



Virginia Mental Health Law Related to Jails

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3 Contexts for Jail Transfers to State Hospital

- “Jail Transfers” – transferred for emergency treatment
 - §19.2-169.6. Emergency Treatment *Prior to Trial*
 - §19.2-176. *Pre-sentence* Emergency Treatment
 - §19.2-177.1. Emergency Treatment *After Sentencing*
- Inpatient Forensic Evaluation
 - §19.2-169.1. Evaluation of Competency to Stand Trial
 - §19.2-169.5. Evaluation of Sanity at the Time of the Offense
- Treatment of Incompetent Defendant
 - §19.2-169.2. Treatment of Incompetent Defendant

History of Civil Commitment

- Virginia and other states began tightening commitment criteria in late 1960s and early 1970s as result of:
 - Civil rights movement protecting marginalized groups, including those with mental illness
 - New constitutional challenges emphasizing treatment and rehabilitation in least restrictive setting

History of Civil Commitment

- By 2008, Virginia had one of the most restrictive civil commitment laws in the country. It was one of only 5 states requiring finding of “imminent danger” to commit an individual.
 - The person presented an *imminent* danger to himself or others as a result of mental illness

Mental Health Law Reform Commission

- Varying interpretations of “imminent danger” criteria throughout Commonwealth
 - Some judges equated “imminent danger” with “immediate danger”; others interpreted that “likely to occur within reasonably short period of time unless appropriate treatment provided”
- Prevented use of involuntary treatment until too late or nearly too late
- Channeled into jails and prisons where mental health issues cannot be adequately addressed



Virginia Tech Review Panel

- Recommended that criteria for involuntary commitment should be modified:
 - To promote more consistent application of the standard and
 - To allow involuntary treatment in a broader range of cases involving severe mental illness

New Commitment Criteria (from §37.2-817C)

The person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future,

- (1) 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
- (2) Suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs

Mental Illness

- Like most state commitment statutes, Virginia's commitment statute defines “mental illness” relatively broadly
 - “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” (§ 37.2-100)
- While any major mental disorder might potentially meet this definition, the illness’s **current** symptoms must be severe enough to meet the above definition.

New Commitment Criteria

1st prong - Dangerousness

The person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future,

- (1) Cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any

1st Prong: Dangerousness

- “Substantial likelihood,” “in the near future,” and “serious physical harm” replace “imminent danger”
 - The term “danger” was considered **too** vague:
 - No indication of how likely the anticipated harm must be
 - No indication of how serious the harm must be in order for commitment to be justified.

“Substantial Likelihood”

- Now, the harm must have a “substantial likelihood” of occurring
 - Not just *any* likelihood, no matter how small
 - Must be *probable*, not simply possible
 - No specific percentage degree of risk or degree of injury is specified (to allow for individual application)
 - Harm doesn’t have to be “more likely than not.”
 - A 20% risk of harm might be considered “substantial enough,” particularly if the severity of threatened harm is high (e.g. following a recent severe suicide attempt or violent assault)

“In the Near Future”

- “In the near future” vs. “Imminent”
 - Previously, some clinical evaluators and legal decision-makers interpreted “imminent” to mean that the feared harm was expected to occur “immediately” or within 24 hours
 - This narrow interpretation of “imminent” was a major target of criticism by clinicians and families of people with mental illness.
 - The Commission and General Assembly concluded that this criterion was unduly (vague) and should be replaced with “in the near future”

“In the Near Future” (cont.)

- “In the near future” vs. “Imminent”
 - The time frame of anticipated harm still isn’t indefinite.
 - Harm believed likely to occur in the more distant future (weeks to months) does not qualify for commitment.
 - Exact specificity (e.g. “in the next 48 hours”) was deemed unworkable.
 - Mental health experts generally acknowledge their inability to predict an individual’s dangerous behavior related to acute mental illness *beyond a period of about a week*.
 - Given this, a reasonable interpretation of “near future” would involve a flexible time frame, generally speaking, of up to about one week, but this isn’t an absolute recommendation; and periods slightly longer than this are not precluded by the statutory language.

“Serious Physical Harm”

- The *severity* of potential harm must be of a “serious physical” nature
 - Not just trivial injury (e.g. superficial scratches) or emotional harm
 - However, the harm doesn’t have to be lethal, as in suicide or homicide

“Recent Behavior” Requirement

*“Substantial likelihood to...cause serious physical harm to himself or others as evidenced by **recent behavior causing, attempting, or threatening harm**”*

- This requirement is designed to anchor the clinical risk assessment in the person’s “recent behavior” and thereby avoid speculation.
- **“Recent”** implies that harmful acts occurring long ago, while providing important information for risk assessment, don’t provide a sufficient evidentiary basis in themselves for civil commitment at the present time.

“Recent Behavior” Requirement

- The terms “causing”, “attempting” and “threatening harm” imply that some overt act or statement suggestive of a harmful act or threat must be documented.
- HOWEVER, **harm itself** need not already have occurred in order for commitment to be justified – an attempt or threat of harm will suffice as evidence.
- The statute doesn’t require specific **intent** of harm (unlike in criminal law).

“Recent Behavior” Requirement

- The revised statute also does not require evidence that the individual has made a specific verbal threat against a particular identifiable individual; a **generalized expression of intention** or an **inclination to cause serious harm to anyone** would be sufficient.
- Any behavior that is “threatening” when seen in the context of the person’s symptoms provides an ample basis for the risk assessment even if it does not amount to a specific verbal threat.

“Other Relevant information, if any”

- Not a substitute for the requirement to meet the primary criteria
- This phrase simply clarifies that “any relevant evidence” may be introduced and used by the decision-maker to support the finding that “there is a substantial likelihood that the person will cause serious physical harm...”
- Examples: Violence during previous episodes of illness, having dropped out of treatment or stopped taking all medications, reappearance of clinical symptoms that in the past have been followed by violent acts



2nd Prong: Lack of Capacity

The person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future,

- (2) Suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs

2nd Prong: Lack of Capacity

BUT...

- Only the 1st prong of the new civil commitment criteria – dangerousness – applies to involuntary admissions from jails under §§ 19.2-169.6, 19.2-176 and 19.2-177.1.
- The lack of capacity 2nd prong does not apply

WSH Admission Criteria

■ Forensic patients

- Ages 18 to 64
- No serious violent crimes of persons (e.g., murder, rape)
- Sentenced to 2 years or less
- Incarcerated over 72 hours (OR negative drug/alcohol screen upon arrest)
- Medical clearance – may take several days

Inpatient Forensic Evaluation

- §19.2-169.1. Evaluation of competency to stand trial
- §19.2-169.5. Evaluation of sanity at the time of the offense

- Forensic evaluations should be performed on an outpatient basis (e.g., in jail, in community if out on bond), if available
- Unless the court specifically finds that
 - Outpatient evaluation services are unavailable or
 - The results of outpatient evaluation indicate that hospitalization is necessary to complete the evaluation
- Inpatient evaluation at state hospital (e.g., WSH, CSH) shall not exceed 30 days

Competency to Stand Trial (CST)

- In Virginia, the components to be addressed include:
 - Capacity to understand the proceedings
 - Ability to assist attorney
 - Need for treatment in the event that the defendant is found incompetent to stand trial

Sanity at the Time of the Offense

- Virginia's legal test:
 - At the time of the offense
 - As a result of mental disease or defect
 - Did not understand the nature, character, and consequences of his/her actions, or
 - Was unable to distinguish right from wrong, or
 - Was unable to resist the impulse to commit the act

Dejarnette v. Commonwealth, 75 Va. 867 (1881); *Price v. Commonwealth*, 228 Va. 452 (1984); *Thompson v. Commonwealth*, 193 Va. 704 (1952)

Inpatient Restoration of Incompetent Defendant

- §19.2-169.2. Treatment of Incompetent Defendant
- If the defendant is found incompetent to stand trial, the court shall order restoration services at:
 - Outpatient facility (if available)
 - State hospital
- Components
 - Psychiatric stabilization – medications may be ordered
 - Legal issues education
 - Psychosocial rehabilitation group therapy
 - Regular re-evaluation of competency to stand trial

Inpatient Restoration of Incompetent Defendant

- 6-month renewable orders *or* until defendant is found to be restored to competency
- For trespassing or disorderly conduct, 45-day orders