECO case, the officer may take the person into custody and transport the person to an appropriate location to assess the need for hospitalization or treatment. The law enforcement officer may do this without prior authorization. This is referred to as "orderless emergency custody."

c. The source of the law enforcement officer's authority is as follows:

– Adults. Subsection G of Va. Code § 37.2-808, for adult respondents.
– Minors. Subsection G of Va. Code § 16.1-340, for juvenile respondents.

d. Outside officer's geographic jurisdiction

1) A law enforcement officer may initiate orderless emergency custody of a person even outside the territorial limits of the officer's jurisdiction if the officer is transporting the person to a mental evaluation with the person's consent, the person revokes the consent, and the officer meets the same requirements for probable cause findings that are described for initiation of orderless emergency custody above.

2) The source of the law enforcement officer's authority is as follows:

- Adults. Subsection H of Va. Code § 37.2-808, for adult respondents.
- Minors. Subsection H of Va. Code § 16.1-340, for juvenile respondents.

e. An officer does not need to obtain an ECO from a magistrate first.

2. Time limitation

a. Eight-hour limitation. The period of emergency custody initiated by a law enforcement officer under subsection G or H of Va. Code § 37.2-808 for an adult, or under subsection G or H of Va. Code § 16.1-340 for a minor, is limited to eight hours.

b. Extension authority. As of July 1, 2014, magistrates may not extend the period of orderless emergency custody beyond the initial eight-hour period.

3. ECO not to be issued after orderless emergency custody initiated

a. A magistrate should not issue an ECO for a respondent who is in orderless emergency custody.

b. As noted above, the statute limits the maximum period of emergency custody under an ECO to eight hours. The statute also limits to the same extent the maximum period of orderless emergency custody initiated by a law enforcement officer. The statute appears to set forth a public policy to limit the total period of emergency custody to eight hours, no matter which authority is used to initiate the emergency custody. If a magistrate were to issue an ECO for a respondent already in orderless emergency custody, the maximum authorized period of custody under the ECO plus the time that the respondent has already been in orderless emergency custody would necessarily exceed the maximum period to which the statutorily expressed public policy limits emergency custody.

c. For example, suppose a law enforcement officer initiated orderless emergency custody at 8:00 a.m., transported the respondent to an office othe law enforcement agency, and then requested a magistrate to issue an ECO at 8:45 a.m. By the time the magistrate is available to conduct the hearing on the request, it is 9:10 a.m. The respondent has already been in emergency custody for one hour and ten minutes. If the magistrate, after the hearing, were to issue the requested ECO at 9:20 a.m., the maximum period of emergency custody under the ECO would expire at 5:20 p.m. By then, the respondent would have

been in custody for a period of nine hours and twenty minutes in violation of the statutory limitation of eight hours.

L. Order Not to Be Issued in Cases of Consent

1. Consent

   An ECO is not to be issued for a competent person who voluntarily consents to an evaluation. An ECO is used to override a refusal of a competent person thought to be in need of the evaluation and services.

2. Order not used to facilitate consensual evaluation

   It is not appropriate, for example, to issue an ECO in order to provide transportation for a competent person who voluntarily consents to evaluation but does not have transportation to the site of the evaluation.

3. Caution regarding delusional or hallucinating respondent

   A respondent who is delusional or hallucinating may be incapable of volunteering for an evaluation. *See* the discussion in the section "Findings For ECO And TDO" below regarding the opinion of the Supreme Court of the United States in the case of Zinermon v. Burch, 494 U.S. 113, 132-134 (1990).

IV. TDO: IN GENERAL

A. Statutory Authority; Forms

1. Statutory Authority

   a. For adults: Va. Code §§ 37.2-809 and 37.2-810
   b. For minors: Va. Code §§ 16.1-340.1 and 16.1-340.2

2. Forms

   a. Petition used for TDOs: DC-4001, PETITION FOR INVOLUNTARY ADMISSION FOR TREATMENT
   b. DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE, Informally Referred To As "Tdo"
   c. DC-895, TEMPORARY DETENTION ORDER –MAGISTRATE (JUVENILE)
   d. DC-4000, ORDER FOR ALTERNATIVE TRANSPORTATIONPROVIDER
   e. DC-4046, ORDER FOR TRANSPORTATION TO ALTERNATIVE FACILITY OF TEMPORARY DETENTION

B. Purpose

1. Purpose of order

   The purpose of a TDO is to require short-term necessary detention of a person believed to be mentally ill and not harmless in an approved mental health institution in order to provide for in-depth evaluation by mental health professionals in preparation for a formal commitment hearing to be conducted in the case by a judge or another judicial officer known as a special justice. It applies only when the person is unwilling to volunteer or incapable of volunteering for admission.

2. Protection of liberty interest

   The temporary detention procedure in Virginia must be viewed within the legal context announced by the Supreme Court of the United States in Zinermon v. Burch, 494 U.S. 113, 132-134 (1990) as follows: "The involuntary placement process serves to guard against the confinement of a person who, though mentally ill, is harmless and can live safely outside an institution."

C. TDO in Context

1. Relationship to ECO

   An ECO is not a prerequisite for issuance of a TDO. It is not necessary for the magistrate to issue an ECO if evaluation of the respondent by an employee or designee of the local community services board is achieved by other means.

2. Potential outcomes of temporary detention under a TDO

   a. When a respondent is detained under a TDO, the court (in some localities, a special justice of the court) is required to hold a commitment hearing within 72 hours (or, depending on whether a weekend or holiday intervenes, until the end of the next business day on which the court is open) after execution of the order.

   b. The commitment hearing could result in any of the following actions under Va. Code § 37.2-817:

      1) Involuntary admission to a facility for inpatient treatment

      2) In the case of adult only, involuntary admission to a facility for inpatient treatment together with authority for the treating physician at the facility to discharge the respondent later, subject to a discharge plan providing for follow-on mandatory outpatient treatment

3) Involuntary commitment directly to mandatory outpatient treatment Release

D. Unique Authority of Magistrate

A magistrate is the only judicial officer authorized to issue a TDO for:

- An adult under Va. Code § 37.2-809.
- A minor under Va. Code § 16.1-340.1.

E. Jurisdiction; Venue

1. Jurisdiction

a. Adult. In the case of a TDO for a respondent who is an adult, the TDO is returnable to the General District Court.

b. Minor. In the case of a TDO for a respondent who is a minor, the TDO is returnable to the Juvenile and Domestic Relations District Court.

NOTE: The foregoing comments on jurisdiction concern the jurisdiction of the court to which the process is returnable. The magistrate acquires jurisdiction to issue a TDO when the respondent is currently located in or last known to be in the magistrate's region.

2. Venue – Adult

Under Va. Code § 8.01-262, proper venue for a TDO for an adult is any one of the following places:

a. Where the respondent resides.

b. Where the cause of action, or any part of the cause of action, arose.

1) This would be anywhere the mental health emergency is occurring.

2) For example, suppose a Botetourt County law enforcement officer initiates orderless emergency custody for an adult resident of Botetourt County and transports the respondent to a location in the City of Roanoke for an evaluation by the CSB screener. The cause of action initially arose in Botetourt County. The respondent's mental health condition continues in Roanoke and the respondent is evaluated there by CSB, so "part of the cause of action" arose in the City of Roanoke.

Venue is proper in both Botetourt County and Roanoke County. If choosing a venue on the basis of where the cause of action or any part of the cause of action arose, the magistrate may designate either the Botetourt County General District Court or the Roanoke City General District Court as the returnable court. Of course, if determining venue on the basis of where the respondent resides, the magistrate would choose the Botetourt County General District Court.

3. Venue – Minor

Under Va. Code § 16.1-243, proper venue of a TDO for a minor is either of the following:

a. Where the minor resides.

b. Where the minor is located when the proceedings are commenced.

V. TDO PROCEDURES

A. Case Initiation

1. In General. The same procedures for the initiation of an ECO case apply to the initiation of a TDO case.

2. Adults

Under Va. Code § 37.2-809, a proceeding for issuance of a TDO for an adult may be initiated in either of two ways, as follows:

a. On the magistrate's own motion.

b. On sworn petition of a treating physician or any other responsible person.

1) Responsible person. The term "responsible person" is defined in Va. Code § 37.2-800 to include the following persons:

- A family member, as defined in Va. Code § 37.2-100
- A community services board or behavioral health authority
- A treating physician of the respondent
- A law enforcement officer

2) Other responsible persons. A magistrate may find that another person not in a category listed above is a responsible person for purposes of the statute. The magistrate would base that finding on appropriate factors such as maturity, education, experience, judgment, powers of

observation, powers of discernment, and, of course, reliability and credibility. Other responsible persons could include, for example, a pastor, a neighbor, a work supervisor, a co-worker, and a roommate.

3. Minors

Under Va. Code § 16.1-340.1, a proceeding for issuance of a TDO for a minor may be initiated in either of two ways, as follows:

a. On the magistrate's own motion.

b. On sworn petition of a person who is eligible to petition.

1) Absolute eligibility. The following persons are always eligible to petition for a TDO for a minor:

- A treating physician
- A parent

2) Contingent eligibility.

If each of the minor's parents is unavailable, unable, or unwilling to petition for a TDO for the minor, then any responsible adult is eligible to petition for the TDO.

- This would be any adult whom the magistrate finds to be responsible on the basis of appropriate factors such as maturity, education, experience, judgment, powers of observation, powers of discernment, and, of course, reliability and credibility. A responsible adult could include, for example, an adult who is a CSB screener, a pastor, a neighbor, a work supervisor, a co-worker, or a roommate.
- An adult person having custody over a minor in detention or shelter care pursuant to an order of a juvenile and domestic relations district court always qualifies as a responsible adult.

3) Required content of petition. If the minor is in a detention home or shelter care facility, the petition is to contain, to the extent possible, the following information obtained from the director of the home or facility:

- The charges against the minor that are the basis of the detention
- The names and addresses of the minor's parents
- The juvenile and domestic relations district court ordering the minor's placement in detention or shelter care

4. Form of petition

   DC-4001, PETITION FOR INVOLUNTARY ADMISSION FOR TREATMENT

5. Electronic filing

   Electronic filing of a petition is permitted. Virginia Code § 37.2-804.1 for adults, and Va. Code § 16.1-345.1 for minors, provides that petitions and orders for emergency custody and temporary detention (and involuntary commitment of minors):

   > …may be filed, issued, served, or executed by electronic means, with or without the use of two-way electronic video and audio communication, and returned in the same manner with the same force, effect, and authority as an original document. All signatures thereon shall be treated as original signatures.

B. Findings Required

1. To issue a TDO, a magistrate must find that all of the applicable statutory criteria are met.

2. The statutory criteria for adults and the statutory criteria for minors are set forth and discussed in the section "Findings For ECO And TDO" below.

C. Evaluation Before Hearing

1. Requirement

   Before the TDO hearing takes place, an employee or designee of the local community services board must conduct an evaluation of the respondent by either of the following two means:

   a. In person

   b. By an authorized two-way electronic video and audio communication system

2. Exceptions

   The requirement for evaluation is waived under subsection D of Va. Code § 37.2-809 (for an adult) and subsection C of Va. Code § 16.1-340.1 (for a minor) in either of the following circumstances:

   a. The respondent has been personally examined within the previous seventy-two hours by an employee or designee of the local community services board,

OR

b. There is a significant physical, psychological, or medical risk to the respondent or to others associated with conducting the evaluation.

3. Qualified evaluators

a. The qualification standards for an employee or designee of a local community services board are set forth in Va. Code §§ 37.2-809 and 16.1- 336.

b. A magistrate ordinarily knows in advance the employees and designees of the local community services board who are the professional mental health evaluators qualified to provide expert evidence to the magistrate on the factual issues that the magistrate must determine in deciding whether to issue a temporary detention order.

c. Subsection J of Va. Code § 37.2-809 (for adults) and subsection K of Va. Code § 16.1-340.1 (for minors) require each community services board to provide to each general district court and magistrate's office within its service area a list of its employees and designees who are available to perform the required evaluations.

4. Local community services board

a. A local community services board is established by a county, city, or combination of counties and cities under Va. Code § 37.2-500 and is funded by the Department of Behavioral Health and Developmental Services.

b. A local community services board provides "individualized services and supports to persons with mental illnesses, mental retardation, or substance abuse" in the locality.

c. In some localities the entity is called a "behavioral health authority." In this chapter, just like in the applicable statute, a reference to a community services board is deemed to refer also to a behavioral health authority.

D. Requirement to Issue TDO

A magistrate is required by subsection B of Va. Code § 37.2-809 (for an adult) or subsection A of Va. Code § 16.1-340.1 (for a minor) to issue a TDO in the case of a respondent if the magistrate finds that the respondent satisfies the applicable statutory criteria discussed in the section "Findings For ECO And TDO" below. The magistrate has no discretion to deny a TDO upon making such findings.

E. Action if CSB Evaluator Recommends No TDO

1. Alternative petitioner

   If the evaluator for the local community services board recommends no TDO, another responsible person may request the TDO. In such a case, a magistrate shall issue a TDO notwithstanding the CSB recommendation if the magistrate finds on the basis of the totality of the evidence that there is probable cause to believe that the respondent meets the applicable statutory criteria set forth in the section "Findings For ECO And TDO" below.

2. Duty of CSB

   Upon determining to recommend no TDO, the evaluator is required to notify any petitioner, the person who initiated emergency custody and an "on-site physician" of that determination. The CSB is also required to facilitate communication between the person who initiated emergency custody and the magistrate if that person wishes to speak with the magistrate. It is possible that such communication will take place by phone. In cases where the CSB decides not to recommend a TDO and puts the person who initiates emergency custody in touch with the magistrate by telephone, the magistrate should speak with the person who initiated emergency custody and the CSB evaluator even though this will be unsworn testimony. After getting information from these parties, the magistrate should determine whether the criteria for TDO have been met.

F. Designation of Mental Health Facility

1. Evaluator's duties

   a. The examining employee or designee of the local community services board is required under subsection E of Va. Code § 37.2-809 (for an adult) or subsection D of Va. Code § 16.1-340.1 (for a minor) to determine the facility of temporary detention, identify that facility for the magistrate, and enter the facility's name in the prescreening admission report.

   b. The local community services board is required to do so even in a case in which the magistrate issues a TDO not recommended by the local community services board.

2. Magistrate's duty

   The magistrate must include in the TDO the name of the facility identified by the employee or designee of the local community services board.

3. Detention in jail prohibited

   a. Prohibition. Subsection E of Va. Code § 37.2-809 (for adults) and subsection D of Va. Code § 16.1-340.1 (for minors) prohibit detention of a respondent under a TDO in a jail or other place of confinement for persons charged with criminal offenses.

      1) Exception for adults. This prohibition does not apply in the case of an inmate of a local correctional facility for whom a TDO is issued under subsection A of Va. Code § 19.2-169.6 as discussed in the section "Inmates" below.

      2) Exception for minors. This prohibition does not apply to a minor who is ordered by a juvenile and domestic relations district court to be detained for a criminal offense.

   b. Continuation in custody. In the case of a respondent to whom this prohibition applies, it is required that the respondent remain in the custody of law enforcement until either the respondent is detained within a secure facility or custody has been accepted by the facility identified in the TDO.

G. Associated Medical Services

1. Emergency medical care

   a. A law enforcement officer is authorized under subsection B of Va. Code § 37.2-810 (in the case of an adults) or subsection B of Va. Code § 16.1-340.2 (in the case of a minor) to obtain any needed emergency medical care for a respondent in the officer's custody pursuant to a TDO.

   b. DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE and the DC-895, TEMPORARY DETENTION ORDER – MAGISTRATE (JUVENILE) each includes a place for the magistrate to order transportation for emergency medical care found advisable by the magistrate.

2. Medical evaluation or treatment required by admitting mental health facility

   a. The magistrate may include in the TDO under subsection B of Va. Code § 37.2-810 (in the case of an adult) or subsection B of Va. Code § 16.1-340.2 (in the case of a minor) an order to transport the respondent to a medical facility "as may be necessary to obtain further medical evaluation or treatment prior to placement as required by a physician at the admitting temporary detention facility."

b. Most public facilities and many private facilities require a medical evaluation of a respondent before admission. Therefore, the magistrate should include in the TDO a directive for the respondent to be transported to a specified facility for a medical evaluation unless the magistrate obtains from the CSB evaluator an assurance that the necessary medical clearance for the respondent has already been completed.

c. The DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE and the DC-895, TEMPORARY DETENTION ORDER – MAGISTRATE (JUVENILE) each includes a place for the magistrate to order transportation of the respondent for such medical services.

H. Selection of Law Enforcement Agency

1. Designation in TDO

The magistrate issuing a TDO designates, in the TDO, a law enforcement agency to serve the order.

The magistrate will also determine the transportation provider that will be responsible for transporting the respondent to the facility named in the TDO. The transportation provider may be a law enforcement agency or an alternative transportation provider. The rules for selecting a law enforcement agency and an alternative transportation provider are discussed in greater detail below.

2. Statutory guidance

Subsection A of Va. Code § 37.2-810 (for adults) and subsection A of Va. Code § 16.1-340.2 (for minors) set forth the rules for designating the law enforcement agency, as follows:

a. Generally, the magistrate designates the law-enforcement agency of the jurisdiction in which the person resides to execute the TDO on such person. After recent amendments effective on July 1, 2014, the magistrate may also designate any other willing law enforcement agency that has agreed to provide transportation.

1) The willing law enforcement agency should be identified to the magistrate; magistrates are not responsible for seeking out other law enforcement agencies that may be willing to participate in a TDO process.

2) If a magistrate has any questions regarding an identified agency's willingness to provide transportation, the magistrate should contact the willing agency to verify their willingness to participate in the TDO process.

b. **Exception:** If the respondent is located in a jurisdiction other than the one in which the respondent resides and the boundary of the jurisdiction of the respondent's residence and the boundary of the jurisdiction of the respondent's location are more than fifty miles from each other at the points of those boundaries that are nearest to each other, then the magistrate designates the law enforcement agency of the jurisdiction in which the respondent is located.

c. **How to apply exception:** First, the magistrate determines the jurisdiction of the residence of the respondent and the jurisdiction in which the respondent is located. Next, the magistrate consults a Virginia roadmap and calculates the distance between the closest boundary points of the jurisdiction of residence and the jurisdiction in which the respondent is located. If the distance is more than fifty miles between the closest two boundary points, the magistrate directs a law enforcement agency where the respondent is located at the time of the issuance of the order to execute the TDO. If the distance between the closest two boundary points is fifty miles or less, the magistrate directs a law enforcement agency where the respondent resides to execute the TDO.

d. **Example to calculate exception:** Joseph Smith, a resident of Axton in Henry County, is visiting relatives in Pipers Gap in Carroll County. Because of mental illness, Mr. Smith becomes suicidal during the visit. An employee of the Mount Rogers Community Mental Health and Mental Retardation Services Board conducts the in-person evaluation in Hillsville. Based upon the facts presented at the probable cause hearing, the Carroll County magistrate issues a temporary detention order. The magistrate would designate the Henry County Sheriff's Department as the law enforcement agency responsible for executing the order and transporting the respondent to the detaining facility because the community of Axton does not have its own police department; thus, it does not qualify as a separate jurisdiction. The magistrate should therefore look to Henry County, where Axton is located, as the "jurisdiction involved for purposes of applying this rule. The nearest two boundary points between Carroll County and Henry County are less than 50 miles apart.

e. **Practice note.** The statute does not state which of two or more law enforcement agencies in a jurisdiction is to be designated. There may be a local agreement or understanding regarding which agency is to be designated. In the absence of such an agreement or understanding, the magistrate should designate whichever agency is thought to be the "primary" law enforcement agency in the jurisdiction. This is the same standard that is statutorily prescribed for ECOs.

3. Primary law enforcement agency

a. The Attorney General has provided guidance on determining which law enforcement agency of a jurisdiction is the so-called "primary" law enforcement agency for the jurisdiction. *See* Attorney General Opinion to Mullins, dated 10/21/2011 Va. AG S-57 (11-123); *meaning of 'primary law-enforcement agency' and 'jurisdiction' as those terms relate to execution of emergency custody and temporary detention orders and transportation of patients pursuant to such orders*.

1) In cases involving temporary detention orders where the respondent either resides in or is located within the corporate limits of a town, the magistrate should specify the police department of the town as the "primary law enforcement agency of the jurisdiction" when a town is served by its own police department.

2) If a town is not served by its own police department, then the sheriff's office of the surrounding county shall be responsible for the execution of such orders and transportation of respondents.

b. The Attorney General goes on to reaffirm an earlier opinion of the Attorney General that states that "any law-enforcement officer requested by a court to execute an emergency custody or a temporary detention order should do so, without delay."

c. Using the standards established in this opinion, a private police department could not be designated as the primary law enforcement agency of a jurisdiction for purposes of serving a TDO and transporting a respondent.

A private police department could, however, be named in a TDO as a willing volunteer agency pursuant to Va. Code § 37.2-810(A)

- The private police department must be willing to handle these duties
- The respondent must be an adult as there is no willing volunteer agency provision in Va. Code § 16.1-340.2, the juvenile TDO statute.

4. Statewide authority to execute TDO

Under subsection C of Va. Code § 37.2-810 (relating to adults) and subsection C of Va. Code § 16.1-340.2 (relating to minors), a law enforcement officer may execute a TDO anywhere in Virginia. Virginia Code § 15.2-1724 reinforces this authority.

I. Alternative Transportation Provider (ATP)

1. MINORS: Under subsection B of Va. Code § 16.1-340.2 (relating to minors), a magistrate shall consider any request to authorize transportation of a respondent by a person or persons other than a law enforcement officer whenever such person

is identified to the magistrate. A person so authorized is known as an "alternative transportation provider" or "ATP."

Magistrates are not responsible for finding a person or entity willing to serve as an ATP. Any potential ATP should be identified to the magistrate during the TDO hearing.

ADULTS: Under subsection C of Va. Code § 37.2-810 (relating to adults), a magistrate shall determine if an Eligible ATP has been identified, and whether the proposed Eligible ATP can meet the required findings (that the proposed ATP is available to provide transportation, the proposed ATP is willing to provide transportation, and the proposed ATP is able to transport the respondent safely). A legislative change effective July 1, 2023, mandates that the magistrate "shall authorize" the use of the Eligible ATP if the above criteria are met.

A legislative change effective July 1, 2024 defined "available" for ADULT mental health TDOs; Virginia Code Section 37.2-810(B) now reads "An alternative transportation provider shall be deemed to be available if the alternative transportation provider states that it is available to take custody of the individual from law enforcement within six hours of issuance of the temporary detention order or an order changing the transportation provider pursuant to subsection E." This change applies to any ATP, including an agency, facility, or person, that meets the required findings listed above.

Note: This definition is applicable only to ADULT mental health TDOs.

The July 1,2024 revision to the Code also allows law enforcement to elect to provide transportation even if an alternative transportation provider has been identified and the ATP criteria are met. This is an exception to the language that a magistrate "shall" authorize the ATP to provide transportation if the ATP meets all criteria for an ATP.

2. Eligible ATPs

   a. An ATP may be a person, facility, or agency and may include the following parties:

      1) A member of the respondent's family

         Note that, in the case of a respondent who is a minor, subsection B of Va. Code § 16.1-340.2 specifically emphasizes that a parent of a juvenile respondent is eligible to serve as an alternative transportation provider.

      2) A friend of the respondent

      3) A representative of the community services board (CSB)

4) A transportation provider with personnel trained to provide transportation in a safe manner.

b. The above list is not exclusive. The magistrate may authorize another party not in a category listed above to serve as the ATP if the magistrate finds that such party is available, willing, and able to transport the respondent safely.

3. Findings. To authorize transportation by an alternative transportation provider, a magistrate must make all of the following findings:

a. Available. The proposed ATP is available to provide the transportation.

1) A legislative change effective July 1, 2024, defined "available" for ADULT mental health TDOs; Virginia Code Section 37.2-810(B) now reads "An alternative transportation provider shall be deemed to be available if the alternative transportation provider states that it is available to take custody of the individual from law enforcement within six hours of issuance of the temporary detention order or an order changing the transportation provider pursuant to subsection E." This change applies to any ATP, including an agency or individual, that meets the required findings listed above.

The July 1, 2024 revision to the Code also allows law enforcement to elect to provide transportation even if an alternative transportation provider has been identified. This is an exception to the language that a magistrate "shall" authorize the ATP to provide transportation if the ATP meets all criteria for an ATP.

For mental health TDOs for MINORS, this definition of "available" does not control the determination of whether a proposed ATP is "available" as the language change was not added to the statutes dealing with mental health TDOS for MINORS.

b. Willing. The proposed ATP is willing to provide the transportation.

c. Able. The proposed ATP is able to transport the respondent safely.

4. NOTE: a recent change in law, effective July 1, 2022, states that a magistrate "shall" authorize alternative transportation in adult TDO cases if the magistrate determines that all of the statutory criteria have been met.

   a. For ECO cases and juvenile TDO cases, the law continues to state that a magistrate "may" authorize alternative transportation if the criteria are met.

   b. If a magistrate determines that one or more of the criteria have not been met, the magistrate should decline to authorize alternative transportation.

5. Evidence

   a. Sources of evidence. To make the findings, the magistrate considers information that is provided by any of the following persons:

      1) The petitioner, if any
      2) The community services board (CSB) or its designee
      3) The local law enforcement agency, if any is involved
      4) The respondent's treating physician
      5) Any other person who is available and has knowledge of the respondent
      6) When the magistrate deems it appropriate, the proposed alternative transportation provider

   b. Means for providing evidence. The magistrate may accept information that is submitted by any of the following means:

      1) In person
      2) By means of a two-way electronic video and audio communication system
      3) By means of a telephone communication system

6. Procedures

   a. To authorize transportation by an alternative transportation provider, a magistrate issues the DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE or DC-895, TEMPORARY DETENTION ORDER –MAGISTRATE (JUVENILE) to an officer of the law enforcement selected as described above and checks the box on the order indicating that transportation by an alternative transportation provider is authorized.

b. The magistrate issues a DC-4000, ORDER FOR ALTERNATIVE TRANSPORTATION PROVIDER and attaches it to the TDO.

   c. The TDO directs the law enforcement officer to execute the order, to take custody of the respondent, and to transfer custody to the alternative

transportation provider. A 2022 change to the statute allows a law enforcement agency to immediately transfer custody to the alternative transportation provider.

d. The ATP is required to deliver the TDO and associated papers to the mental health facility to which transportation is ordered.

e. The mental health facility admitting the respondent under the TDO is required to return the papers to the court.

f. Delivery of the TDO to a law-enforcement officer or ATP and return of the TDO may be accomplished electronically or by facsimile.

J. J. Changing the Transportation Provider

1. As of July 1, 2020, magistrates gained the authority to change the transportation provider designated in the TDO at any time after the temporary detention order has been executed but prior to the initiation of transportation.

   a. Statutory authorization for this is found in Subsection E of both 16.1-340.2 (juvenile TDO) and 37.2-810 (adult TDO).

   b. The transportation provider may be changed from alternative transport to law enforcement or from law enforcement to alternative transport. There are no restrictions in this regard.

   c. Note this authority ends once transportation has commenced. If problems occur after transportation has commenced, Subsection C of 16.1-340.2 and 37.2-810 directs the primary law enforcement agency for the jurisdiction where the transportation provider is located when the problem develops to intervene. Magistrates do not have the authority to issue any additional orders in this situation.

2. General provisions

   a. Magistrates changing a transportation provider will be issuing a new order, DC-4048. Magistrates do not need to amend the existing TDO.

   b. While this request may often be made of the magistrate that issued the TDO, it is proper for another magistrate to issue the DC-4048.

      – This new order only requires a magistrate to decide the appropriate transportation arrangements.
      – No findings regarding the respondent's mental health are required, so a magistrate issuing a DC-4048 does not need to have extensive familiarity with the facts that supported the underlying TDO.

3. Procedure

   a. In eMagistrate System, locate the TDO that requires a change in the transportation provider.

   b. Click on the blue button in the lower right portion of the screen marked "Change Transportation Provider".

   c. Fill in the required fields, which include the source of the request and the name and identifying information of the current transportation provider and the new transportation provider.

   d. Print.

K. K. Time Limits

1. The order

   a. A law enforcement officer has twenty-four hours in which to execute a TDO, calculated from the time the magistrate issues the temporary detention order. A magistrate may specify in the TDO a shorter period for execution of the order.

   b. A failure of the officer to execute the order within the twenty-four-hour period (or within the shorter period specified in the TDO by the magistrate, if so) voids the TDO upon the expiration of that period. If the order becomes void for lack of timely execution, subsection I of Va. Code § 37.2- 809 (in the case of an adult respondent) or subsection H of Va. Code § 16.1-340.1 (in the case of a juvenile respondent) requires the officer to return the order to the issuing court, if open. If the court is not open, the officer must return the order to any magistrate serving the issuing court (the court to which the TDO is returnable). Although the statute does not say what the magistrate is to do with the void TDO, it is recommended that the magistrate deliver it to the court.

2. The petition

   a. If an officer is not able to execute the order within twenty-four hours, the original petition (if any) remains valid for ninety-six hours from the filing of the petition with the magistrate

   b. A magistrate may issue a subsequent temporary detention order in response to the same petition within ninety-six hours after that petition is filed if the evidence is then still sufficient to meet the detention criteria in the subsequent hearing.

3. The evaluation

A magistrate may issue a temporary detention order without a new evaluation if an evaluation meeting the requirements of Va. Code § 37.2-809 (in the case of an adult respondent) or Va. Code § 16.1-340.1 (in the case of a juvenile respondent) was conducted during the previous seventy-two hours.

L. L. Successive TDOs Not Authorized

1. Prohibition: executed order

After a respondent is detained under a TDO, a magistrate may not issue a successive temporary detention order for the purpose of extending or reinstating temporary detention in order to provide more time for completing compliance with procedural requirements that are applicable to a person who is in temporary detention under a TDO.

2. Opinion of the Attorney General

a. The Attorney General issued an opinion in 1996 that a magistrate may not issue successive temporary detention orders when statutory actions required as rights of the respondent or for protection of the respondent (e.g., physician examination, attorney employment, witness subpoenas, independent evaluation, preparation of prescreening report) are not completed within the maximum time permitted under the statute. *See* Attorney General Opinion to Morris, dated 07/01/96 (1996, page 166); *magistrate may not issue successive TDOs should all statutorily created rights of temporarily detained person not be met within 48 hours or extended weekend or legal holiday periods*.

b. In the context of the opinion, it appears that this principle is designed to prevent issuance of a successive order for the purpose of extending the initial order when statutorily required actions have not been completed in time.

3. Inapplicability to unexecuted order. The prohibition does not apply to a TDO that lapses, and is therefore void, because it was not executed within twenty-four hours

M. M. Designation of Alternative Detention Facility

1. Authority of CSB

Recent amendments to Va. Code § 37.2-809 and Va. Code 16.1-340.2 allow the CSB to change the facility of temporary detention. The “new” facility is referred to as the alternative detention facility.

2. Timing

   An alternative detention facility may be designated at any point during the period of temporary detention in cases with adult respondents. For juveniles, the alternative facility must be designated within four hours of the minor's admission into the initial detention facility.

3. Procedure

   The CSB is responsible for designating an alternative detention facility. The CSB shall file written notice with the court to which the original TDO was returnable advising the court of the change in facility. A new form has been developed for this purpose.

   a. There is no need to amend the original TDO or issue a new TDO designating the alternative detention facility.

   b. Magistrates are not involved in the designation of the alternative detention facility but may have a role in resolving transportation issues. *See* the following section on Transportation for more information.

4. Transportation

   a. Recent amendments to Va. Code § 37.2-810 address the issue of transporting adult respondents between detention facilities. Recent amendments to Va. Code 16.1-340.2, effective as of July 1, 2018, address the issue of transporting juvenile respondents between detention facilities. The procedures for adult and juvenile cases are similar.

   b. If an alternative detention facility is designated before the initial detention facility accepts custody of the respondent, then the LEO or ATP transporting the respondent pursuant to the TDO shall continue transporting the respondent to the alternative detention facility. No new or amended TDO is required as the standard language on the TDO has been modified to reflect this possibility.

      1) Magistrates should be mindful of the possibility that the detention facility will change when designating an ATP for a TDO.

      2) The possibility of a longer trip to a distant facility may be relevant to the magistrate's findings about the proposed ATP's willingness to transport and ability to safely transport the respondent.

   c. If custody of the respondent has been accepted by the initial detention facility, then the CSB shall request a DC-4046, ORDER FOR TRANSPORTATION TO ALTERNATIVE FACILITY OF TEMPORARY DETENTION from the magistrate.

1) This new form combines the CSB's request and the magistrate's order into a single document. As it will originate with the CSB, it is not available in e-Mag but can be downloaded from the online forms database.

2) The CSB will provide the respondent's identifying information, the identity of any proposed ATP, and the contact information for both the initial and alternative detention facilities.

3) The magistrate will then authorize an ATP or a law enforcement agency to transport the respondent between the facilities.

d. Use of an ATP

1) While a magistrate may designate an ATP to transport the respondent from one detention facility to another, all of the previously discussed rules regarding ATP's apply.

2) Any proposed ATP must be identified to the magistrate; the magistrate has no obligation to locate a party willing to serve as an ATP.

3) If there is a risk that the respondent will cause serious physical harm to self or others, magistrates should not authorize an ATP.

4) The magistrate must also find that the proposed ATP is available to transport, willing to transport, and able to safely transport the respondent.

e. Use of a Law Enforcement Agency

1) If a law enforcement agency is used to transport the respondent between facilities, the magistrate should select the law enforcement agency where the respondent resides unless the 50 mile rule applies.

2) It would appear that magistrates may also designate any other willing law enforcement agency that has agreed to provide transportation if such an agency is available.

5. Cases involving minors

a. Procedure

1) Virginia Code § 16.1-340 gives the CSB a four-hour timeframe in which to identify an alternative detention facility after a minor respondent is detained in a state facility pursuant to a TDO.

2) The statute is silent on how such an alternative facility is to be designated.

b. Transportation

As of July 1, 2018, magistrates may now issue a DC-4046 Order For Transportation to Alternative Facility of Temporary Detention for cases involving juvenile respondents. Recent amendments to Va. Code 16.1-340.2 now allow the use of transportation orders for juveniles.

VI. FINDINGS FOR ECO AND TDO

A.

A. Standard of Proof for

Findings

1. Probable Cause

Before issuing an ECO or a TDO a magistrate must find probable cause to believe that all of the applicable criteria for issuance are met.

2. Emergency Custody Order (ECO).

In the case of an ECO, probable cause is expressly required by subsection A of Va. Code § 37.2-808 (for adults) and subsection A of Va. Code § 16.1-340 (for minors).

3. Temporary Detention Order (TDO)

In the case of a TDO, the statute does not expressly require a standard of probable cause in the same way that is provided in the statute for an ECO. However, a statement in subsection C of Va. Code § 37.2-809 (relating to adults) and subsection B of Va. Code § 16.1-340.1 (relating to minors) reflects an assumption that probable cause is the applicable standard. Therefore, a magistrate applies the probable cause standard of proof in making findings in a TDO case.

B. Criteria for ECO and TDO

1. Adults. The criteria applicable to issuance of an ECO for an adult under Va. Code § 37.2-808 and the criteria applicable to issuance of a TDO for an adult under Va. Code § 37.2-809 are the same.

2. Minors. The criteria applicable to issuance of an ECO for a minor under Va. Code § 16.1-340 and the criteria applicable to issuance of a TDO for a minor under Va. Code § 16.1-340.1 are the same.

C. Criteria Enumerated: Adults

To issue an ECO or TDO for an adult, a magistrate must make all of the following four findings:

1. Mental illness: The respondent has a mental illness.

2. Potential for harm: There is a substantial likelihood that, as a result of mental illness, the respondent will, in the near future, either:

   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 (not necessarily physical harm) due to his lack of capacity to protect himself from harm or to provide for his basic human needs.

3. Hospitalization or treatment: The respondent is in need of hospitalization or treatment.

4. No consent: The respondent is unwilling to volunteer or incapable of volunteering for hospitalization or treatment.

D. Criteria Enumerated: Minors

To issue an ECO or TDO for a minor, a magistrate must make all of the following three findings:

1. Mental illness: The minor has a mental illness.

2. Potential for harm: Because of mental illness, the minor either:

   a. presents a serious danger to himself or others to the extent that a severe or irremediable injury is likely to result (as evidenced by recent acts or threats); **OR**

   b. is experiencing a serious deterioration of his ability to care for himself in a developmentally age-appropriate manner (as evidenced by delusionary thinking or by a significant impairment of functioning in hydration, nutrition, self-protection, or self-control).

3. Treatment: The minor is in need of compulsory treatment for a mental illness and is reasonably likely to benefit from the proposed treatment.

E. Criteria Discussed

1. Mental illness

a. The respondent has a mental illness.

b. Definitions

1) Adults. For an adult, Va. Code § 37.2-100 defines the term "mental illness" as "a disorder of thought, mood, emotion, perception, or orientation that significantly impairs judgment, behavior, capacity to recognize reality, or ability to address basic life necessities and requires care and treatment for the health, safety, or recovery of the individual or for the safety of others."

2) Minors. For a minor, Va. Code § 16.1-336 defines the term "mental illness as "a substantial disorder of the minor's cognitive, volitional, or emotional processes that demonstrably and significantly impairs judgment or capacity to recognize reality or to control behavior." The statute goes on to say that "[m]ental retardation, head injury, a learning disability, or a seizure disorder is not sufficient, in itself, to justify a finding of mental illness..... "

c. Substance abuse is considered a mental illness.

1) Under Va. Code § 37.2-800 (relating to adults) and Va. Code § 16.1-336 (relating to minors), a magistrate is to consider substance abuse as being a mental illness for the purposes of ECOs and TDOs.

2) Adults. For an adult, Va. Code § 37.2-100 defines the term "substance abuse" to mean:

…the use of drugs, enumerated in the Virginia Drug Control Act (§ 54.1-3400 et seq.), without a compelling medical reason or alcohol that (i) results in psychological or physiological dependence or danger to self or others as a function of continued and compulsive use or (ii) results in mental, emotional, or physical impairment that causes socially dysfunctional or socially disordering behavior and

(i) because of such substance abuse, requires care and treatment for the health of the individual. This care and treatment may include counseling, rehabilitation, or medical or psychiatric care.

3) Minors. For a minor, Va. Code § 16.1-336 defines the term "substance abuse" to mean:

> …the use, without compelling medical reason, of any substance which results in psychological or physiological dependency as a function of continued use in such a manner as to induce mental, emotional, or physical impairment and cause socially dysfunctional or socially disordering behavior.

2. Potential for harm

The Supreme Court of the United States has emphasized that involuntary detention or commitment of a mentally ill person who is harmless is not justified, even to ensure a higher standard of living for the person. In O'Connor v. Donaldson, 422 U.S. 563, 575-576 (1975), the Court provides this commentary: A finding of mental illness alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the mentally ill can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. *See* Shelton v. Tucker, 364 U.S. 479, 488- 490.

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty…

In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends…

3. Need for hospitalization or treatment

To find probable cause to believe that the respondent needs hospitalization or treatment a magistrate considers:

a. The usual course of treatment for the particular mental disease (ascertainable when a CSB evaluator or treating physician is presenting evidence for a TDO; probably not ascertainable when a lay person is presenting evidence for an ECO).

b. Indication of a need for close monitoring of the respondent by mental health care professionals.

c. Indication of a need for medication.

d. Indication of delusion or hallucination.

e. Other factors that the magistrate considers appropriate.

4. No consent

a. An expression of consent by the respondent does not necessarily refute evidence that the respondent is incapable of volunteering for hospitalization or treatment. The respondent must be capable of providing "informed" consent.

b. **Example:** A respondent who is delusional or hallucinating may meet the criterion of being incapable of volunteering even if the respondent agrees to seek so-called voluntary treatment. In such circumstances, the respondent might not meaningfully understand the proceedings and associated rights as is necessary for the consent to be informed. Consider the United States Supreme Court case of Zinermon v. Burch, 494 U.S. 113, 132-134 (1990).

c. In Zinermon, the respondent was wandering along a Florida highway. He was slightly injured and was hallucinating, confused, and psychotic. Florida mental health services evaluated the defendant and diagnosed him as a paranoid schizophrenic. The mental health staff had him sign documents requesting voluntary admission to a state facility and authorizing treatment. The defendant remained at the state facility for five months during which no commitment hearing was held. The Supreme Court of the United States ruled that a procedure that allows a mentally ill person voluntarily to seek admission to a mental health facility when the person is incapable of informed consent is unconstitutional. The court said:

> [T]he very nature of mental illness makes if [sic] foreseeable that a person needing mental health care will be unable to understand any proffered explanation and disclosure of the subject matter of the forms that person is asked to sign, and will be unable to make a knowing and willful decision whether to consent to admission. ..... A person who is willing to sign forms but is incapable of making an informed decision is, by the same token, unlikely to benefit from the voluntary patient's statutory right to request discharge .....

Such a person thus is in danger of being confined indefinitely without benefit of the procedural safeguards of the involuntary placement process, a process specifically designed to protect persons incapable of looking after their own interests.

d. Advance directive (adult only)

1) An advance directive in effect for an adult respondent under the Health Care Decisions Act (Va. Code § 54.1-2981 et seq.) may authorize a designated agent to consent to admission and treatment of the respondent in a mental health facility when the respondent becomes incapable of making an informed decision on the matter.

2) Such a directive does not override the authority of a magistrate to issue an ECO or TDO in the case of the person making the advance directive.

3) Subsection C of Va. Code § 54.1-2983.3 specifically provides the following:

If any provision of a patient's advance directive conflicts with the authority conferred by any emergency custody, temporary detention, involuntary admission, and mandatory outpatient treatment order set forth in Chapter 8 (§ 37.2-800 et seq.) of Title 37.2 or by any other provision of law, the provisions of the patient's advance directive that create the conflict shall have no effect. However, a patient's advance directive shall otherwise be given full effect.

F. F. Magistrate's Duty to Get Facts, Not Conclusions

1. Duty

The magistrate has the duty to make the findings on the factual criteria enumerated above. The magistrate is to obtain from the witness or witnesses evidence on which the magistrate may draw the factual conclusions that are the required findings. The magistrate is not to default on the performance of this duty by settling for the opinion of a health care professional or anyone else on any of the ultimate findings.

2. Examples of correct and incorrect hearing of evidence

a. Mental illness

1) **Incorrect:** The magistrate relies on the mental health evaluator's unexplained assertion that the respondent has a mental illness.

2) **Correct:** The magistrate hears from the mental health evaluator that the respondent has a history of the psychotic disorder referred to as schizophrenia. Symptoms of the disorder include delusion,

hallucination, disorganized behavior or speech, sometimes flattery or inappropriate affect. The respondent is currently thinking of himself as being a National Football League quarterback, which he is not. He envisions a half-dozen men in black coats as stalking him wherever he goes in order to abduct him and remove him to China where they will use him to anchor an upstart professional football team. The respondent tells this story in a halting manner, interrupted repeatedly by digressions to discussions of his childhood pets, algebraic formulas, and his religious awakenings. His history shows that his use of a medication typically used for the treatment of schizophrenia has been successful in dispelling the delusions, hallucinations, and disorganized conversations.

b. Likelihood of resulting harm

1) **Incorrect:** The magistrate relies on the mental health evaluator's unexplained prediction that the respondent will assault family members if left at liberty.

2) **Correct:** The magistrate hears from the mental health evaluator that the respondent had what appears to have been a psychotic episode the previous month while not taking the medication prescribed for him for schizophrenia. That is, the respondent's father reported that the respondent frantically searched through kitchen drawers for knives, asserting throughout his frenzy that he intended to stab all of the "thugs" in the kitchen. The only other person in the kitchen at the time was his father. The father said that the respondent and his father have an affectionate relationship when the respondent is taking his medication. During this episode, the respondent shouted at his father that the respondent would not go to China. His father was able to administer the respondent's medication and get him to his doctor for some immediate therapy. This combination of actions calmed the respondent then and restored his orientation to reality. This week, however, the respondent has again voiced to his father angry vows not to go China, has warned his father that he will kill his father and his father's "henchmen" rather than let them take him, and has furiously waved at the father a bayonet that the respondent has obtained from some unknown source. His father says that the medication is nowhere to be found. Anyway, the utility of this particular medication has lately been diminishing, as the frequency and duration of episodes like the one described above, although sometimes less severe than that one, have been increasing even when the respondent is taking the medication.

G. G. Evidence

1. Petition

If the case is initiated by means of a sworn petition, the magistrate considers the

information in the petition.

2. Mandatory evidence. This is evidence that must be considered when presented.

   a. Mental health evaluators

      1) For an ECO, it is not necessary for a professional mental health evaluator to be a witness. Any credible witness who knows of permissible evidence may present evidence that the magistrate finds sufficient for issuance of the order. Witnesses may include, for example, a family member, a friend, a law enforcement officer, a treating physician, a clergyman, as well as any other responsible person. Whoever the witness may be, the magistrate must elicit underlying evidence for each required finding. In the case of a witness who does not have professional expertise in mental health (for example, a family member, probably), the magistrate would not expect to receive a clinical diagnosis of mental illness, which is one of the necessary findings.

         However, the magistrate could obtain from the witness enough information about the respondent's behavior or history to lead the magistrate to conclude, on the basis of the magistrate's experience with human behavior and the ways of the world, that the respondent probably has a mental illness, as defined in Va. Code § 37.2-100 (for an adult) and in Va. Code § 16.1-336 (for a minor).

      2) For a TDO, the magistrate receives information furnished by an evaluator provided by the local community services board who meets the requirements of subsection A of Va. Code § 37.2-809 (for an adult) or subsection A of Va. Code § 16.1-340.1 (for a minor), as follows:

         - An employee of the local community services board
         - A designee of the local community services board

   b. For a TDO

      1) Physician

         Under subsection B of Va. Code § 37.2-809 (for an adult) or subsection A of Va. Code § 16.1-340.1 (for a minor), a magistrate is required to consider any recommendation made by any of the following physicians:

         - A treating or examining physician licensed in Virginia, if available
         - Any other treating physician

      2) Clinical psychologist

Under subsection B of Va. Code § 37.2-809 (for an adult) or subsection A of Va. Code § 16.1-340.1 (for a minor), a magistrate is required to consider any recommendation made by a clinical psychologist.

3) Parent of a juvenile respondent

Under subsection A of Va. Code § 16.1-340.1, a magistrate is required to consider any recommendation made by a parent of a respondent who is a minor.

3. Permissible evidence for an ECO or a TDO. This is evidence that may be considered when available.

a. Recommendations of any of the following health care providers:

1) A treating physician licensed in Virginia.

(For a TDO, a magistrate must consider any recommendations from this source. *See* the immediately preceding discussion.)

2) An examining physician licensed in Virginia.

(For a TDO, a magistrate must consider any recommendations from this source. *See* the immediately preceding discussion.)

3) A treating psychologist licensed in Virginia.

(For a TDO, a magistrate must consider any recommendations from a clinical psychologist. *See* the immediately preceding discussion.)

4) An examining psychologist licensed in Virginia.

b. Any past actions of the respondent

c. Any past mental health treatment of the person

d. Any relevant hearsay evidence

e. Any medical records available

f. Any affidavit submitted, if the witness is unavailable and it so states in the affidavit

g. Any other available information that the magistrate considers relevant to the determination of whether probable cause exists to issue an ECO

4. Medical records

   a. Certain health records regarding the respondent are accessible by the magistrate.

   b. Virginia Code §§ 37.2-804.2 and 16.1-337 require a health care provider, upon request, to disclose to the magistrate (and others, such as the local community services board evaluator) "any information that is necessary and appropriate" to enable the magistrate to perform the magistrate's duties relating to emergency custody and temporary detention.
   c. The DC-492, EMERGENCY CUSTODY ORDER and the DC-592, EMERGENCY CUSTODY ORDER – JUVENILE each includes a notice of the above requirement.

   d. The DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE and the DC-895, TEMPORARY DETENTION ORDER – MAGISTRATE (JUVENILE) each includes a notice of the above requirement.

VII. MINORS: VOLUNTARY COMMITMENT, SPECIAL NOTE

A. Introduction: Relationship to Involuntary Commitment

1. The authority and procedures applicable to ECOs and TDOs for minors are set forth and discussed in the foregoing sections.

2. A magistrate is not to refuse to hear a request for an ECO or a TDO for a minor on the basis that voluntary commitment of the minor has not been attempted under Va. Code § 16.1-338, as discussed below.

B. Commitment Procedures Not Involving Magistrates

1. Authority: Va. Code § 16.1-338

2. Minor under fourteen years of age

   a. A minor younger than fourteen years of age may be admitted to a willing mental health facility for inpatient treatment upon application and with the consent of a parent.

   b. Consent of the parent is needed.

   c. Consent of the minor is not needed.

3. Minor fourteen years of age or older

a. A minor fourteen years of age or older may be admitted to a willing mental health facility for inpatient treatment upon the joint application and consent of the minor and the minor's parent.

b. Consent of the parent is needed.

c. Consent of the child is needed.

C. Relationship to Magistrate's Authority to Issue ECO or TDO

1. A magistrate's authority to issue an ECO or TDO for a minor of any age under Va. Code § 16.1-340 is not limited merely because there is an alternative means under Va. Code § 16.1-338 for a parent of a minor, or for a parent and minor together, to obtain admission of the minor to a mental health facility without magistrate intervention.

2. It is not a requirement that a parent of a minor attempt to achieve admission of the minor under Va. Code § 16.1-338 before an ECO or TDO for the minor may be requested of a magistrate and be issued by a magistrate.

3. For example, a parent might choose to request a magistrate to issue an ECO or TDO in the case of a minor instead of choosing to admit the minor under Va. Code § 16.1-338 if the parent does not have sufficient control or means effectively to require an unwilling child under 14 years of age to submit to admission into a willing mental health facility.

4. In any such case, a magistrate might be asked to issue an ECO or TDO. The magistrate is authorized to hear and act on the request and is to do so.

VIII. POST-TDO DUTIES OF MAGISTRATE

A. A. Statutory Authority; Forms

1. Statutory Authority

a. Virginia Code § 37.2-817.1, relating to issuance of an ECO or TDO for an adult in relation to a mandatory outpatient treatment plan A discharge plan.

b. Virginia Code § 37.2-817.2, relating to enforcement of a mandatory examination order issued by the court in the case of an adult

c. Virginia Code § 16.1-345.3, relating to issuance of an ECO or TDO in relation to a mandatory outpatient treatment plan for a minor

d. Virginia Code § 16.1-345.4, relating to enforcement of a mandatory examination order issued by the court in the case of a minor

2. Forms

a. DC-4026, CAPIAS: TRANSPORT AND MANDATORY EXAMINATION ORDER

b. DC-492, EMERGENCY CUSTODY ORDER

c. DC-592, EMERGENCY CUSTODY ORDER – JUVENILE

d. DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE

e. DC-895, TEMPORARY DETENTION ORDER – MAGISTRATE (JUVENILE)

f. DC-4000, ORDER FOR ALTERNATIVE TRANSPORTATION PROVIDER

B. Purpose

The purpose of post-TDO activities of a magistrate is to assist the court in imposing remedies for a respondent's noncompliance with certain mandatory outpatient treatment procedures or conditions or for some other deficiency relating to mandatory outpatient treatment.

C. Context

1. Background

When a respondent is detained under a TDO, the court (often a special justice of the court) holds a commitment hearing. The court may take any of the following actions:

a. Involuntary commitment. The court may order an adult respondent or a juvenile respondent involuntarily committed to a facility for inpatient treatment.

b. Mandatory outpatient treatment. The court may order a respondent into mandatory outpatient treatment.

c. Combination of involuntary commitment and mandatory outpatient treatment (adult only). The court may order an adult respondent involuntarily committed to a facility for inpatient treatment and provide in the order for the treating physician at the facility to discharge the respondent whenever the respondent meets certain conditions. A discharge under such authority must be subject to a discharge plan providing for follow-on mandatory outpatient treatment. Note that the plan for mandatory outpatient treatment under this

course of action is referred to in the statutes as a "discharge plan" instead of a mandatory outpatient treatment plan (MOT plan).

d. Release. The court may order the respondent released.

2. Mandatory outpatient treatment

a. MOT Plan. If a respondent is ordered into mandatory outpatient treatment, the local community services board develops a mandatory outpatient treatment plan for the respondent. The court approves the MOT plan.

b. Discharge Plan. If an adult respondent is being discharged after having been involuntarily committed to inpatient treatment pursuant to an order that includes a grant of authority to a physician at the admitting facility to discharge the respondent when appropriate, the discharging physician consults with the local community services board and develops a discharge plan setting forth a plan for mandatory outpatient treatment of the adult respondent. The court approves the discharge plan.

c. CSB Monitoring.

1) Adult. In the case of an adult respondent, the community services board for the adult respondent's place of residence is required under Va. Code § 37.2-817.1 to monitor the respondent's compliance with the MOT plan or the discharge plan, as the case may be.

2) Minor. In the case of a juvenile respondent, the community services board for the juvenile respondent's place of residence is required under Va. Code § 16.1-345.3 to monitor the respondent's compliance with the MOT plan.

D. Mandatory Examination: Refusal or Failure to Attend

1. Background

a. At any time that a motion for review of a mandatory outpatient treatment plan or discharge plan is pending in the court, the court conducts a hearing to review the MOT plan or discharge plan under Va. Code § 37.2-817.2 (in the case of an adult) or to review the MOT plan under Va. Code § 16.1-345.4 (in the case of a minor).

b. Whenever requested by the respondent, the CSB, a treatment provider listed in the MOT plan or discharge plan (as the case may be), or the original petitioner for the respondent's involuntary treatment, the court may require the respondent to submit to a comprehensive examination by a psychiatrist or psychologist licensed in Virginia. The purpose of the examination is to determine information regarding whether there is probable cause to believe

that the respondent then still meets the criteria for involuntary inpatient admission or mandatory outpatient treatment.

2. Magistrate's role

   a. Adults. If an adult respondent refuses or fails to appear for a comprehensive examination ordered under Va. Code § 37.2-817.2, a magistrate (if a court the court is not available to do so) shall issue a DC-4026, CAPIAS: TRANSPORT AND MANDATORY EXAMINATION ORDER to require a law enforcement officer to take the adult respondent into custody and transport the respondent to the prescribed location for the examination.

   b. Minors. A magistrate has no authority to issue such an order in the case of a minor who refuses or fails to appear. (Va. Code § 16.1-345.4).

   c. Alternative: ECO or TDO

      1) A CSB could choose to request a magistrate to issue an ECO or TDO in the case of an adult respondent who refuses or fails to appear.

      2) The CSB could request, and a magistrate may issue, an ECO or TDO for a juvenile respondent who refuses or fails to appear even though the magistrate does not have authority to issue a DC-4026, CAPIAS: TRANSPORT AND MANDATORY EXAMINATION ORDER for a minor.

      3) In the case of such a request, the magistrate would proceed in the same manner as the magistrate would proceed in any other case of a request for an ECO or TDO.

3. Capias: Transport and Mandatory Examination Order

   a. Contingent authority of magistrate

      The magistrate's authority to issue a DC-4026, Capias: Transport And Mandatory Examination Order in the case of an adult respondent is contingent on the unavailability of the court. If the court is "not available" to do so, the magistrate then has authority to issue the capias.

   b. Case initiation

      1) The community services board notifies the magistrate that the respondent has refused or failed to appear for the ordered comprehensive examination

      2) A petition is not required

c. Findings

A magistrate issues the capias for an adult respondent upon finding that the following criteria are met:

1) The respondent has been ordered under Va. Code § 37.2-817.2 to submit to a comprehensive examination

2) The local community services board arranged for the examination
3) The respondent refused or failed to appear for the examination

d. Requirement to issue

If the magistrate makes the requisite findings, the magistrate is required to issue the requested capias.

e. Location of examination

The community services board identifies the location of the examination for the magistrate to enter on the capias.

f. Designation of law enforcement agency

The magistrate enters in the capias the law-enforcement agency that is to transport the person to the location of the examination. For this purpose the magistrate designates the primary law-enforcement agency for the jurisdiction where the person resides.

g. No bail hearing

1) A bail hearing is not called for in the case of a DC-4026, Capias: Transport And Mandatory Examination Order.

2) The capias is not of the same nature as other capiases in that it is not an order to arrest the respondent. Instead, it has the same nature as an emergency custody order (ECO) in that it orders a short-term custody only for the purposes of examination and the transportation related to the examination.

h. Time limits

The capias expires the earlier of the following:

1) When a temporary detention order (TDO) is issued

2) When the respondent has been in custody for eight hours

4. A potential outcome of the mandatory examination: TDO

   a. The local community services board may request a magistrate to issue a TDO on the basis of the results of the mandatory examination of an adult or a minor.

   b. If a TDO is requested, the magistrate proceeds under Va. Code § 37.2-809 for an adult or under Va. Code § 16.1-340.1 for a minor.
   c. If an employee or designee of the community services board has performed the face-to-face evaluation required in Va. Code § 37.2-809 (for an adult) or Va. Code § 16.1-340.1 (for a minor) and the magistrate makes the findings required by such statute, the magistrate may issue the requested TDO.

E. MOT Noncompliance: ECO Or TDO

1. Magistrate's role

   a. The magistrate may hear and act on a request for an ECO or TDO in the case of a respondent involuntarily admitted to mandatory outpatient treatment when the local community service board makes such a request under Va. Code § 37.2-817.1 (in the case of an adult) or Va. Code § 16.1-345.3 (in the case of a minor). The statutes authorize the community services board to make such a request for the following reasons:

      1) Failure of the respondent materially to comply with a MOT plan, as determined by the local community services board

      2) Any other reason

         The statute does not elaborate on the meaning of the ground described as "any other reason." One possible situation in which the local community services board might rely on this ground is the case of a person who is not responding to outpatient treatment, or is experiencing a deterioration in mental condition, and meets the statutory criteria for emergency custody under an ECO or temporary detention under a TDO.

   b. If an ECO is requested, the magistrate proceeds in the same manner as the magistrate would proceed in any other case of a request for an ECO, as follows:

      1) For an adult: proceed under Va. Code § 37.2-808, discussed above

      2) For a minor: proceed under Va. Code § 16.1-340, discussed above

c. If a TDO is requested, the magistrate proceeds in the same manner as the magistrate would proceed in any other case of a request for a TDO, as follows:

1) For an adult: proceed under Va. Code §§ 37.2-809 and 37.2-810, discussed above

2) For a minor: proceed under Va. Code §§ 16.1-340.1 and 16.1-340.2, discussed above

d. The magistrate is not authorized to make a finding on an allegation of the local community services board that the respondent is failing materially to comply with an MOT plan. The magistrate's duty in the proceeding is to make findings on the same criteria, as the magistrate would consider in any other case of an ECO or TDO, as discussed in the section "Findings For ECO And TDO" above.

2. Case initiation

To initiate the action, the local community services board that is monitoring compliance with the MOT plan applies for an ECO or TDO as required under Va. Code § 37.2-817.1 (for an adult) or Va. Code § 16.1-345.3 (for a minor).

IX. INMATES

A. Introduction

Different statutes and various standards and procedures apply in cases of TDOs for inmates.

B. Inmate of Local Correctional Facility

1. Statutory Authority; Form

a. Statutory authority: Paragraph 2 of subsection A of Va. Code § 19.2-169.6

b. Forms

1) DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE
2) DC-4001, PETITION FOR INVOLUNTARY ADMISSION FOR TREATMENT

2. Applicability

a. This statute applies only to an inmate of a local correctional facility, as follows:

1) An incarcerated person who is charged and is awaiting trial

2) An incarcerated person who has been convicted of one or more charges and is awaiting sentencing

3) An incarcerated person who has been convicted and sentenced and is serving the sentence in the local correctional facility

b. The statute does not apply to an inmate of a State correctional facility who is serving a sentence there.

c. The statute does not apply to a criminal defendant who is at liberty on bail, as the defendant actually has to be in jail. A person at liberty on bail is subject to emergency custody under Va. Code § 37.2-808 or temporary detention under Va. Code § 37.2-809. *See* Attorney General Opinion to Morris, dated 01/23/86 (1985-86, page 135); *procedure set forth in § 19.2-169.6 for hospitalization for psychiatric treatment of defendant in jail prior to trial inapplicable to commitment of criminally charged person out of jail on bond*.

3. Magistrate's authority

a. Unique authority. A magistrate is the only judicial officer who has authority to issue a TDO under the statute.

b. TDO only. The statute authorizes a magistrate only to issue a TDO. It does not provide any authority for an ECO.

4. Procedures, findings, standard of proof, and other requirements and limitations

a. In general. The procedures applicable to TDOs under Va. Code § 37.2-809 apply, except as discussed below.

b. Case initiation

1) Petition required. The case must be initiated by means of a petition from the person having custody of the inmate. The case may not be initiated on the magistrate's own motion.

2) The statute does not require that the petitioner swear to the petition

3) Form: DC-4001, PETITION FOR INVOLUNTARY ADMISSION FOR TREATMENT

c. Evaluation: The jailor who has custody of the respondent arranges for the prehearing evaluation by an employee or designee of the local community services board. The evaluation occurs before the jailor presents the petition for the TDO to the magistrate.

d. Findings. To issue a TDO, the magistrate must find that all of the following criteria are met:

1) The inmate has a mental illness

2) There exists a substantial likelihood that, as a result of mental illness, the inmate will, in the near future:

- 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**:
- suffer serious harm due to his lack of capacity to protect himself from harm as evidenced by recent behavior and any other relevant information

3) The inmate needs treatment in a hospital rather than in a local correctional facility

e. Standard of Proof. The standard of proof is "probable cause" to believe that each of the criteria specified above is true.

f. Notification requirement. Formerly, a magistrate issuing a TDO for an inmate was required to notify the court having jurisdiction over the respondent's criminal case and the respondent's attorney before the detention begins pursuant to the TDO or as soon thereafter as is reasonable. By amendment to the statute, this duty has been transferred to the person having custody of the inmate, effective July 1, 2010.

g. Location of temporary detention. The magistrate specifies in the TDO a facility that is a hospital designated by the Commissioner of Behavioral Health and Developmental Services as being appropriate for treatment and evaluation of persons under criminal charge. The CSB screener identifies for the magistrate the hospital that is to be specified in the TDO.

h. Voluntary admission not permitted. A respondent may not seek voluntary admission under this statute.

i. Selection of Law Enforcement Agency

1) As of July 1, 2018, Va. Code 19.2-169.6 specifically allows an inmate TDO to be served by a deputy sheriff or jail officer employed at the local correctional facility that houses the inmate.

2) This will allow magistrates to direct the TDO to the agency that oversees the local correctional facility, whether it is a sheriff's department or a regional jail authority.

C. Medical Issues for Local Correctional Facility Inmates

As of July 1, 2019, magistrates are now able to issue medical TDOs for inmates in local correctional facilities pursuant to Va. Code 53.1-133.04. This process is discussed in greater detail in the medical TDO section. See Page 6-93 et. seq. for more information.

D. Inmate of State Correctional Facility

1. Statutory authority: Va. Code § 53.1-40.1

2. Applicability

   This statute applies only to a criminal defendant who is serving a sentence in a State correctional facility.

3. Role of magistrate

   a. Mental Health. There is no authority equivalent to Va. Code § 19.2-169.6 for a magistrate to order temporary detention for mental health treatment in the case of an inmate of a State correctional facility.

   b. Medical. The magistrate does have authority under subsection F of Va. Code § 53.1- 40.1, when the court is not available, to order temporary detention of the prisoner in a hospital or other health care facility for medical care, including testing, observation, or treatment, when the prisoner is incapable of giving informed consent for the medical care due to a physical or mental condition. This authority is discussed in detail below in the matter relating to medical emergency temporary detention orders.

X. ACQUITTEES, CONDITIONALLY RELEASED

A. Introduction

1. Applicable law. Different statutes and various standards and procedures apply to a respondent who is a conditionally released acquittee.

2. Conditionally released acquittee defined. A person is a conditionally released acquittee if the person has been acquitted of a crime by reason of insanity and the court has released the person from mental hospitalization on conditions under Va. Code § 19.2-182.7.

B. Statutory Authority; Forms

1. Statutory authority: Va. Code § 19.2-182.9

2. Forms

   a. DC-492, EMERGENCY CUSTODY ORDER

   b. DC-894A, TEMPORARY DETENTION ORDER –MAGISTRATE

C. Relationship to Other ECO and TDO Authority: Independent Authority

1. Independent authority

   The authority for a magistrate to issue an ECO or a TDO under Va. Code § 19.2-182.9 is independent of the authorities under Va. Code § 37.2-808 (relating to ECO) and Va. Code § 37.2-809 (relating to TDO).

2. Inapplicability of other procedures, standards, requirements and limitations

   When proceeding under Va. Code § 19.2-182.9 in the case of a conditionally released acquittee, the magistrate's authority is limited to that which is provided in that statute, and the magistrate applies the procedures, standards, requirements and limitations that are provided in that section for ECOs and TDOs.

D. Emergency Custody Order (ECO) for Conditionally Released Acquittee

1. Form

   DC-492, EMERGENCY CUSTODY ORDER

2. Concurrent authority of magistrate

   A magistrate may issue an ECO in the case of a conditionally released acquittee. A judge or special justice also has authority to issue an ECO in such a case, but a magistrate may issue an ECO whether or not a judge or special justice is also available at the time.

3. Case initiation

   A proceeding for issuance of an ECO may be initiated in either of two ways, as follows:

   a. A sworn petition of a responsible person

b. The magistrate's own motion

4. ECO authorized, not required

Virginia Code § 19.2-182.9, unlike Va. Code § 37.2-808, does not require the magistrate to issue an ECO in each case in which a conditionally released acquittee meets the criteria for an ECO. It would be unusual, however, for a magistrate not to issue an ECO when the criteria are met.

5. Findings

To issue an ECO, a magistrate must find that all of the following statutory criteria are met:

a. The acquittee is located in a judicial district within the magistrate's regions. (The second sentence of Va. Code § 19.2-182.9 requires that the respondent be located within a judicial district that is served by the magistrate.)

b. Exigent circumstances do not permit compliance with the procedures for court revocation of the respondent's release under Va. Code § 19.2-182.8, which include the following:

1) an evaluation by a psychiatrist or clinical psychologist
2) a hearing
3) advance notice of the hearing
4) assistance of counsel
5) opportunity to present evidence and cross-examine witnesses

c. The acquittee on conditional release either:

1) has violated the conditions of release, **or**
2) is no longer a proper subject for conditional release (*see* discussion below)

d. The acquittee requires inpatient hospitalization.

6. Proper subject for conditional release: discussion of criterion

a. Criteria. In determining whether a conditionally released acquittee is no longer a proper subject for conditional release, a magistrate applies the same criteria as the court initially applied in granting conditional release, as provided in Va. Code § 19.2-182.7. To be a proper subject for conditional release, the acquittee must meet all of the following criteria:

1) Based on the factors listed in Va. Code § 19.2-182.3 (set forth below), the acquittee does not need inpatient hospitalization but needs outpatient treatment for monitoring to prevent the acquittee's condition from deteriorating to the degree that the acquittee would need inpatient hospitalization.

2) Appropriate outpatient supervision and treatment are reasonably available

3) There is significant reason to believe that the acquittee would comply with the specified conditions

4) Conditional release will not present an undue risk to public safety

b. Factors. The factors listed in Va. Code § 19.2-182.3 that are to be considered in the determination regarding the first criterion listed above are as follows:

1) To what extent the acquittee has mental illness or intellectual disability

2) The likelihood that the acquittee will engage in conduct that presents substantial risk of bodily harm to other persons or to self in the foreseeable future

3) The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis

4) Any other relevant factors

7. Standard of proof

Probable cause is the applicable standard of proof

8. Evaluator

The person evaluating the acquittee must:

a. be designated by the community services board (or by the behavioral health authority for a city or county that has such an authority under Va. Code § 37.2-601), **and**

b. be skilled in the diagnosis and treatment of mental illness.

9. Location of mental evaluation: a convenient location

a. The statute does not specifically state where an evaluation is to take place. Virginia Code § 19.2-182.9 merely states that the law enforcement officer taking custody of the respondent is required to take the person to a "convenient location" to be evaluated.

b. The magistrate does specify the location for evaluation in the ECO. The DC-492, EMERGENCY CUSTODY ORDER, includes a place for that entry.

10. Associated medical services

The statute is silent regarding authority to order transportation of an acquittee to a medical facility for medical care or evaluation.

11. Execution by law enforcement agency

a. Selection of agency

1) The statute is silent on the selection of the law enforcement agency that is to be designated to execute the ECO

2) Local arrangements need to be made for service of the order. Although the sheriff is authorized to serve civil processes, police or other law enforcement officers also may be available to do it. The ECO is a civil process

3) Sheriffs and deputy sheriffs are authorized to serve civil process under Va. Code § 8.01-293. The court may direct any process to the sheriff for execution under Va. Code § 8.01-292

4) The authority of a police officer to execute an ECO is provided in Va. Code § 15.2-1704. Moreover, Va. Code § 8.01-293 states that "any person of age 18 years or older and who is not a party or otherwise interested in the subject matter in controversy" is authorized to serve process. So a police officer, as an adult, may serve the ECO

b. Statewide authority to execute: The statute is silent on the authority of a law enforcement officer to go outside the officer's jurisdiction to execute an ECO anywhere else in Virginia.

12. Alternative transportation authority.

The statute does not authorize a magistrate to provide for transportation of the respondent by an alternative transportation provider.

13. Time limit; extension authority

a. Time limit: Custody under an ECO is authorized for up to eight hours after the law enforcement officer executes the order.

b. Extension authority

As of July 1, 2014, magistrates no longer have authority to extend the period of emergency custody for a conditionally released acquittee beyond the initial eight-hour period.

c. Custody: The acquittee remains in custody under an ECO until the earlier of the following:

1) The period of authorized custody lapses following execution of the ECO by law enforcement

2) A temporary detention order (TDO) is issued for the acquittee

3) The acquittee is released

d. Unexecuted order

The statute is silent regarding a limitation on the period of continuing validity of an ECO that goes unexecuted.

14. Successive ECOs not authorized

a. Prohibition

After a conditionally released acquittee is taken into custody under an ECO, a magistrate may not issue a successive emergency custody order for the purpose of extending or reinstating emergency custody in order to provide more time for completing compliance with procedural requirements that are applicable to a person who is in emergency custody under an ECO.

b. Attorney General Opinion

1) The Attorney General issued an opinion in 1996 that, although specifically addressing temporary detention orders, states the principle on the basis of reasoning that would be equally applicable to emergency custody orders for conditionally released acquittees. In the opinion of the Attorney General, a magistrate may not issue successive temporary detention orders when statutory actions required as rights of the respondent or for protection of the respondent (e.g., physician examination, attorney employment, witness subpoenas, independent evaluation, preparation of prescreening report) are not completed within the maximum time permitted under the statute. *See* Attorney General Opinion to Morris, dated 07/01/96 (1996, page 166); *magistrate may not issue successive TDOs should all statutorily created rights of temporarily detained person not be met within 48 hours or extended weekend or legal holiday periods*.

2) In the context of the opinion, it appears that the principle is designed to prevent issuance of a successive order for the purpose of extending the initial order when statutorily required actions have not been completed in time.

c. Inapplicability to unexecuted order. The prohibition does not apply to an ECO that lapses, and is therefore void, because it was not executed within eight hours after issuance.

15. Emergency custody initiated by law enforcement

a. Under Va. Code § 19.2-182.9, if a law-enforcement officer, based upon the officer's observation or the reliable reports of others, has probable cause to believe that a conditionally released acquittee meets the criteria for emergency custody discussed below, the officer may take the person into custody and transport the person to an appropriate location to assess the need for hospitalization or treatment without prior authorization. The officer does not need to obtain an ECO from a magistrate first.

b. To initiate emergency custody, the law enforcement officer must find that all of the following criteria are met:

1) The acquittee has violated the conditions of release
2) The acquittee is no longer a proper subject for conditional release
3) The acquittee requires emergency evaluation to assess the need for inpatient hospitalization

c. Differences in criteria

1) Note that all three criteria must be met. This is different from the requirement applicable to issuance of an ECO by a magistrate in that, for an ECO, the magistrate must find either, not both, of the first two criteria (violation of conditions and improper subject for conditional release). Va. Code § 19.2-182.9

2) Note also that it is not clear in the statute that a law enforcement officer, like the magistrate, must first find that exigent circumstances do not permit compliance with the procedures for revocation of the respondent's release under Va. Code § 19.2-182.9

d. Standard of proof: Probable cause, the same as the standard that is applicable for a magistrate.

e. Time limitation; extension authority

Eight-hour limitation. The same eight-hour limitation on duration of emergency custody that applies to custody under an emergency custody order issued under Va. Code § 19.2-182.9 also applies to law enforcement initiated emergency custody

f. Extension authority. As of July 1, 2014, magistrates may not extend the period of orderless emergency custody beyond the initial eight hour period.

16. ECO not to be issued after orderless emergency custody initiated

a. A magistrate should not issue an ECO for a conditionally released acquittee who is in orderless emergency custody.

b. As noted above, the statute limits the maximum period of emergency custody under an ECO to eight hours. The statute also limits the maximum period of orderless emergency custody initiated by a law enforcement officer to the same extent. The statute appears to set forth a public policy to limit the total period of emergency custody to eight hours no matter which authority is used to initiate the emergency custody. If a magistrate were to issue an ECO for a conditionally released acquittee already in orderless emergency custody, the maximum authorized period of custody under the ECO plus the time that the acquittee has already been in orderless emergency custody would necessarily exceed the maximum period to which the statutorily expressed public policy limits emergency custody.

c. For example, suppose a law enforcement officer initiated orderless emergency custody of a conditionally released acquittee at 8:00 a.m., transported the acquittee to an office of the law enforcement agency, and then requested a magistrate to issue an ECO at 8:45 a.m. By the time the magistrate is available to conduct the hearing on the request, it is 9:10 a.m. The acquittee has already been in emergency custody for one hour and ten minutes. If the magistrate, after the hearing, were to issue the requested ECO at 9:20 a.m., the maximum period of emergency custody under the ECO would expire at 5:20 p.m. By then, the acquittee would have been in custody for a period of nine hours and twenty minutes in violation of the statutory limitation of eight hours.

E. Temporary Detention Order (TDO) for Conditionally Released Acquittee

1. Form: DC-894A, TEMPORARY DETENTION ORDER –MAGISTRATE

2. Concurrent authority of magistrate

A magistrate may issue a TDO in the case of a conditionally released acquittee. A judge or special justice also has authority to issue a TDO in such a case, but a magistrate may issue a TDO whether or not a judge or special justice is also available at the time.

3. Case initiation

   A proceeding for issuance of a TDO may be initiated in either of two ways, as follows:

   a. A sworn petition of a responsible person
   b. The magistrate's own motion

4. TDO authorized, not required

   Virginia Code § 19.2-182.9, unlike Va. Code § 37.2-809, does not require the magistrate to issue a TDO in each case in which a conditionally released acquittee meets the criteria for a TDO. It would be unusual, however, for a magistrate not to issue a TDO when the criteria are met.

5. Findings on criteria

   To issue a TDO, a magistrate must find that all of the following statutory criteria are met:

   a. The acquittee is located in a judicial district within the magistrate's magisterial region. (The portion of the text of Va. Code § 19.2-182.9 that authorizes TDOs refers to "the" magistrate. The antecedent for that reference appears to be the same magistrate who could issue an ECO in the case. This reference probably, therefore, makes applicable to the TDO authority the provision in the second sentence of Va. Code § 19.2-182.9 that requires the respondent in an ECO case to be located within a judicial district that is served by the magistrate.)

   b. The acquittee on conditional release either:

      1) as violated the conditions of release; **or**
      2) is no longer a proper subject for conditional release (*see* discussion below).

   c. The acquittee requires emergency evaluation to assess the need for inpatient hospitalization.

      (Note the difference between this criterion and the corresponding criterion for an ECO under this statute. In a reversal of what one might expect, this criterion for a TDO addresses an issue of need for "emergency evaluation" and assessment, in other words, information on which to draw a conclusion on whether inpatient hospitalization is needed. This is an issue that one might expect to be central to the purpose of an ECO. Yet, the corresponding

criterion for an ECO skips the steps of evaluation and assessment and calls for the ultimate conclusion that "inpatient hospitalization" is needed.)

6. Proper subject for conditional release: discussion of criterion

   a. Criteria. In determining whether a conditionally released acquittee is no longer a proper subject for conditional release, a magistrate applies the same criteria as the court initially applied in granting conditional release, as provided in Va. Code § 19.2-182.7. To be a proper subject for conditional release, the acquittee must meet all of the following criteria:

      1) Based on the factors listed in Va. Code § 19.2-182.3 (set forth below), the acquittee does not need inpatient hospitalization but needs outpatient treatment for monitoring to prevent the acquittee's condition from deteriorating to the degree that the acquittee would need inpatient hospitalization

      2) Appropriate outpatient supervision and treatment are reasonably available

      3) There is significant reason to believe that the acquittee would comply with the specified conditions

      4) Conditional release will not present an undue risk to public safety

   b. Factors. The factors listed in Va. Code § 19.2-182.3 that are to be considered in the determination regarding the first criterion listed above are as follows:

      1) To what extent the acquittee has mental illness or intellectual disability

      2) The likelihood that the acquittee will engage in conduct that presents substantial risk of bodily harm to other persons or to self in the foreseeable future

      3) The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis

      4) Any other relevant factors

7. Standard of proof

   The statute does not specify a standard of proof.

8. Required advice from CSB evaluator

   The magistrate is required to obtain the advice of an evaluator who:

a. is designated by the community services board (or by the behavioral health authority for a city or county that has such an authority under Va. Code § 37.2-601), and

b. is skilled in the diagnosis and treatment of mental illness.

9. Designation of mental health facility

a. The statute merely provides for detention in "an appropriate facility". Presumably, this would be a facility identified by the local community services board or behavioral health authority under applicable regulations.

b. The magistrate specifies the facility in the TDO. The DC-894A, TEMPORARY DETENTION ORDER – MAGISTRATE, includes a place forthat entry.

10. Associated medical services

The statute is silent regarding authority to order transportation of an acquittee to a medical facility for medical care or evaluation.

11. Execution by law enforcement agency

a. Selection of agency: The statute is silent on the selection of the law enforcement agency that is to be designated to execute the TDO.

1) Local arrangements need to be made for service of the order. Although the sheriff is authorized to serve civil processes, police or other law enforcement officers also may be available to do it. The TDO is a civil process

2) Sheriffs and deputy sheriffs are authorized to serve civil process under Va. Code § 8.01-293. The court may direct any process to the sheriff for execution under Va. Code § 8.01-292

3) The authority of a police officer to execute a TDO is provided in Va. Code § 15.2-1704. Moreover, Va. Code § 8.01-293 states that "any person of age 18 years or older and who is not a party or otherwise interested in the subject matter in controversy" is authorized to serve process. So a police officer, as an adult, may serve the TDO

b. Statewide authority to execute: The statute is silent on the authority of a law enforcement officer to go outside the officer's jurisdiction to execute a TDO anywhere else in Virginia.

12. Alternative transportation authority.

    The statute does not authorize a magistrate to provide for transportation of the respondent by an alternative transportation provider.

13. Unexecuted order

    The statute is silent on the duration of a TDO issued under this authority.

14. Successive TDOs not authorized

    After a respondent is taken into detention under a TDO, issuance of a successive temporary detention order is not authorized. A magistrate may not issue a successive temporary detention order for the purpose of extending or reinstating emergency custody in order to provide more time for completing compliance with procedural requirements that are applicable to a person who is in emergency custody under a TDO.

    The Attorney General issued an opinion in 1996 that, although specifically addressing temporary detention orders, states the principle on the basis of reasoning that would be equally applicable to temporary detention orders for conditionally released acquittees. In the opinion of the Attorney General, a magistrate may not issue successive temporary detention orders when statutory actions required as rights or for protection of the respondent (e.g., physician examination, attorney employment, witness subpoenas, independent evaluation, preparation of prescreening report) are not completed within the maximum time permitted under the statute. *See* Attorney General Opinion to Morris, dated 07/01/96 (1996, page 166); *magistrate may not issue successive TDOs should all statutorily created rights of temporarily detained person not be met within 48 hours or extended weekend or legal holiday periods.*

XI. SEXUALLY VIOLENT PREDATORS, CONDITIONALLY RELEASED

A. Statutory Authority; Forms

1. Statutory authority: Va. Code § 37.2-913

2. Forms

   a. CC-1494, PETITION FOR EMERGENCY CUSTODY ORDER –VIOLATION OF CONDITIONAL RELEASE SEXUAL PREDATOR
   b. CC-1495, EMERGENCY CUSTODY ORDER –VIOLATION OF CONDITIONAL RELEASE

   NOTE: these forms are not in the e-Magistrate system. Magistrates may access these forms using the hyperlinks above. Magistrates will need to

complete the CC-1495, EMERGENCY CUSTODY ORDER- VIOLATION OF CONDITIONAL RELEASE by hand.

B. Definitions

1. Conditionally released sexually violent predator

   A conditionally released sexually violent predator is a person who has been determined in court under Va. Code § 37.2-908 to be a sexually violent predator and has been released on conditions under Va. Code § 37.2-912.

2. Sexually violent predator

   The term "sexually violent predator" is defined in Va. Code § 37.2-900 to mean,

   > …any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to § 19.2-169.3 and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

3. Sexually violent offense

   The term "sexually violent offense" used in the above definition is also defined in Va. Code § 37.2-900. It means,

   > …a felony under (i) former § 18-54, former § 18.1-44, subdivision 5 of § 18.2-31, § 18.2-61, 18.2-67.1, or 18.2-67.2; (ii) § 18.2-48 (ii), 18.2-48 (iii), 18.2-63, 18.2-64.1, or 18.2-67.3; (iii) subdivision 1 of § 18.2-31 where the abduction was committed with intent to defile the victim; (iv) § 18.2-32 when the killing was in the commission of, or attempt to commit rape, forcible sodomy, or inanimate or animate object sexual penetration; (v) the laws of the Commonwealth for a forcible sexual offense committed prior to July 1, 1981, where the criminal behavior is set forth in § 18.2-67.1 or 18.2-67.2, or is set forth in § 18.2-67.3; or (vi) conspiracy to commit or attempt to commit any of the above offenses.

C. Authority of Magistrate

1. Concurrent authority. A magistrate may issue an ECO in the case of a conditionally released sexually violent predator. Any other judicial officer may do so, too, but a magistrate may issue the ECO whether or not any other judicial officer is available at the time.

2. ECO only. A magistrate is authorized under the statute to issue only an ECO. The statute does not authorize a TDO.

D. Relationship to Other ECO Authority

1. Independent authority

The authority for a magistrate to issue an ECO under Va. Code § 37.2-913 is independent of the authority under Va. Code § 37.2-808 (relating to ECOs generally).

2. Inapplicability of other procedures, standards, requirements and limitation

When proceeding under Va. Code § 37.2-913 in the case of an ECO for a conditionally released sexually violent predator, the magistrate's authority is limited to that which is provided in this statute, and the magistrate applies only the procedures, standards, requirements and limitations that are provided in this statute.

E. Issuance Authorized, Not Required

Virginia Code § 37.2-913, unlike Va. Code § 37.2-808, does not require the magistrate to issue an ECO in each case in which a conditionally released sexually violent predator meets the criteria for an ECO. It would be unusual, however, for a magistrate not to issue an ECO when the criteria are met.

F. Returnable Court

The emergency custody order is returnable to the circuit court that ordered the release of the respondent on conditions under the statute.

G. Case Initiation

1. Ways to initiate

A proceeding for issuance of an ECO may be initiated in either of two ways, as follows:

a A sworn petition of a responsible person: CC-1494, Petition For Emergency Custody Order - Violation Of Conditional Release Sexual Predator.

b The magistrate's own motion.

2. Use of electronic communication

a A petition and an ECO may be filed, issued, served, or executed by electronic means with or without the use of two-way electronic video and audio communication.

b If a petition or ECO is filed, issued, served, or executed by such means:

1) the document has the force, effect, and authority of an original document, **and**
2) a signature on the document is treated as being an original signature

H. Findings

1. Criteria

To issue an ECO, a magistrate must find that all of the following statutory criteria are met:

a. The respondent is located in a judicial district within the magistrate's magisterial region. (Subsection A of Va. Code § 37.2-913 requires that the respondent be located within a judicial district served by the magistrate.)

b. The respondent has previously been adjudicated a sexually violent predator under Va. Code § 37.2-908.

c. The respondent has previously been released on conditions under Va. Code § 37.2-912.

d. The respondent has violated the conditions of release.

e. The respondent is no longer a proper subject for conditional release.

f. In other words, it is no longer true that the respondent meets all of the following statutory criteria for conditional release:

1) The respondent does not need secure inpatient treatment but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need secure inpatient treatment

2) Appropriate outpatient supervision and treatment are reasonably available

3) There is significant reason to believe that the respondent would comply with the conditions specified

4) Conditional release will not present an undue risk to public safety

2. Inapplicable considerations

The criteria specified in the statute do not include criteria regarding whether a person has a mental illness and whether the respondent is in need of hospitalization, which are criteria under other ECO authorities.

I. Standard of Proof

Probable cause is the applicable standard of proof

J. Evaluator

1. Designation and qualifications

   The person who is to evaluate the conditionally released sexually violent predator must:

   a. Be designated by the Department of Behavioral Health and Developmental Services, **and**

   b. Be skilled in the diagnosis and treatment of mental abnormalities and personality disorders. (Note that this is different from the corresponding requirement under other ECO authorities for the evaluator to be skilled in the assessment and treatment of "mental illness.")

2. Evaluator not available at Local CSB

   The evaluator is not available at the local CSB. Under policies of the Department of Behavioral Health and Developmental Services, the evaluator is a forensic professional who is designated on a case-by-case basis by the Director of the Office of Sexually Violent Predator Services of that Department upon receiving from the magistrate the required notification discussed below.

3. Evaluator arranges evaluation

   The evaluator designated by the Director of the Office of Sexually Violent Predator Services contacts the respondent and the local detention facility where the respondent is being held to arrange for the evaluator to meet with the respondent for the evaluation.

K. Location of Evaluation

1. Magistrate specifies in order

   The magistrate specifies the location of the evaluation in the ECO.

2. Statutory guidance

   The statute provides for the evaluation to take place in a "secure facility specified by the Department" (the Department of Behavioral Health and Developmental Services).

3. Local detention facility

The magistrate should designate the local detention facility as the location for the evaluation. This is guidance from the Senior Assistant Attorney General who is the Chief, Sexually Violent Predators Civil Commitment Section, Office of the Attorney General. It is not in the statute.

L. Custody

1. Sufficiency of ECO as commitment order

a. The Senior Assistant Attorney General who is the Chief, Sexually Violent Predators Civil Commitment Section, Office of the Attorney General, advises that the local detention facility should accept into its custody a conditionally released sexually violent predator and maintain custody of that person on the basis of an ECO issued under Va. Code § 37.2-913.

b. The Senior Assistant Attorney General takes the position that the ECO issued for a conditionally released sexually violent predator under Va. Code § 37.2-913 is sufficient authorization, in and of itself, for a local detention facility to accept the respondent into custody in the detention facility.

c. The ECO is a civil process. The respondent is not under arrest pursuant to the ECO. Therefore, no bond hearing is held, and no DC-352, COMMITMENT ORDER, is issued.

d. When the magistrate has issued the ECO in a case and (as discussed below) has faxed the petition and ECO to the Attorney General, to the Department of Behavioral Health and Developmental Services, and to the original circuit court, the magistrate has completed all actions that the magistrate has the duty and authority to perform in the case under that statute.

2. Continuation of custody in detention facility

a. A respondent taken into custody under the statute remains in custody in the local detention facility until the circuit court determines whether the respondent should be returned to the custody of the Commissioner of Behavioral Health and Developmental Services.

b. The magistrate includes in the ECO a statement of this requirement for continuation of custody as follows: "*The Respondent must remain in custody pending hearing in Circuit Court on the motion or petition to determine whether the Respondent should be returned to the custody of the Commissioner of Behavioral Health and Developmental Services*."

3. Other commitment document in case of probation or parole

   If the respondent is on parole or probation, the violation of a condition of release as a sexually violent predator might also be a violation of a condition of the release on parole or probation. In such a case, the respondent could be committed to the local detention facility on the basis of a PB-14, WARRANT, VIRGINIA PAROLE BOARD, or a PB-15, VIRGINIA DEPARTMENT OF CORRECTIONS, ARREST AUTHORITY submitted by a probation officer.

M. Associated Medical Services

The statute is silent regarding authority to order transportation of a conditionally released sexually violent predator to a medical facility for medical care or evaluation.

N. Execution by Law Enforcement Agency

1. Selection of agency

   a. The statute is silent on the selection of the law enforcement agency that is to be designated to execute the ECO.

   b. Local arrangements need to be made for service of the order. Although the sheriff is authorized to serve civil processes, police or other law enforcement officers also may be available to do it. The ECO is a civil process.

   c. Sheriffs and deputy sheriffs are authorized to serve civil process under Va. Code § 8.01-293. The court may direct any process to the sheriff to be executed under Va. Code § 8.01-292.

   d. The authority of a police officer to execute the ECO is provided in Va. Code § 15.2-1704. Moreover, Va. Code § 8.01-293 states that "any person of age 18 years or older and who is not a party or otherwise interested in the subject matter in controversy" is authorized to serve process. So a police officer, as an adult, may serve the ECO.

2. Statewide authority to execute

   A law enforcement officer may go or be sent anywhere in Virginia to execute the ECO.

3. Alternative transportation authority. The statute does not authorize a magistrate to provide for transportation of the respondent by an alternative transportation provider.

O. Notification Requirements

Upon issuing an ECO for a conditionally released sexually violent predator, the magistrate immediately faxes a copy of the petition and a copy of the ECO to all of the following:

1. The circuit court that originally ordered the release of the respondent on conditions.

2. The Commissioner of Behavioral Health and Developmental Services

   a. Fax a copy of the petition and a copy of the ECO to the Office of Sexually Violent Predator Services at (804) 786-2315.

   b. Call that office at (804) 405-2061 to attempt to alert personnel there that the documents are being faxed. Complete the fax whether or not voice contact is achieved.

3. The Attorney General

   a. Fax a copy of the petition and a copy of the ECO to the Sexually Violent Predators Civil Commitment Section at (804) 692-1098.

   b. Call either Susan Barr, (804) 786-3374 or Stacie Steele (804) 225-3886. Complete the fax whether or not voice contact is achieved.

4. The Commonwealth's Attorney for the jurisdiction where the conditionally released sexually violent predator resides.

P. Time Limits

1. Executed ECO

   An ECO for a conditionally released sexually violent predator under Va. Code § 37.2-913 remains in effect, and the respondent remains in custody under such section, until the circuit court determines whether the respondent should be returned to the custody of the Department of Behavioral Health and Developmental Services.

2. Unexecuted order

   The statute is silent regarding the period of continuing validity of an ECO that goes unexecuted.

Q. Emergency Custody Initiated by Law Enforcement

There is no authority under the statute for a law-enforcement officer to take a conditionally released sexually violent predator into emergency custody without prior authorization by a judicial officer.

XII. MEDICAL ECO AND TDO IN GENERAL

A. Magistrate Authority

A magistrate is authorized to issue medical emergency custody orders and medical emergency temporary detention orders as discussed in the sections "Medical ECO: Medical Emergency Custody Order" and "Medical TDO: Medical Temporary Detention Order" below.

B. Other Emergency Care Authorities for Health Care Providers

1. In addition to authority under a medical emergency custody order or a medical emergency temporary detention order, there are several other bases on which a health care provider may intervene, or may withhold care, without the consent of the patient in emergency situations.

2. A magistrate may not require a physician or other health care provider to pursue any of these alternative means as a prerequisite for acting on a request for a medical emergency custody order or a medical emergency temporary detention order.

3. The several alternatives are as follows:

   a. Exercise of a physician's common law authority
   b. An advance directive
   c. Consent provided by another person legally authorized to consent
   d. A Durable Do Not Resuscitate Order

4. The discussion of each alternative below is a summarization of the alternative and, as such, is intended to provide a magistrate with background information. It is not designed to be a comprehensive, detailed guide for use of or reliance on such alternative as a basis for a provision, withholding, or withdrawal of care or treatment.

C. Physician's Common Law Authority

1. Authority

   A physician may exercise common law authority to provide medical treatment necessary to prevent death or serious harm.

2. Restraints on exercise of authority

Practical considerations might restrict a physician's flexibility or ability to provide necessary medical treatment under common law. Examples of such considerations include the following:

a. Assistance of law enforcement officers or hospital security personnel is needed to restrain an unruly patient enough to examine and care for the patient.

b. Restrictions imposed by liability insurers prevent a physician from taking action otherwise permissible under common law.

3. Relationship of magistrate authority to physician's common law authority

A magistrate may not withhold issuance of a medical emergency custody order or a medical emergency temporary detention order on the basis that a physician may have common law authority that is sufficient authority for treating the respondent.

D. Advance Directive

1. Statutory terminology

The statutory terminology is "advance directive". The instrument is sometimes colloquially referred to as an "advance medical directive" or a "living will."

2. Authority

Any competent adult may make an advance directive under Va. Code § 54.1-2983.

3. Purposes

a. Health care

An advance directive authorizes the providing, withholding or withdrawal of health care in the event that the person becomes incapable of making an informed decision on such matters.

b. Agent for making decisions

1) Appointment of agent. The person making an advance directive may include in the directive an appointment of an agent to make health care decisions for the person under circumstances stated in the advance directive in the event that the person should be determined to be incapable of making an informed decision.
2) Admission to mental health facility. The person may specifically provide in the advance directive authority for the appointed agent to consent to

admission and treatment of the person in a mental health facility to the extent that such admission and treatment is otherwise authorized under chapter 8 (Va. Code § 37.2-800 et seq.) of title 37.2.

4. Required formalities

   a. Patient diagnosed terminally ill: A person who has been diagnosed by the attending physician as being in a terminal condition may orally declare an advance directive. The attending physician and two other witnesses must be present for the oral declaration.

   b. Patient not diagnosed terminally ill: A person who has not been so diagnosed as being in a terminal condition must declare the advance directive in writing and must sign the advance directive in the presence of two witnesses. The two witnesses must also sign the advance directive.

5. Format

   Virginia Code § 54.1-2984 provides a suggested form for an advance directive.

6. Revoked advance directive

   An advance directive that has been revoked in accordance with Va. Code § 54.1-2985 is not legally valid.

7. Prohibited authorizations

   Virginia Code § 54.1-2983.3 provides that the following procedures and other actions may not be authorized in or pursuant to an advance directive:

   a. Nontherapeutic sterilization
   b. Abortion
   c. Psychosurgery

E. Other Person Legally Authorized to Consent

1. Authority

   a. Another person is legally authorized under Va. Code § 54.1-2986 to consent to medical or surgical care or treatment for a patient if the prerequisites discussed below are met.

   b. This is informally referred to as "surrogate decision-making."

2. Prerequisites for surrogate decision-making

The prerequisites for surrogate decision-making in the case of a patient are as follows:

a. The attending physician has personally examined the patient.

b. On the basis of the personal examination, the attending physician has made the following three determinations:

1) The patient has a mental illness, intellectual disability, or another mental disorder, or a physical disorder

2) The mental illness, intellectual disability, or other mental disorder, or the physical disorder, precludes communication or impairs judgment

3) As a result, the patient is incapable of making an informed decision about providing, withholding or withdrawing the specific medical treatment or course of treatment that is proposed because the patient is unable to understand the nature, extent or probable consequences of the proposed health care decision or to make a rational evaluation of the risks and benefits of alternatives to that decision

c. The patient has not provided relevant directions in an advance medical directive as follows:

1) The patient has not made an advance medical directive as discussed above

2) If the patient did make an advance medical directive, the patient has not addressed in the advance medical directive the specific course of treatment at issue and has not included in the advance medical directive an appointment of an agent to make health care decisions for the patient (upon the patient becoming incapable of making an informed decision)

3. Person legally authorized to consent

a. Authorization for a specific medical or surgical care or treatment or course of treatment for a patient may be provided by any of the persons in classes as follows, in the specified order of priority, if the physician is not aware of any available, willing and competent person in a higher class:

1) Class 1: A guardian or committee for the patient

2) Class 2: The patient's spouse except when a divorce action has been filed and the divorce is not final

3) Class 3: An adult child of the patient

4) Class 4: A parent of the patient

5) Class 5: An adult brother or sister of the patient

6) Class 6: Any other relative of the patient in the descending order of blood relationship

7) Class 7 (limited to certain cases): In the case of a proposed recommendation that does not involve a withholding or withdrawal of a life-prolonging procedure, any adult who has exhibited special care and concern for the patient and is familiar with the patient's religious beliefs and basic values and any preferences previously expressed by the patient regarding health care, to the extent that they are known. The adult's eligibility must be determined in accordance with a procedure specified in the statute. The adult may not be any of the health care providers currently providing health care for the patient.

b. The attending physician may rely on authorization given by a single member of a class unless the following three prerequisites are met:

1) There are two or more members of the class

2) There is disagreement between or among two or more members of the class

3) Two or more of the disagreeing persons communicate the disagreement to the attending physician

c. In case of a disagreement among persons of the same class (other than class 1 or 2), the attending physician proceeds as follows. If two or more adult children (class 3), two or, somehow, more parents (class 4), two or more adult siblings (class 5), or two or more other relatives of the same order of blood relationship (class 6) inform the attending physician that they disagree as to a particular treatment decision, the attending physician may rely on the authorization of a majority of the reasonably available members of the same class.

4. Prohibited authorizations

The following procedures and other actions may not be authorized by a person otherwise legally authorized to provide consent as discussed above:

a. Nontherapeutic sterilization
b. Abortion
c. Psychosurgery
d. Admission to a facility, as defined in Va. Code § 37.2-100

F. Durable Do Not Resuscitate Order

1. Authority; Definition

   a. Authority: Va. Code § 54.1-2987.1

   b. Definition: Virginia Code § 54.1-2982 defines a Durable Do Not Resuscitate Order as being "a written physician's order issued pursuant to § 54.1-2987.1 to withhold cardiopulmonary resuscitation from a particular patient in the event of cardiac or respiratory arrest."

2. Purpose of order

   The purpose of a Durable Do Not Resuscitate Order is to effectuate a patient's advance expression of preference not to be resuscitated in the event of a cardiac or respiratory arrest.

3. Entry of order; requirements

   a. A physician writes the order.

   b. The physician must have "a bona fide physician/patient relationship as defined in the guidelines of the Board of Medicine."
   c. The order may be entered only with the consent of the patient.

4. Revocation

   A Durable Do Not Resuscitate Order is revoked if the patient later expresses to a treating "health care provider or practitioner the desire to be resuscitated in the event of cardiac or respiratory arrest."

5. Minors and incapacitated person

   In the case of a patient who is a minor or is incapable of making an informed decision, a person authorized to consent on behalf of the patient may:

   a. Request and consent to a Durable Do Not Resuscitate Order for the person;

      AND

   b. Revoke the order and express to a treating health care provider or practitioner the desire for the patient to be resuscitated in the event of a cardiac or respiratory arrest.

6. Period of validity

A Durable Do Not Resuscitate Order remains in effect until revoked.

XIII. MEDICAL ECO: MEDICAL EMERGENCY CUSTODY ORDER

A. Statutory Authority; Forms

1. Statutory authority: Va. Code § 37.2-1103

2. Forms

   a. DC-488, MEDICAL EMERGENCY CUSTODY ORDER, informally referred to as a "medical ECO"

   b. DC-491, MEDICAL EMERGENCY CUSTODY PETITION

B. Purpose

The purpose of a medical ECO is to require, in the case of a gravely injured or ill adult person who is resistant to emergency medical care and to transportation to an emergency care facility and is incapable of making an informed decision, that such person be transported against the person's will to a hospital emergency room for testing, observation or treatment for a brief time in order to provide opportunity for a licensed physician to perform a medical evaluation and provide necessary emergency medical care.

C. Medical ECO in Context

1. General situation

   A medical ECO is used in a medical emergency of an adult person who is in a location that is not a hospital emergency room setting, such as the scene of a motor vehicle accident or the site of a job-related accident.

2. Potential outcomes

   After a respondent is transported to an emergency room for medical attention in accordance with a medical ECO, any of the following actions could result:

   a. Provision or termination of medical observation, care, and treatment in accordance with the respondent's expressed wishes if the respondent becomes capable of making and communicating an informed decision

   b. Observation, care, and treatment pursuant to consent provided by another person legally authorized to consent, as discussed in the section "Medical ECO And TDO In General" above

Issuance of DC-490, MEDICAL EMERGENCY TEMPORARY DETENTION ORDER

c. Issuance of an order by a circuit court, general district court, or special justice under Va. Code § 37.2-1101 authorizing treatment of the respondent

d. Release of the respondent for either of the following reasons:

1) A finding that the respondent does not meet the statutory criteria for medical temporary detention
2) Expiration of the medical ECO

D. Unique Authority of Magistrate

A magistrate is the only judicial officer authorized to issue a medical ECO under Va. Code § 37.2-1103.

E. Case Initiation

1. Not statutorily prescribed

The statute is silent on authorized means for the initiation of an action for a medical ECO. The only requirement is that the magistrate receive "the opinion of a licensed physician", which could be the initiating act.

2. Petition provided

A court form is provided, however, for use in such cases: DC-491, MEDICAL EMERGENCY CUSTODY PETITION.

F. ECO Authorized, Not Required

The statute authorizes, but does not require, a magistrate to issue a medical ECO upon a finding that the statutory criteria are satisfied, unlike Va. Code § 37.2-808.

G. Findings Required

To issue a medical ECO, a magistrate must find that all of the applicable criteria are met, as follows:

1. Location

a. The respondent is at a location other than a hospital emergency room.

b. The respondent is located in a judicial district within the magistrate's magisterial region. (Virginia Code § 37.2-1104, relating to medical TDOs, specifies that the respondent must be "within the court's jurisdiction." This

terminology probably is used in a geographic sense and refers to the localities that the court serves. A magistrate's authority to act for the court in a medical TDO case probably is limited by the same geographic restrictions. Although Va. Code § 37.2-1103, relating to medical ECOs, does not contain the same language, it is advisable for a magistrate to apply the same geographic limitation to medical ECOs.)

2. Age of respondent

   a. The respondent is an adult.

   b. Virginia Code § 16.1-336 defines the term "minor" to mean "a person less than eighteen years of age."

3. Injury or illness

   Criterion: The respondent has an injury or illness.

4. Dire necessity for testing, observation, and treatment

   Criterion: The medical standard of care for the injury or illness indicates that testing, observation, and treatment are necessary to prevent imminent and irreversible harm.

5. Incapacity to provide informed consent

   a. Criterion: As a result of physical injury or illness, the respondent is incapable of making an informed decision regarding obtaining necessary treatment.

   b. Definition: The term "incapable of making an informed decision" is defined in Va. Code § 37.2-1100 to mean "unable to understand the nature, extent, or probable consequences of a proposed treatment or unable to make a rational evaluation of the risks and benefits of the proposed treatment as compared with the risks and benefits of alternatives to the treatment."

   c. Dysphasia, other communication disorder: A person with dysphasia or another communication disorder who is mentally competent and able to communicate shall not be considered incapable of giving informed consent.

6. Refusal of transport for treatment

   Criterion: The respondent has refused transport to obtain the necessary treatment.

7. Intention to resist transport

   Criterion: The respondent has indicated an intention to resist transport for necessary treatment.

8. Likelihood of regaining capacity in time

   Criterion: The respondent is unlikely to become capable of making an informed decision regarding obtaining necessary treatment within the time required for such decision.

9. Unavailability of other authorized decision maker

   Criterion: There is no other person available who is legally authorized to give consent to necessary treatment for the respondent. (*See* the discussion above relating to persons legally authorized to consent.)

10. Consciousness

    a. The respondent is conscious.
    b. This is not a statutory criterion. It is implied by the criteria numbered 6 and 7 above. A respondent would be unable to refuse and resist transport while unconscious.

H. Evidence for Findings

1. Opinion of licensed physician

   A magistrate's findings on two of the criteria must be "[b]ased upon" the opinion of a licensed physician. The two criteria are as follows:

   a. The medical standard of care for the injury or illness indicates that testing, observation, and treatment are necessary to prevent imminent and irreversible harm.

   b. As a result of physical injury or illness, the respondent is incapable of making an informed decision regarding obtaining necessary treatment.

2. Prerequisites for opinion

   Before rendering an opinion on the capacity of the respondent to make an informed decision, the physician must have:

   a. Communicated electronically or personally with the emergency medical services personnel on the scene;

   b. Attempted to communicate electronically or personally with the respondent to obtain information and medical data concerning the cause of the adult person's incapacity; **and**

c. Attempted and failed to obtain consent from the respondent.

I. Standard of Proof

1. No standard specified

   The statute is silent on the standard of proof to be applied.

2. Appropriate standard

   Probable cause is an appropriate standard to apply, as that is the standard specified in Va. Code § 37.2-1104 for issuance of a medical emergency temporary detention order, which is an order that is more intrusive on a person's liberty than is the medical ECO.

J. Evaluator

A licensed physician evaluates the respondent upon arrival of the respondent at the hospital emergency room.

K. Location of Medical Evaluation

The evaluation is performed at the hospital emergency room to which the respondent is transported.

L. Execution by Law Enforcement Agency

1. No statutory guidance

   a. The statute does not specifically provide for service of the order on the respondent. Best practices would indicate service of one copy of the order on the respondent and at least one copy on the physician. The original should be returned to the clerk of court or, if the clerk's office is closed, to the magistrate for forwarding to the court.

   b. The statute is silent on the selection of the law enforcement agency to execute the medical ECO.

   c. Local arrangements need to be made for service of the order. Although the sheriff is authorized to serve civil processes, police or other law enforcement officers also may be available to do it. The medical emergency TDO is a civil process.

   d. Sheriffs and deputy sheriffs are authorized to serve civil process under Va. Code § 8.01-293. The court may direct any process to the sheriff for execution under Va. Code § 8.01-292.

e. The authority of a police officer to execute an ECO is provided in Va. Code § 15.2-1704. Moreover, Va. Code § 8.01-293 states that "any person of age 18 years or older and who is not a party or otherwise interested in the subject matter in controversy" is authorized to serve process. So a police officer, as an adult, may serve the ECO.

2. Designation in ECO

The magistrate issuing a medical ECO designates in the ECO a law enforcement agency to serve the order on the respondent.

3. Statewide authority

Under subsection F of Va. Code § 37.2-1103, a law enforcement officer may go anywhere in Virginia to execute a medical ECO.

M. Time Limits; Extension Authority

1. Executed order

a. Expiration: An executed order expires the earlier of the following:

1) When the licensed physician determines that the respondent has become capable of making and communicating an informed decision

2) Four hours after the order is executed

3) When the evaluation has been performed and a medical temporary detention order is issued under Va. Code § 37.2-1104

4) When the evaluation has been performed and the physician determines that the respondent does not meet the criteria for a medical temporary detention order under Va. Code § 37.2-1104.

b. Extension: A magistrate does not have authority to extend a medical ECO beyond the applicable limit described above.

2. Unexecuted order

a. Void by lapse of time: A medical ECO becomes void four hours after issuance if it is not executed by then.
b. Disposition of void document: The void medical ECO is to be returned 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 (the court to which the order is returnable). Although the statute does not say what the magistrate is to

do with the void medical ECO, it is recommended that the magistrate deliver it to the issuing court.

N. Successive ECOs Not Authorized

1. Prohibition

   After a respondent is taken into custody under a medical ECO, a magistrate may not issue a successive medical emergency custody order for the purpose of extending or reinstating emergency custody in order to provide more time for completing compliance with procedural requirements that are applicable to a person who is in emergency custody under a medical ECO.

2. Opinion of Attorney General

   a. The Attorney General issued an opinion in 1996 that, although specifically addressing temporary detention orders, states the principle on the basis of reasoning that would be equally applicable to medical emergency custody orders. In the opinion of the Attorney General, a magistrate may not issue successive temporary detention orders when statutory actions required as rights of the respondent or for protection of the respondent (e.g., physician examination, attorney employment, witness subpoenas, independent evaluation, preparation of prescreening report) are not completed within the maximum time permitted under the statute. *See* Attorney General Opinion to Morris, dated 07/01/96 (1996, page 166); *magistrate may not issue successive TDOs should all statutorily created rights of temporarily detained person not be met within 48 hours or extended weekend or legal holiday periods*.

   b. In the context of the opinion, it appears that the principle is designed to prevent issuance of a successive order for the purpose of extending the initial order when statutorily required actions have not been completed in time.

3. Inapplicability to unexecuted order. The prohibition does not apply to a medical ECO that lapses, and is therefore void, because it was not executed within four hours after issuance.

O. Emergency Custody Initiated by Law Enforcement

The statute provides no authority for a law enforcement officer to initiate medical emergency custody without prior authorization. This does not limit any other authority that a law enforcement officer may have to assist in obtaining medical testing, observation, and treatment for an injured or ill person at a hospital emergency room.

XIV. MEDICAL TDO: MEDICAL TEMPORARY DETENTION ORDER

A. Statutory Authority; Form

1. Statutory authority: Va. Code § 37.2-1104

2. Forms

   a. DC-490, MEDICAL EMERGENCY TEMPORARY DETENTION ORDER, informally referred to as a "medical TDO"

   b. DC-489, MEDICAL EMERGENCY TEMPORARY DETENTION PETITION

B. Purpose

Due to the legislative changes effective July 1, 2023, there are two types of Medical TDOs. While the Medical TDO allowed in Section A of Va. Code § 37.2-1104 and the Medical TDO allowed in Section B of Va. Code § 37.2-1104 are similar, there are significant differences in the magistrate authority and the type of harm that is to be prevented. Additionally, Section B only applies "[w]hen a mental or physical condition to be treated appears to be a result of intoxication.
The purpose of a medical TDO is to authorize short-term testing, observation, or treatment of a physical or mental condition.

If a Medical TDO is sought under Section A, the magistrate may with the advice of a licensed physician who has attempt to obtain informed consent of the respondent authorize temporary detention of a person after making the appropriate findings. The magistrate must find that there is probable cause to believe 1) that the respondent has a mental or physical condition, 2) that the respondent is incapable of making or communicating an informed decision regarding treatment of a physical or mental condition due to a mental or physical condition, including intoxication, and 3) that the medical standard of care calls for observation, testing or treatment within the next 24 hours to prevent injury, disability, death, or other harm resulting from such mental or physical condition.

If a Medical TDO is sought under Section B, a licensed physician may seek an order requesting temporary detention of the respondent for observation or treatment. The magistrate must find that there is probable cause to believe 1) that respondent has a mental or physical condition that appears to be the result of intoxication, 2) that the respondent's intoxication has rendered the respondent incapable of making or communicating an informed decision regarding treatment, and 3) that the medical standard of care calls for observation, testing or treatment within the next 24 hours to prevent injury, disability, death, or other harm to the respondent or another person resulting from such intoxication.

C. Medical TDO in Context

1. Relationship to medical ECO

   A medical ECO is not a prerequisite for issuance of a medical TDO.

2. Potential outcomes

   Action in accordance with a medical emergency TDO could have any of the following results:

   a. Provision or termination of medical observation, care, and treatment in accordance with the respondent's expressed wishes if the respondent becomes capable of making and communicating an informed decision.

   b. Issuance of an order by a circuit court, general district court, or special justice under Va. Code § 37.2-1101 authorizing treatment of the respondent.

   c. Release upon expiration of the medical TDO.

3. Relationship to mental health ECO

   The existence of a mental health ECO does not prevent a magistrate from issuing a medical TDO provided that the criteria of Va. Code § 37.2-1104 are satisfied.

D. Authority of Magistrate to Issue Medical TDO

1. Under Section A, court is authorized to issue a medical TDO. A magistrate is authorized to issue a medical TDO under Section A only when the court is not available.

2. Under Section B, either a magistrate or the court is authorized to issue a medical TDO.

E. Case Initiation

1. Not statutorily prescribed

   The statute is silent on authorized means for the initiation of an action for a medical TDO. The only requirement in Section A is that the magistrate receive "the opinion of a licensed physician," which could be the initiating act.

   In Section B, the statute reads "a licensed physician … may seek an order from the magistrate or court". There are no further requirements listed in the statute.

2. Petition provided

   A court form is provided, however, for use in such cases: DC-489, MEDICAL EMERGENCY TEMPORARY DETENTION PETITION.

   A Petition is strongly recommended. First, the Petition will enable the magistrate to clearly determine whether the licensed physician is proceeding under Section A or Section B. This is critical as magistrates have contingent authority to act under Section A and concurrent authority under Section B. If the request is under Section A, the magistrate must be presented with evidence that the court is unavailable.

F. TDO Authorized, Not Required

Under Section A, the statute authorizes, but does not require, a magistrate to issue a medical TDO upon a finding that the statutory criteria are satisfied, unlike Va. Code § 37.2-809.

Under Section B, the statute is not explicit, it says only that a "licensed physician … may seek an order from the magistrate or the court". There is no explicit language indicating whether the magistrate "may" or "shall" issue the Medical TDO if all the correct criteria are met.

G. Findings Required

To issue a medical TDO, a magistrate must find that all of the applicable statutory criteria are satisfied, as follows:

1. Location

   The respondent is located in a judicial district within the magistrate's magisterial region. (Virginia Code § 37.2-1104, relating to medical TDOs, specifies that the respondent must be "within the court's jurisdiction." This terminology probably is used in a geographic sense and refers to the localities that the court serves. A magistrate's authority to act for the court in a medical TDO case probably is limited by the same geographic restrictions.)

2. Age of respondent

   a. The respondent is an adult.

b. Virginia Code § 16.1-336 defines the term "minor" to mean "a person less than eighteen years of age."

3. Physical or mental condition

a. Criterion: For Section A, the respondent has a physical or mental condition.

b. Criterion: For Section B, the respondent has a physical or mental condition that appears to be the result of intoxication.

c. Condition discussed. The term "condition" is not defined in Va. Code § 37.2-1104. Before 2015 amendments to Va. Code § 37.2-1104, the term "disorder" was used instead of "condition." "Disorder" is defined under Va. Code § 37.2-1100 to mean "any physical or mental disorder or impairment, whether caused by injury, disease, genetics, or other cause." Therefore, it appears reasonable to interpret a "condition" as being something broader than a "disorder."

d. Mental condition included. Note that the statute covers a mental condition as well as a physical condition. If a mental condition could be classified as a disorder as defined in Va. Code § 37.2-1100, a magistrate would normally proceed under Va. Code § 37.2-808 or Va. Code § 37.2-809, relating to mental health ECOs and TDOs, as the criteria are less restrictive than are the criteria for a medical TDO.

e. Legislation effective as of July 1, 2023 deleted the language stating that intoxication qualifies as a mental or physical condition under this statute.

Section A indicates that intoxication can be the mental of physical condition that makes the respondent incapable of making or communicating informed consent. Under A is just one mental or physical condition that makes the respondent incapable of making or communicating informed consent.

Section B requires that the mental or physical condition to be treated must appear to be the result of intoxication. Section B also requires that the respondent's intoxication must be the reason that the respondent is incapable of making or communicating informed consent.

4. Injury, disability, death, or other harm

Criterion for section A: The medical standard of care calls for testing, observation, or treatment of the condition within the next twenty-four hours to prevent injury, disability, death, or other harm to the person resulting from such mental or physical condition.

Criterion for Section B: The medical standard of care calls for testing,

observation, or treatment of the condition within the next twenty-four hours to prevent injury, disability, death, or other harm to the person or another person resulting from such intoxication.

5. Attempt to obtain informed consent

Criterion: The physician advising the magistrate of the circumstances must have attempted to obtain informed consent from the respondent.

6. Incapacity to provide informed consent

a. Criterion for Section A: As a result of a physical or mental condition, the respondent is incapable of making an informed decision regarding treatment of the condition or is incapable of communicating such a decision.

b. Criterion for Section B: : As a result of the respondent's intoxication, the respondent is incapable of making an informed decision regarding treatment of the condition or is incapable of communicating such a decision.

c. Definition: The term "incapable of making an informed decision" is defined in Va. Code § 37.2-1100 to mean "unable to understand the nature, extent, or probable consequences of a proposed treatment or unable to make a rational evaluation of the risks and benefits of the proposed treatment as compared with the risks and benefits of alternatives to the treatment."

d. Dysphasia, other communication condition: A person with dysphasia or another communication condition, who is mentally competent and able to communicate, shall not be considered incapable of giving informed consent.

H. Evidence

1. Advice of licensed physician

a. For making findings on two of the criteria, the magistrate must consider the advice of the licensed physician who attempted to obtain consent from the respondent.

b. The two criteria are as follows:

1) Medical Standard of Care

For Section A, the medical standard of care calls for testing, observation, or treatment within the next twenty-four hours to prevent injury, disability, death or other harm to the person resulting from such mental or physical condition.

For Section B, the medical standard of care calls for testing, observation, or treatment within the next twenty-four hours to prevent injury, disability, death or other harm to the person or another person resulting from the respondent's intoxication.

2) Lack of Informed Consent

For Section A, as a result of a physical or mental condition, the respondent is incapable of making an informed decision regarding treatment of the condition or is incapable of communicating such a decision. This mental or physical condition includes intoxication.

For Section B, the respondent's intoxication must be the reason rendering the respondent incapable of making an informed decision or incapable of communicating such a decision

2. Magistrate's personal observation or communication

a. In each case in which it is at all practicable to do so, the magistrate may go to the place where the respondent is located and personally observe and speak with the respondent.

b. When personal observation is not practicable, the magistrate should attempt some form of personal contact with the respondent, such as telephone contact.

I. Standard of Proof

Probable cause is the standard of proof specified in the statute.

J. Actions Ordered

A medical TDO orders two courses of actions as follows:

1. Detention by a hospital emergency room or other appropriate facility

2. Testing, observation, or treatment

K. Location of Medical Care

The testing, observation, and treatment is to be provided in a hospital emergency room or other appropriate facility.

L. Service of Order

1. No statutory guidance

   The statute does not specifically provide for service of a medical TDO on the respondent.

2. Recommendation

   Service of one copy of the order on the respondent and at least one copy on the physician is recommended. The original should be returned to the clerk of court or, if the clerk's office is closed, to the magistrate for forwarding to the court.

M. Execution by Law Enforcement Agency

1. Selection of law enforcement agency

   The statute is silent on the selection of the law enforcement agency to execute a medical TDO.

2. No designation in TDO

   a. The DC-490, MEDICAL EMERGENCY TEMPORARY DETENTION ORDER does not provide a place for the magistrate to designate the law enforcement agency that is to serve the order on the respondent.

   b. Local arrangements need to be made for service of the order. Although the sheriff is authorized to serve civil processes, police or other law enforcement officers also may be available to do it. The medical emergency TDO is a civil process.

   c. Sheriffs and deputy sheriffs are authorized to serve civil process under Va. Code § 8.01-293. The court may direct any process to the sheriff for execution under Va. Code § 8.01-292.

   d. The authority of a police officer to execute a TDO is provided in Va. Code § 15.2-1704. Moreover, Va. Code § 8.01-293 states that "any person of age 18 years or older and who is not a party or otherwise interested in the subject matter in controversy" is authorized to serve process. So a police officer, as an adult, may serve the medical TDO.

3. No statewide authority to execute TDO

   The statute does not authorize a law enforcement officer to go outside the officer's jurisdiction to serve a medical TDO somewhere else in Virginia even though subsection F of Va. Code § 37.2-1103 does provide that authority in the case of a medical ECO.

N. Time Limits' Extension Authority

1. Executed order

   a. Expiration: The period of detention under an executed medical TDO expires twenty-four hours after the order is executed.

   b. Extension: The period of detention under an executed medical TDO may be extended by the court as part of an order authorizing treatment under Va. Code § 37.2-1101.

2. Unexecuted order

   The statute is silent regarding the period of continuing validity of a medical emergency TDO that goes unexecuted.

O. Successive TDOs Not Authorized

1. Prohibition

   After a respondent is detained under a medical TDO, a magistrate may not issue a successive medical TDO for the purpose of extending or reinstating detention in order to provide more time for completing compliance with procedural requirements that are applicable to a person who is in detention under a medical TDO.

2. Opinion of Attorney General

   a. The Attorney General issued an opinion in 1996 that, although specifically addressing temporary detention orders, states the principle on the basis of reasoning that would be equally applicable to medical temporary detention orders. In the opinion of the Attorney General, a magistrate may not issue successive temporary detention orders when statutory actions required as rights of the respondent or for protection of the respondent (e.g., physician examination, attorney employment, witness subpoenas, independent evaluation, preparation of prescreening report) are not completed within the maximum time permitted under the statute. *See* Attorney General Opinion to Morris, dated 07/01/96 (1996, page 166); *magistrate may not issue successive TDOs should all statutorily created rights of temporarily detained person not be met within 48 hours or extended weekend or legal holiday periods*.

   b. In the context of the opinion, it appears that the principle is designed to prevent issuance of a successive order for the purpose of extending the initial order when statutorily required actions have not been completed in time.

P. Appeal of a Medical TDO

1. Authority for appeal

   A respondent may appeal a medical emergency TDO to the circuit court under Va. Code § 37.2-1105.

2. Time for filing appeal

   The appeal must be filed within ten days. The statute does not specify whether the limiting period begins upon issuance of the order or upon execution of the order.

3. Action in circuit court

   The circuit court determines the issues *de novo* when a medical emergency TDO order is appealed.

XV. MEDICAL TDO: INMATES

A. Authority; Forms

1. Authority: Va. Code § 53.1-40.1 and Va. Code 53.133.04

2. Forms

   a. DC-490, MEDICAL EMERGENCY TEMPORARY DETENTION ORDER

   b. DC-489, MEDICAL EMERGENCY TEMPORARY DETENTION PETITION

B. Purpose

The purpose of a medical temporary detention order for a person serving a sentence in either a local correctional facility or a State correctional facility is to order temporary detention of the prisoner in a hospital or other health care facility for medical care, including testing, observation, or treatment, when the prisoner is incapable of giving informed consent for the medical care due to a physical or mental condition. Prior to July 1, 2019, this process was only available for inmates in the custody of the Department of Corrections under the provisions of Va. Code 53.1-40.1. With the passage of House Bill 1933 and the creation of Va. Code 53.1-133.04, this process became available for inmates in local correctional facilities as well.

C. Contingent Authority of Magistrate to Issue Medical TDO

1. Court authority

   A court is authorized to issue a medical TDO under this statute.

2. Magistrate authority

   A magistrate is authorized to issue a medical TDO under this statute only when the court is not available.

D. Case Initiation

1. Not statutorily prescribed

   The statute is silent on authorized means for the initiation of an action for a medical TDO for the prisoner. The only requirement is that the magistrate receives "the advice of a licensed physician, psychiatrist, or clinical psychologist acting within his area of expertise," which could be the initiating act.

2. Petition provided

   A court form is provided, for use in such cases: DC-489, MEDICAL EMERGENCY TEMPORARY DETENTION PETITION.

E. Issuance of TDO Required

1. Requirement

   The statute requires the magistrate to issue a medical TDO upon a finding that the statutory criteria are satisfied.

2. Contrast with other medical TDO

   This is different from the general authority for issuance of a medical emergency TDO that is provided in Va. Code § 37.2-1104.

F. Findings Required

To issue a medical TDO for a person serving a sentence in a State or local correctional facility, a magistrate must find that all of the applicable statutory criteria are met, as follows:

1. Location

   The respondent is located in a judicial district within the magistrate's magisterial region. (Virginia Code § 53.1-40.1 and 53.1-133.04 set forth an extensive procedure for a court "of the county or city in which the prisoner is located" to order medical treatment of a prisoner of the Department of Corrections or a local correctional facility. The statutes also set forth a summary, ex parte procedure for that court to issue a medical TDO under certain circumstances. The statutes

authorize a magistrate to issue a medical TDO under those circumstances when the court is not available. Thus, the magistrate acts for the court that could have acted if it had been available. It follows that the magistrate authorized to act would need to be a magistrate who is appointed to serve the same "county or city" as that court serves, specifically, the "county or city in which the prisoner is located.....")

2. Status of respondent

   The respondent is serving a sentence in a State correctional facility or a local correctional facility.

3. Physical or mental condition

   The respondent has a physical or mental condition.

4. Imminence of death, disability, or serious irreversible condition

   a. Twelve-hour rule: The medical standard of care calls for testing, observation, or treatment of the disorder within the next twelve hours to prevent death, disability, or a serious irreversible condition.

   b. Contrast with general authority: This is a different requirement for the standard of care than is provided in Va. Code § 37.2-1104 for issuance of a medical emergency TDO in that it requires a magnitude of urgency of twelve hours instead of twenty-four hours. This statute also differs from Va. Code § 37.2-1104 in that it retains the "serious, irreversible condition" criteria.

5. Attempt to obtain consent

   The physician, psychiatrist, or clinical psychologist advising the magistrate of the circumstances must have attempted to obtain consent from the respondent.

6. Incapacity to provide informed consent

   As a result of physical or mental condition, the respondent is incapable of giving informed consent to treatment.

G. Evidence

1. Advice of licensed physician, psychiatrist, or clinical psychologist

   For making findings on two of the criteria, the magistrate must consider the advice of the licensed physician, psychiatrist, or clinical psychologist who attempted to obtain consent from the respondent.

2. Criteria to which requirement applies the two criteria are as follows:

a. The medical standard of care calls for testing, observation, or treatment of the disorder within the next twelve hours to prevent death, disability, or a serious irreversible condition.

b. As a result of a physical or mental condition, the respondent is incapable of giving informed consent to treatment.

H. Standard of Proof

Probable cause is the standard of proof specified in the statute.

I. Actions Ordered

A medical TDO orders both of the following two courses of action:

1. Temporary admission to a hospital or health care facility

2. Testing, observation, or treatment

J. Time Limits; Extension Authority

1. Executed medical TDO

a. Expiration: The period of detention under an executed medical TDO expires twelve hours after the order is executed.

b. Extension:

1) There is no authority for the magistrate to extend the period of detention under an executed medical TDO

2) The period of detention under an executed medical TDO may be extended by the court as part of an order authorizing treatment under subsection A of Va. Code § 53.1-40.1 or 53.1-133.04.

2. Unexecuted medical TDO

The statutes are silent regarding the period of continuing validity of a medical TDO that goes unexecuted.

K. Successive TDOs Not Authorized

1. Prohibition

After a respondent is detained under a medical TDO, a magistrate may not issue a successive medical TDO for the purpose of extending or reinstating detention in order to provide more time for completing compliance with procedural requirements that are applicable to a person who is in detention under a medical TDO.

2. Opinion of Attorney General

a. The Attorney General issued an opinion in 1996 that, although specifically addressing temporary detention orders, states the principle on the basis of reasoning that would be equally applicable to medical temporary detention orders. In the opinion of the Attorney General, a magistrate may not issue successive temporary detention orders when statutory actions required as rights of the respondent or for protection of the respondent (e.g., physician examination, attorney employment, witness subpoenas, independent evaluation, preparation of prescreening report) are not completed within the maximum time permitted under the statute. *See* Attorney General Opinion to Morris, dated 07/01/96 (1996, page 166); *magistrate may not issue successive TDOs should all statutorily created rights of temporarily detained person not be met within 48 hours or extended weekend or legal holiday periods*.

b. In the context of the opinion, it appears that the principle is designed to prevent issuance of a successive order for the purpose of extending the initial order when statutorily required actions have not been completed in time.

XVI. CRIMES RELATED TO ECO AND TDO

A. Escape

1. Escape from custody of officer serving an ECO or TDO

a. Statute: Va. Code § 37.2-833

b. Process

1) A magistrate should issue a DC-361, Capias: Attachment Of The Body

2) The capias is treated as civil. The Attorney General has opined that this process is civil in nature. *See* Attorney General Opinion to Kidd, dated 08/05/88 (1987-88, page 408); *warrant obtained by sheriff for apprehension of person transported pursuant to order of temporary detention, who escapes from hospital while being examined prior to admission, valid; warrant civil in nature*.

3) Practice note. The magistrate should enter in the body of the capias a directive to the arresting officer to deliver the respondent to the facility

in which the respondent would have been detained on the ECO or TDO. Use the box marked "Other" on the capias to fill in this information.

2. Escape from hospital after being admitted

   a. Statute: Va. Code § 37.2-834

   b. Role of magistrate: None

   c. Process

      1) Issuance of arrest warrant. The director of the hospital issues an arrest warrant directed to any officer authorized to make arrests

         - Each hospital uses its own form of warrant
         - The Department of Behavioral Health and Developmental Services does not have a standard form of warrant for the hospital director to use

      2) No appearance before magistrate. The law enforcement officer executing warrant takes the person directly to the hospital from which the person escaped. There is no appearance before a magistrate.

3. Aiding and abetting escape from hospital officers (class 1 misdemeanor). Statute: Va. Code § 37.2-428

B. Other Statutes Relating to Hospitals

1. Hospital personnel appointed as conservators of the peace. Statute: Va. Code § 37.2-426

2. Mistreatment of consumers in hospital or training centers (class 1 misdemeanor). Statute: Va. Code § 37.2-427

3. Disorderly conduct on grounds and interference with officers (class 1 misdemeanor). Statute: Va. Code § 37.2-429

4. Providing alcohol to consumers at hospital or training center (class 1 misdemeanor). Statute: Va. Code § 37.2-430

5. Contriving or conspiring to maliciously obtain admission of person (class 1 misdemeanor). Statute: Va. Code § 37.2-431.