

Unseen and Untracked: The Risks of Paperless Emergency Custody Orders in Mental Health Crises

Executive Summary

Emergency Custody Orders (ECOs) have served as a tool to address mental and behavioral health crises to ensure individuals receive necessary treatment. However, the current practice of law enforcement officers issuing “Paperless ECOs,” which bypass traditional judicial oversight and documentation requirements, raises significant concerns regarding clarity, accountability, and the rights of individuals in crises.

dLCV recommends that DBHDS and the Virginia General Assembly update state policies and Virginia Code to:

- Create more clarity and accountability around the Paperless ECO process
- Track and collect data on Paperless ECOs

Introduction

In Virginia, Emergency Custody Orders (ECOs) enable law enforcement to place individuals in custody who are experiencing a mental or behavioral crisis if they pose a risk to themselves or others and cannot or will not consent to treatment. Historically, the way an ECO is issued is that law enforcement officers (LEOs) or families petition the local magistrate for an ECO; the magistrate then reviews the case and determines if the individual meets ECO requirements. Once in custody, LEOs must transport the individual to a hospital or other appropriate location to be assessed for treatment by a local Community Service Board (CSB) and have eight hours until the ECO expires and the individual is no longer under custody.

Despite this mechanism for ECOs, Virginia added a second process to the code in 1995 in an attempt to streamline the crisis system in cases where an individual poses a risk to themselves or others and cannot or will not consent to treatment. Virginia code § 37.2-808 allows LEOs to bypass this process, thus taking the individual into custody under a “Paperless emergency custody order.” **A “Paperless ECO” is an order in which an officer makes the on-site determination to take an individual into custody for psychiatric evaluation without prior authorization or any documented legal order.**

LEOs are not required to provide a written explanation for the Paperless ECO after the fact or document the Paperless ECO in any way. This completely undocumented, unexamined, and unsupervised process is ripe for misunderstanding, mismanagement, and abuse.

Evidence & Analysis

dLCV reviewed public reports from the [Joint Legislative Audit & Review Commission \(JLARC\)](#) based on a collection of the Department of Behavioral Health and Developmental Services (DBHDS) data, interpretations of the U.S. Constitution from the National Constitution Center, research on best practices from the [Substance Abuse and Mental Health Services Administration \(SAMHSA\)](#), relevant Virginia code sections ([§ 37.2-808](#) and [§ 37.2-817.2](#)), and existing laws and policies from local counties and other states.

Findings

Timeline, Notification and Protections

Once an ECO is issued, the ECO is only valid for a maximum of eight hours before an individual must be released. However, because Paperless ECOs are enacted without prior authorization or paperwork, it becomes unclear when exactly the eight-hour countdown begins and when the individual must be released. This can lead to individuals being held for longer than the eight-hour period, which violates their rights and can lead to additional trauma.

The confusion around when custody starts and ends may also lead to confusion on the legality of detainment for these individuals. This puts unnecessary liability on LEOs and police departments, which may face allegations of unlawful detainment following a Paperless ECO.

While individuals are required to be notified of their rights under this process, initial survey efforts by dLCV suggest that individuals rarely understand the process they are going through. Additionally, individuals have little recourse if their rights are being violated, as the overwhelming majority of law enforcement precincts in Virginia have internal complaint processes that are not clearly available to the public, and no meaningful state or federal oversight.

Lack of Data and Tracking

There is currently no way to determine when a Paperless ECO was issued, and no data available regarding how many Paperless ECOs were issued. Data of this sort is crucial for many reasons. Sufficient tracking of these processes provides transparency for the individual under the ECO and accountability for the LEOs issuing the ECO. Sufficient data also provides critical insight into how the process can be improved. Without this data, it's difficult for policymakers to identify and enact effective solutions.

Conclusions

During a mental or behavioral health crisis, time is crucial, but so is safety. Paperless ECOs bypass the judicial process to prioritize getting individuals the help they need but at significant risk. Paperless ECOs appear to have led to confused and uninformed consumers who do not

feel safe and empowered in their recovery. Of course, we say “appear” because the lack of data prevents us from ever really knowing the full scope of the issue.

Policy Recommendations

dLCV recommends that DBHDS and the Virginia General Assembly update state policies and Virginia Code to:

- Create more clarity and accountability around the Paperless ECO process, such as a process or electronic “dashboard” that could:
 - Notify supervisors when Paperless ECOs are issued
 - Document incidents with Probable Cause for the Paperless ECO
 - Document Paperless ECOs within 48 hours of issuance
 - Provide documentation to individuals with the start and expiration time of their ECO
 - Provide documentation that individuals have been educated on their rights under an ECO
- Track and collect data on Paperless ECOs to:
 - Identify how Paperless ECOs are being applied and whether there are any major irregularities in application across Virginia’s Law Enforcement
 - Provide appropriate oversight of the processes and procedures
 - Identify strengths and areas of improvement to ensure that the Paperless ECO process is best serving Virginians with disabilities

References

Joint Legislative Audit and Review Commission. Virginia’s State Psychiatric Hospitals. December 11, 2023. <https://jlarc.virginia.gov/pdfs/reports/Rpt584-4.pdf>

Substance Abuse and Mental Health Services Administration. (2020). National guidelines for behavioral health crisis care: Best practice toolkit. U.S. Department of Health and Human Services. <https://www.samhsa.gov/sites/default/files/national-guidelines-for-behavioral-health-crisis-care-02242020.pdf>