

**ADULT RESTORATION SERVICES MANUAL  
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## CHAPTER 1 - INTRODUCTION TO THE RESTORATION MANUAL

### WHY WAS THE MANUAL DEVELOPED?

The Virginia Department of Behavioral Health and Developmental Services (DBHDS) has been asked to provide materials to Community Services Boards (CSBs) and Behavioral Health Authorities (BHAs) that have been court-ordered to provide restoration services to adult clients pursuant to Virginia Code section § 19.2-169.2, Disposition when defendant found incompetent to stand trial. Court orders to the CSBs/BHAs for community-based restoration services are infrequent, but may create a challenge when issued. The purpose of this manual is to provide information for the CSBs/BHAs when they are ordered to provide restoration services to an adult defendant in the community on bond or in the jail.

In response to these requests, the DBHDS Director of Forensic Services, James J. Morris, Ph.D., determined that a manual would be developed to assist CSBs/BHAs who have been court ordered to provide restoration services. The following individuals were responsible for the original development of this manual in March, 2004 and/or the manual revision in July, 2009:

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DBHDS wants to recognize the help of the Mental Health Departments of Florida and Ohio. Their restoration materials were of invaluable help during the development of this manual.

The manual was intentionally written in a manner that would be easy for all parties to understand, that would provide comprehensive information for teaching a defendant about the legal system and their rights in the system, and that would lend itself to 1:1 or small group learning situations.

## CODE OVERVIEW AND COMPETENCY TO STAND TRIAL EVALUATIONS FOR ADULTS

**COMPETENCY EVALUATION** - When an adult defendant with mental illness or mental retardation is charged with a crime and a defense attorney or a Commonwealth's Attorney raises the issue, and the court finds probable cause that the defendant lacks substantial capacity to understand the proceedings against them or to assist their attorney in their own defense, the court shall order a competency evaluation be performed pursuant to the Code of Virginia § 19.2-169.1.

### *Location & duration of competency to stand trial evaluations*

- The Code of Virginia § 19.2-169.1 states, "The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless the court specifically finds that outpatient evaluation services are unavailable or unless the results of outpatient evaluation indicate that hospitalization of the defendant for evaluation on competency is necessary."
- If hospitalization is required, the Code of Virginia § 19.2-169.1 states, "The defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the defendant's competency, but not to exceed thirty days from the date of the admission to the hospital."

### *Qualifications required to perform adult competency to stand trial evaluations*

- The Code of Virginia § 19.2-169.1 defines qualifications for evaluators as, "...the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who is qualified by training and experience in forensic evaluation."
- When asked the definition of "qualified by training and experience", the Department of Behavioral Health and Developmental Services recommends the five-day basic forensic evaluation course offered by the Institute of Law, Psychiatry and Public Policy (ILPPP), University of Virginia, or equivalent training.

### *Payment mechanism for initial competency to stand trial evaluations completed in the community*

- The Code of Virginia § 19.2-175, Compensation of Experts, lists all the evaluations that will be reimbursed by the Supreme Court of Virginia, including competency to stand trial evaluations. The Supreme Court of Virginia is the payment source for the initial competency evaluation. The Supreme Court does not provide reimbursement for follow-up competency evaluations, often called restoration outcome evaluations.

## CODE OVERVIEW AND RESTORATION SERVICES FOR ADULTS

**RESTORATION SERVICES** - If the competency evaluation concludes that the adult defendant is incompetent to stand trial, the court must hold a hearing. If the court finds the individual incompetent to stand trial, the court will order that the defendant receive treatment to restore their competency. This restoration to competency treatment is provided in the community unless the court finds inpatient hospital treatment is required. Hospital-based restoration treatment must be provided in a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal charge. Treatment to restore competency is ordered pursuant to the Code of Virginia § 19.2-169.2.

### *Location of restoration services*

- Upon finding that a defendant is incompetent to stand trial, the Code of Virginia § 19.2-169.2 states, "The court shall order that the defendant receive treatment to restore their competency on an outpatient basis or, if the court specifically finds the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Behavioral Health and Developmental Services."

### *Qualifications for adult restoration service providers*

- The Code does not reference qualifications for the adult restoration provider as it does for juvenile restoration providers. The Code section for juvenile restoration services is listed below as reference only.
- Subsection A of § 16.1-356, the Code of Virginia, does specify that the Commissioner of Behavioral Health and Developmental Services shall approve the training and qualifications for individuals authorized to conduct juvenile competency evaluations and provide restoration services. The training and qualifications for juvenile restoration providers are included *for reference only*. They are:
  - A bachelor's degree in education, nursing or human services- related field and
  - 2 years of post-baccalaureate work experience providing mental health-related services to children and/or adolescents and
  - The work experience has been under the supervision of a person licensed to provide mental health and evaluation services to children and adolescents

### *Payment mechanism for restoration services provided in the community*

- The Code of Virginia does not include compensation for adult restoration services provided through § 19.2-169.2. Unlike the initial competency evaluation, there is no known source of funding specifically designated for adult restoration services (or for follow-up competency evaluations).

### *What is the duration of restoration services?*

- Unless a defendant is charged with certain misdemeanor offenses (see below), a court order to the CSB/BHA to provide restoration services is only valid for six months at a time. If restoration services need to continue after the first six month time period because the court determined the defendant incompetent but restorable in the foreseeable future, a new court order for restoration services should be obtained from the court.
- If a defendant is charged with trespassing, disorderly conduct, or petit larceny, the Code of Virginia § 19.2-169.3( C ) now provides that if the defendant has not been restored after 45 days, "the director of the community services board, behavioral health authority, or the director of the treating inpatient facility, or any of their designees, shall send a report indicating the defendant's status to the court. The report shall also indicate whether the defendant should be released or committed pursuant to § 37.2-817 or certified pursuant to § 37.2-806." Please note that petit larceny is charged as a felony when the defendant is charged with this offense for the third time. If there is any doubt about whether the charge is a felony or misdemeanor, look at the arrest warrant to verify.
- The Code of Virginia § 19.2-169.3 says if the court determines that the defendant is incompetent but restorable in the foreseeable future that the court can order restoration services for up to five years at six-month intervals. The only exception to this is in cases of capital murder, in which there is no limit to the length of restoration services.
- At any time after the initiation of restoration services, the CSB/BHA Director or designee should immediately notify the Court when the defendant is considered either (1) restored to competency or (2) likely to remain incompetent for the foreseeable future by a qualified forensic evaluator.
- The Code also says, "If not dismissed without prejudice at an earlier time, charges against an unrestorable incompetent defendant shall be dismissed on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest for such charges, whichever is sooner."

## CHAPTER 2 - ORIENTATION FOR CSB/BHA RESTORATION TRAINER

### INTRODUCTION TO THE CONCEPT OF COMPETENCY

This section of the manual is intended to provide the CSB/BHA staff person with an understanding of the legal concept, as well as the legal components, of competence to stand trial. By taking the “mystery” out of this legal issue, you will be more comfortable as you undertake provision of outpatient restoration services.

In everyday life, we all make decisions daily about our own and others’ competence. For example, is your 10-year old competent to prepare macaroni and cheese from a box? Is the 13-year old neighbor competent to baby-sit your 5-year old? Is your spouse competent to do the grocery shopping, get everything on the list and stay within budget? The point is that you are already making decisions about others’ competence.

Next, consider that, in general for adults, competency in everyday life is assumed. Why did we laugh at the example of our spouse going grocery shopping? Because adults’ competence to perform such tasks is assumed, the only question is will the other person perform the task the way we want the task performed, that is the “right way.” When we see an adult approach and enter a car, then start it and drive away, we assume they are competent to drive a car. When we hire a professional to perform a service, we assume they are competent to provide that service. It is only when an adult’s performance on a specific task comes into question that the issue of their competence is raised. This same assumption of competence holds true in the law. It is only when there is some question about an adult’s performance that the question of competence to stand trial is raised.

### HISTORY OF THE LEGAL CONCEPT OF COMPETENCY:

**ENGLISH COMMON LAW:** Next, let’s look briefly at the history of competence to stand trial. While the concept of competence to stand trial dates back to at least the 1600s, the first actual statement of the concept in the law was in 1793.

- “[I]f a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with the advise and caution he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense?”

It is clear from this 1793 statement that the law holds the basic underlying premise of competence to stand trial in the moral principal of fairness.

**LANDMARK U.S. SUPREME COURT CASES:** In 1899, the U.S. Supreme Court made competence to stand trial a cornerstone in American law.

- “[I]t is fundamental that an insane person can neither plead to an arraignment, be subjected to trial, or, after a trial, receive judgment, or, after judgment, undergo punishment; ... It is not ‘due process of law’ to subject an insane person to trial upon an indictment involving liberty or life.”

Why is it then that the 1960 U.S. Supreme Court case entitled Dusky v. United States is considered to be a landmark legal decision? The concept is not new, even in American law. Simply stated, Dusky is a landmark case because it is *the first time the law defines competence to stand trial*. The U.S. Supreme Court stated,

“The test must be whether he [the defendant] has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as a factual understanding of proceedings against him.”

It is important to note, however, that the law fails to define, in Dusky or elsewhere, what the terms “reasonable degree of rational understanding” or “a rational as well as factual understanding” mean. The only assistance the law gives to defining these terms is in a subsequent U.S. District Court case from Missouri, entitled Wieter v. Settle (1961), where the Court lists seven guidelines. In Wieter the Court asks whether the defendant has the:

- “[M]ental capabilities to appreciate his presence in relation to time, place, and things, [and whether the defendant’s] elementary processes are such that he apprehends [understands] that
  - ❑ he is in a Court of justice, charged with a criminal offense;
  - ❑ there is a Judge on the Bench;
  - ❑ a Prosecutor is present who will try to convict him of a criminal charge;
  - ❑ he has a lawyer who will undertake to defend him against that charge;
  - ❑ he will be expected to tell his lawyer the circumstances, to the best of his mental ability, (whether colored or not by mental aberration) and the facts surrounding him at the time and place;
  - ❑ there is or will be a jury present to pass upon evidence adduced as to his guilt or innocence of such charges; and
  - ❑ he has memory sufficient to relate those things in his own personal manner.”

As you will recall, the law assumes an adult is competent to stand trial, and it is not until there are observed deficits or failings in the defendant’s performance that their competency comes into question. There are two conditions that must exist in order to “raise the question” and request the Court order a competency evaluation. First, U.S. Supreme Court cases subsequent to Dusky and Wieter require that there be “a bona fida doubt” about the defendant’s competency. Second, state laws require that the

defendant's deficits be the result of "a mental disease or defect" (or similar language).

Note that "a mental disease or defect" refers only to a clinical diagnosis on Axis I of a major mental illness, or a diagnosis on Axis II of mental retardation, or a substantial organic impairment such as dementia.

### **CURRENT LEGAL AND PROFESSIONAL CRITERIA FOR COMPETENCY**

Virginia Code § 19.2-169.1 states that a competency evaluation shall be performed when "... the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense."

To further explain the above legal standard, the professional standards for competency have been summarized below:

- Defendant's understanding of the seriousness of the charges and likely consequences
- Defendant's ability to participate in the trial and ability to understand the court proceedings
- Defendant's ability to assist his attorney
- Defendant's ability to maintain the dignity of the courtroom

### **PRACTICAL TIPS**

- The defendant who has been found incompetent to stand trial and is in need of restoration services on an outpatient basis is probably an individual with limited cognitive abilities or an individual whose mental illness may be interfering with their normal thought processes. The CSB/BHA staff are already trained and experienced in working with people with mental illness or mental retardation.
- Restoration services include educational information and training and/or clinical intervention including medications. The clinical skills are the same that are used with other CSB/BHA clients. The primary difference is that restoration services include legal information that is to be taught and assessed.
- Before restoration services are initiated by the CSB/BHA, make sure that you have a copy of the current restoration court order and that it is written for the provision of restoration services pursuant to §19.2-169.2. Note the date of the Court order and remember that the court order is valid for six (6) months from the date that the defendant is "admitted to the treating facility". See Virginia Code § 19.2-169.3A & B for reference. Note that there are forty-five (45) day limits placed on restoration orders for certain misdemeanor charges - see § 19.2-169.3C for specific charges.
- Before restoration services are initiated by the CSB/BHA, obtain a copy of the competency to stand trial evaluation for the defendant. Make sure that the



restoration trainer assigned to work with the defendant has a copy of the competency evaluation. It will assist your staff in a number of ways, including providing some background information about the defendant, information about the charges and possibly the incident that led to those charges, and most importantly, it should provide a description of the defendant's areas of impairment in their competency abilities. In the competency evaluation, look for the specific deficit(s) that precludes this defendant from being competent, e.g., psychosis, delusional disorder, mental retardation, or organic brain impairment.

The restoration trainer may want to contact the competency evaluator directly to review and/or clarify the areas of deficiencies in the defendant's competency abilities.

- If not provided with the competency evaluation or restoration court order, it may be helpful to obtain copies of the charges/arrest warrant(s), the police report and witness/victim statements from the Court.
- The defendant ordered for restoration services will be in jail or out on bond. If the defendant is in jail (and cannot be transported to the CSB/BHA office), inquire about the jail's requirements for reserving a professional visitation room (sometimes called a contact visitation room) with a table.

### **GETTING STARTED**

- Schedule a time and meet with your client, the defendant. Try to arrange a setting conducive to learning.
- Explain your involvement to your client, the defendant.
- Use your clinical skills just as you would in any treatment setting – the only difference is that you are teaching legal concepts as well as assessing and treating the defendant.
- Assess the defendant's specific deficit(s) and then tailor your restoration service plan to the specific deficit(s) of the defendant. You should review the original competency evaluation for reference and you may want to use the pretest to verify the current deficit(s) or problem area(s). The pretest is provided at the end of this chapter.
- The CSB/BHA restoration trainer needs to keep the following time frames in mind:
  - On a weekly basis, record progress and note continuing problem areas.
  - On a monthly basis, record progress and project training goals for the next three months or less frequently for defendants with misdemeanor charges of trespassing, disorderly conduct or petit larceny.

For the defendant who does require the full 6 months (or longer if a new restoration court order is issued) of restoration services, notify the CSB/BHA director (or designee) of the defendant's status one month in advance of the expiration of the current court order. Defendants with certain misdemeanor offenses (trespassing, disorderly conduct, petit larceny) receive a maximum of 45 days for restoration; therefore, notification of the CSB/BHA director (or designee) will need to occur at the beginning of the restoration process to ensure that a timely follow-up restoration evaluation is arranged.

- Not all defendants require the full 6 months for restoration services (or the full 45 days for certain misdemeanor defendants). At any point after the initiation of restoration services that the CSB/BHA restoration trainer believes the defendant (1) has been restored to competence or (2) is likely to remain incompetent for the foreseeable future, the restoration trainer should notify the CSB/BHA director (or designee) so that a follow-up competency evaluation can be arranged.
- The DBHDS Forensic Office staff and the forensic coordinators at the state hospitals are available for consultation to CSB/BHA staff assigned to provide restoration services (see Appendix).

#### **CONFIDENTIALITY:**

- At no time should the CSB/BHA restoration trainer repeat any statements, either orally or in agency records, from the defendant about the alleged offenses. The CSB/BHA restoration trainer should not indicate, orally or in writing, whether the defendant is guilty or not guilty or whether the defendant plans to plead guilty or not guilty. Virginia Code permits no specificity – “No statements of the defendant relating to the time period of the alleged offense shall be included...”
- Other State and ethical reporting requirements (e.g., duty to warn, alleged sexual abuse, etc.) still apply to the restoration trainer.

## PRE-TEST FOR THE DEFENDANT

1. What are your charges? Explain what these charges mean in your own words.
2. How much time (sentence) could you get? The most time? The least time?
3. Tell me what is the defense attorney's job.
4. Tell me what is the commonwealth attorney's (or prosecutor's) job.
5. Tell me what is the judge's job.
6. Tell me how you should behave in court during your trial.
7. What are the three or four ways to plea and explain each?
  - Not guilty
  - Guilty
  - NGRI (not guilty by reason of insanity)
  - No contest (Nolo Contendere) – optional answer
8. What is a plea bargain and what rights do you give up if you accept a plea bargain?
9. What is a jury?
10. If you do not understand what is happening in the courtroom, what should you do?
11. Can your defense attorney tell anyone what you have said (to your attorney) without your permission?
12. Do you know what your legal rights are? Can you name some?

## CHAPTER 3 -RESTORATION SERVICES TRAINING COMPONENTS

**Note to the restoration trainer: The following nine areas are presented in a sequential order that may be helpful to follow when providing restoration training with the defendant. Each of these nine areas is written in language designed for training the defendant.**

### **(1) PURPOSE OF RESTORATION TRAINING – AN EXPLANATION FOR THE DEFENDANT**

You are here because you have been accused of breaking the law. You have already been arrested and have an attorney. You are waiting to go back to court with your attorney who will help to defend you. Soon after you were arrested, you may remember going before the judge. At that time, it was recommended that you be evaluated to determine whether you understood the charges against you and what could happen to you if you are convicted of these charges. The results of the evaluation showed that you needed help in learning more about the court process in order to help your attorney. We will spend our time trying to teach you things that you will need to know to help your attorney in court.

NOTE to the restoration trainer: After you have provided an explanation for the defendant and established rapport, it might be helpful to administer the pre-test provided in the previous chapter.

### **(2) LEGAL RIGHTS OF THE DEFENDANT**

Even though you have been arrested, you still have many rights. The United States Constitution grants these rights to you. Violations of your Constitutional rights can be appealed up to the U.S. Supreme Court. It is important to know your rights so that you can protect yourself when necessary. These rights include the following:

- You have the right to remain silent when you are arrested and afterwards. This means that you do not have to answer questions or explain anything unless you have your attorney present.
- You have the right to an attorney. If you cannot afford one, the Court will appoint an attorney for you. Work with your attorney and don't make their job harder by trying to handle your legal affairs on your own.
- You have the right to face your accuser. You should know who has accused you of the crime and the accuser will be at the trial. You have the right to ask your accuser questions through your attorney.
- You have the right to be present at your trial. You cannot be tried unless you are in the courtroom. If you cannot behave appropriately in the courtroom, the Judge may order that you be restrained.
- You have the right to a public trial. Anyone can come to your trial, including the press. This right is to protect you from the court doing anything unfair to you behind closed doors.

- You have the right to a jury trial. This means that 12 people must be selected that do not know you or anything about you and should decide about your charges fairly.
- You have the right to a speedy trial. When you were referred for restoration services, your trial was put on hold. Your defense attorney knows the rules about speedy trials.
- You have the right to know why you were arrested.
- You have the right to understand the possible pleas.
- You have the right to know what sentence that you could be given if you are convicted.

It is important to know your rights and to ask questions if you are unsure about your rights. Tell me what some of your rights are.

### **(3) CHARGES, PENALTIES AND EVIDENCE**

**NOTE: The restoration trainer should pay close attention to paranoid thinking that interferes with the defendant's ability to effectively communicate with their attorney.**

You have been charged with a crime because a law enforcement officer reported that you broke a law. It is important that you understand the charges against you. You will hear about your charges many times. The Judge will tell you the formal name of your charges in Court and will read the brief legal description of your charges.

You need to know 1) the formal name of your charges, 2) the brief legal description of your charges, and 3) what they say you did that caused you to receive these charges. Even though you may not agree with the charges, you need to know what they are and the seriousness of your charges. You need to be able to describe your charge to your attorney in a clear, coherent manner.

There are 2 types of charges:

- Felony – This is a crime that is considered serious and can result in a long prison sentence and/or a large fine, e.g., more than \$1000 fine and more than 1 year in prison.
- Misdemeanor – This is a crime that is not as serious as a felony and can result in a shorter jail sentence, smaller fine, or another less serious consequence, e.g., up to a \$1000 fine and/or up to a year in jail.

Judges have guidelines for penalties (length of jail/prison time, fines, etc.) when you are found guilty of the charges. Although the Judge does not have to stay within these guidelines, he/she usually does. Your attorney can tell you what the penalty guidelines are for your charges.

It is also important that you understand how much evidence there is against you. You may make a different decision about whether you will plead guilty or not guilty

depending on the evidence against you. Some of the evidence comes from the *Criminal Complaint*, which gives a brief description from a police officer or other witness. Also, ask your attorney to review the police report and any witness statements with you if they are available.

In summary, do you know the following?

- What is the formal name(s) of your charge(s)?
- Can you briefly describe your charge(s)?
- What did the police or witness say that you did that caused you to receive these charge(s)?
- Is your charge a felony or misdemeanor?
- What evidence is likely to be presented against you?
- What questions do you need to ask your attorney?

#### **(4) PLEAS AND PLEA BARGAINS**

**PLEAS:** A plea is the answer you (and your lawyer) give to the charges made against you. There are four different ways to plead: guilty, not guilty, no contest, or not guilty by reason of insanity.

- **Not Guilty:** A plea of not guilty means you say that you did not do the crime. When you plead not guilty, you go to trial and have evidence presented against you and for you. You retain all your legal rights.
- **Guilty:** A plea of guilty means that you admit to doing the crime. You will have the conviction on your record if you plead guilty. You give up certain rights such as the right to a trial and the right to confront witnesses in court.
- **No Contest:** A plea of no contest (*Nolo Contendere*) means you say there is evidence you did the crime, but you are not admitting you did it. In other words, you are not fighting the charge, and you will take whatever sentence the court gives you and not ask for a trial. You give up some rights in order to get a speedy decision and a lighter sentence, which you will know about and agree to ahead of time. The outcome for you is similar to a plea bargain except you have a no contest plea instead of a guilty plea to the crime(s) on your record.
- **Not Guilty by Reason of Insanity:** A plea of Not Guilty by Reason of Insanity means that you admit you did the crime, but you are asking that you not be put in jail and not be held criminally responsible because you have mental retardation or were mentally ill at the time.

You are telling the court that at the time of the crime your mental illness or mental retardation caused you to act in a way that you didn't understand was wrong. This plea cannot be forced upon you. You and your attorney must decide together if

this is how you want to defend yourself. In admitting you did the crime, you must admit you were mentally ill or have mental retardation.

A psychiatrist or psychologist will have to examine you and will tell the court about your crime and your mental illness or mental retardation. If the Judge or jury believes that, due to your mental illness or mental retardation, you did not know that your behavior was wrong, you could be found not guilty by reason of insanity. If you are found not guilty by reason of insanity, you will be sent to a state psychiatric hospital for an indeterminate period of time. If the Judge or jury believes you understood that your behavior was wrong, you will be found guilty of the charge(s).

**Plea Bargain:** A plea bargain is when your lawyer, the Commonwealth's Attorney (prosecutor) and the Judge allow you to plead guilty to a less serious charge. The Judge and Commonwealth's Attorney avoid the time and expense of a trial. In exchange, you will usually get a lighter sentence. You must agree to a plea bargain and the Judge must approve it. People usually take a plea bargain because they believe the Commonwealth's Attorney has enough evidence to convict them (be found guilty) in court. You may accept a plea bargain because:

- 1) You might get a lighter sentence;
- 2) You might have some of the charges dropped; or,
- 3) It takes away some of the uncertainty about what will happen to you.

If you take a plea bargain, you give up your rights to a trial and to appeal the conviction. Thus, you don't get to tell your side or challenge the people who might speak against you. You return to court to hear the Judge sentence you (e.g., jail time, fines, probation, etc).

### **Questions for Pleas and Plea Bargains (Correct answer has an asterisk)**

1. When you plead guilty, you give up your right to a trial.  
True\*          False
2. Pleading No Contest means you are going to fight the charges.  
True          False\*
3. List the four pleas you can make to a charge in court.
  - Guilty
  - Not guilty
  - No contest
  - Not guilty by reason of insanity

4. Which plea will guarantee me I will not serve any time?
  - Guilty
  - Not Guilty
  - No Contest
  - Not Guilty by Reason of Insanity
  - None of the above\*
  
5. Which pleas will result in a trial?
  - Guilty
  - Not Guilty
  - No Contest
  - Not Guilty by Reason of Insanity
  - 2 and 4\*
  
6. If you accept a plea bargain, who has to agree to the deal?
  - Judge
  - Commonwealth's Attorney (prosecutor)
  - Your attorney
  - You (defendant)
  - All of the above\*
  
7. What might you gain by accepting a plea bargain?
  - All charges are dropped
  - A shorter sentence
  - Less serious charges
  - Number 2 and 3 \*
  
8. What right do you not give up in a plea bargain?
  - Right to a trial
  - Right to an attorney\*
  - Right to appeal the conviction
  - Right to confront your accusers

#### **(5) CRIMINAL PENALTIES & PLEA OUTCOMES**

**CRIMINAL PENALTIES:** It is very important to understand all the possible criminal penalties. They are listed below:

**Jail or Prison:** You could be locked up in a jail or prison. Whether you serve your sentence in a jail or in a prison depends on the seriousness of the crime (e.g., felony or misdemeanor), the length of your sentence and your criminal history.

If you are found guilty of a misdemeanor, a less serious crime, it can result in jail sentence ranging from one day to twelve months.



If you are found guilty of a felony, a more serious crime, it can result in a prison sentence ranging from one year to life.

**Suspended sentence:** A suspended sentence is a jail sentence that the Judge gives you, but, instead of actually spending your time in jail, you can serve that amount of time on probation. If you successfully complete probation, then your charge will be dismissed. However, if you do not successfully complete probation, then you will be required to serve any remaining time on your sentence in jail. For example, if you get a six month suspended sentence for assault, you will have to serve six months in jail if you don't follow all the rules of probation. You could go to jail if the probation officer tells the Judge you are not following the rules.

**Probation:** This means you don't have to go to jail, but you must live by some rules decided by the Judge. You must meet regularly (usually either weekly or monthly) with a probation officer who will make sure you follow the rules that the Court gave you. Typical rules of probation include things like: 1) no drug or alcohol use; 2) comply with mental health and/or substance abuse treatment; 3) taking all medicine prescribed by your doctor; and 4) living in a certain place or with certain people. You may remain on probation for the entire time you would otherwise have had to serve in jail.

**Treatment:** Mental health and/or substance abuse treatment may be ordered by the Judge as part of your sentence.

You may be required to participate in counseling and possibly to take medication if you are found guilty. Treatment could occur in jail or prison and/or as part of probation when you return home. Treatment is usually a part of the probation rules. You give up some of your rights to privacy (confidentiality) about your treatment, because your therapist must tell the probation officer and/or Judge about how often you come to treatment and if they believe the treatment is helping you.

If you are found not guilty by reason of insanity, you will be sent to a state psychiatric hospital for treatment. You do not go home. At the state hospital, staff will treat your mental illness or mental retardation. You cannot go home until the Judge agrees that you will be safe. The length of treatment could last from several months to many years.

**PLEA OUTCOMES:** It is very important to understand all the pleas and their possible outcomes. They are listed below:

If you plead **Not Guilty**, you go to trial and exercise all your legal rights.

These are the possible outcomes of the trial:

- Found not guilty – sent home
- Found guilty – the conviction goes on your record and you are sentenced to:
  - Jail – for a misdemeanor (1 day to 12 months)
  - Prison – for a felony (1 year to life)
  - Probation – for all or part of the time sentenced to jail or prison

If you plead **Guilty**, you don't have a trial and you give up some rights. You just get sentenced and the conviction goes on your record. People often plead guilty as part of a PLEA BARGAIN. These are the possible outcomes of pleading guilty:

- Sentenced to Jail for a misdemeanor (1 day to 12 months)
- Sentenced to Prison for a felony (1 year to life)
- Given Probation – for all or part of the time sentenced to jail or prison

If you plead **Not Guilty by Reason of Insanity**, you go to trial and you can be found Guilty *or* Not Guilty by Reason of Insanity.

a.) If you are found guilty, you can be sentenced to:

- Jail (as above)
- Prison (as above)
- Probation (as above)

b.) If you are found Not Guilty by Reason of Insanity, you are sentenced to treatment at a state psychiatric hospital. You cannot leave until your Judge says you are safe. The amount of time you spend in the hospital may be longer than if you were convicted of the crime. You may remain in court ordered and supervised treatment (like probation) even after you leave the hospital. This supervised treatment is called conditional release. The Judge determines the length of time that you spend in the hospital and on conditional release.

### **Questions for Criminal Penalties & Plea Outcomes (Correct answer has an asterisk)**

1. If you plead not guilty, which of the following might happen in court?

- You are found not guilty
- You are found guilty and sentenced to jail
- You are found guilty and placed on probation
- All of the above\*

2. If you are found Not Guilty by Reason of Insanity, it means:

- You knew what you were doing
- The judge lets you go home
- You have mental illness or mental retardation and did not know that your behavior was wrong\*
- The judge believed there was not enough evidence to convict you

3. If you plead Not Guilty by Reason of Insanity, which of the following outcomes are possible?

- Found guilty and go to jail
- Found not guilty by reason of insanity and sent to a hospital
- Found not guilty and sent home
- Found not guilty by reason of insanity and sent home
- 1 and 2\*

4. What charge could result in the longest sentence?
  - Misdemeanor
  - Felony\*
5. What are the possible penalties if you are found guilty of your charge?
6. You would serve a six-month sentence in prison.  
True            False\*
7. What might the judge do if you stop going to therapy when therapy is part of your probation?
  - Put me in jail\*
  - The judge wouldn't care because I would tell the judge I'm better.
  - The judge wouldn't know because my therapy is confidential (private).
  - The judge would find me a better therapist

## (6) COURTROOM PERSONNEL

It is important that you understand the roles of the different people in the legal process and in the courtroom. Several people are needed in a trial. Their titles and descriptions of their role in the trial process are listed below:

**Defendant:** You are the defendant. You have been accused of a crime and your situation will be the focus of the court proceedings.

**Judge:** The Judge's job is to make sure that the rules (of law) are followed so that the trial is fair. The Judge will decide what evidence is allowed and what testimony the witnesses can provide. The Judge sits in an elevated area at the front of the courtroom, which is a symbol of authority. If there is no jury, the Judge decides whether a person is guilty or not guilty. A Judge decides the sentence for a person who has been found guilty.

There are two types of attorneys in the courtroom. The two attorneys have opposing goals.

**Defense attorney:** The defense attorney is for you; this is your attorney. Your attorney's job is to get you the best possible outcome in your criminal case. Your attorney will talk with you about the crime and will look for witnesses and evidence that support your case. Your attorney cannot tell anyone else what you say (this is called attorney-client privilege). If you cannot afford an attorney, the Court will provide a Court-appointed attorney or a Public Defender, who is an attorney paid for by the Commonwealth.

**Commonwealth's Attorney:** The Commonwealth's Attorney (prosecutor) is against you. This means that he/she is trying to convict you of the crime with which you have

been charged. The Commonwealth's Attorney works with law enforcement officers to present evidence against you in order to show that you committed the crime.

**Jury:** If you decide to have a jury trial, a group of twelve impartial people from the community will listen to your case throughout the trial. At the end of the trial, the jurors will decide if you are guilty or not guilty. Their decision must be unanimous for you to be found guilty. They may also be asked to provide a recommendation for punishment if you are found guilty.

**Witness:** Witnesses have information related to the crime. They are subpoenaed to Court, sworn to tell the truth, and seated on the witness stand during the court proceedings. The witnesses cannot make any statements; they can only answer the questions that the attorneys ask them. They may have statements that support the Commonwealth Attorney's case or they may have statements that support your case. Witnesses provide testimony (sworn statements under oath) and both attorneys ask them questions in order to clarify the information they are providing.

**Bailiff (also known as Court Security):** A bailiff or court security officer is a law enforcement officer who stands near the front of the courtroom and assures that there is order in the courtroom. The bailiff may introduce the judge, keep people quiet, and bring you from the jail to the courtroom.

**Court clerk and Court Stenographer:** These persons assist the trial process by swearing in witnesses and recording all that is said during the legal proceedings.

#### **Questions for Courtroom Personnel:**

- Who is the defendant?
- What is the job of the Judge?
- What is the job of the jury?
- What is the job of a witness?
- How is the role of the Commonwealth's Attorney different from the Defense Attorney?

There is a diagram at the end of this chapter for the defendant. The defendant should be able to (1) explain where each of the courtroom personnel sits in the courtroom and (2) explain the role of each of the courtroom personnel.

### **(7) ASSISTING YOUR DEFENSE ATTORNEY**

Your defense attorney is supposed to defend you against the charges. You should know some of the defensive strategies a defense attorney may use outside as well as inside the courtroom and what you could do to assist your defense attorney in developing your defense. This includes knowing what to tell your attorney and how your appearance and behavior can help or hurt your case.

Your defense attorney (or lawyer) is a person trained to assist people with legal problems and represents you before the court. In order to practice law, an attorney usually spends four years in college, three years in law school and must pass the bar examination. The bar examination is a test of a person's knowledge of law and it is very difficult.

**Who is the Defense Attorney?** The Defense Attorney is your attorney. A court-appointed attorney (sometimes called a Public Defender) is assigned if you cannot afford an attorney. Your attorney is on your side whether you are innocent or guilty. Your attorney is supposed to explain to you all the things that can happen to you and explain to you all of your possible choices. Your attorney is also supposed to answer all of your questions about what is happening in court. Your attorney is getting paid to give you legal advice.

**What is Legal Advice?** When an attorney gives you advice about your case, they are sharing all the experiences gained in their years of legal study and training, as well as knowledge gained from searching the law books about the laws affecting your legal problem. Your attorney has the training and resources you do not so it is to your advantage to listen to what your attorney says. Your attorney should also tell you what the best thing would be for you to do if you have any choices or what you should tell the judge. Besides telling you what your best choices are, your attorney should explain why a certain choice is the best one. For example, your attorney will advise you about how you should plead, whether you should have a trial by a jury or Judge and whether or not you should testify. Of course, what you decide to do after you listen to your attorney's advice is up to you.

**What is your attorney's responsibility?** Your attorney has two main responsibilities:

1. The first is to protect your rights by making sure everything that happens before and during your trial is legal. For example, your attorney will make sure that no one takes advantage of you by doing things like trying to make you talk without a attorney present or by allowing the Commonwealth's Attorney (prosecution) to say things about you in court that are not true.

Before you go to court, your attorney will try to help you by asking the Judge to release you from jail on bail or on bond until your trial. Your attorney will try to get information about the evidence the Commonwealth Attorney has against you. Your attorney may also try to get the Commonwealth Attorney to agree to a plea bargain.

2. The second job of your attorney is to plan an effective defense strategy in order to defend you against the crime(s) you're charged with. There are several ways your attorney does this:

- Your attorney will try to show the Judge and the jury that you are not guilty of the charge(s) against you. Your attorney does this by cross-examining the

Commonwealth's witnesses and trying to find holes in their story or bringing out evidence from a witness that can help you.

- Your attorney can also call new witnesses that the Commonwealth Attorney didn't call and ask questions to show anything that might help you. There are three kinds of witnesses your attorney might call:
  - A character witness is someone who will tell the Judge about the kind of person you are.
  - An expert witness is someone who will tell the court what kind of help you need or give the Judge and jury specific information about a particular aspect of your case.
  - A material/fact witness is someone who will testify about facts of your case. For example, a fact witness might be someone who knew you weren't present when the crime happened.
- If you are found guilty, your attorney's job is to try to get you as little a sentence (time) or punishment as possible. Your attorney may do this by talking to the Commonwealth Attorney about a plea bargain. Your attorney will also try to convince the Judge to go light on you (i.e., to give you the least amount of time possible.)

**What is your role as the defendant? Your role as the defendant is to cooperate with your attorney and help your attorney defend you against the charges. There are several ways you can help your attorney defend you.**

- When you are in the courtroom (unless you are on the witness stand testifying), your attorney will speak for you. If you want something said in the courtroom, quietly tell your attorney and let your attorney say it for you.
- Since your attorney's job is to plan a defense strategy, it is very important that you talk to your attorney. You should tell your attorney the whole truth so they can decide the best way to defend you. What you tell your attorney is confidential. Your attorney cannot tell anyone else what you tell him or her. What you say to your attorney can't be used against you. If you don't tell your attorney the truth, your attorney may decide to use a defense strategy that hurts rather than helps you. For example, Joe lies and tells his attorney that he's not guilty of breaking and entering and that he was nowhere near the scene of the crime. During the trial, the Commonwealth Attorney shows evidence that Joe's fingerprints and footprint were found at the scene of the crime. Because Joe didn't tell his attorney he was there, his attorney has no defense prepared (i.e., no way to show that Joe's fingerprints and footprint were there for another reason). Because of this evidence, Joe will probably be convicted and will go to prison.
- Be sure to tell your attorney everything that happened that led up to you being arrested. Try to remember everything you can. Try to remember if there were any witnesses.

## Questions for Assisting your Defense Attorney:

1. Who is your defense attorney?
2. What do you think of your defense attorney?
3. What is the job of your defense attorney?
4. Why is a criminal trial called an adversarial proceeding?
5. Does a defendant have to testify?
6. What is the role of the defendant? How does the defendant help their attorney?

## (8) PROCEEDINGS OF A TRIAL

The criminal proceedings follow a specific order.

**Arraignment:** Arraignment is a court appearance where you hear the charge and are asked whether you will enter a plea of guilty or not guilty to that charge. If you refuse to enter a plea, the court will enter a not guilty plea for you and order your case to go to trial.

**Pre-trial hearings:** Your defense attorney may make certain motions or requests, such as a mental health evaluation. You decide, with assistance of your attorney, whether you want to go to trial or accept a plea bargain.

**Trial by jury:** You are entitled to a trial by jury if you have been charged with any crime that could result in a jail or prison sentence and you are entering a plea of not guilty. If you, the Commonwealth's Attorney and the Judge agree, you may choose to have a non-jury trial where the Judge hears and decides your case (sometimes called a bench trial).

**Jury selection:** The Constitution of the United States allows an accused person the right to a speedy and public trial by an impartial jury. You may choose a trial by Judge instead of a trial by jury. Trial jurors are selected from a list called the jury panel. The jurors are questioned and then approved by the Judge. Then the defense attorney and the Commonwealth's Attorney can question each juror and sometimes excuse a juror from serving.

**Opening statements:** The Commonwealth's Attorney has to prove you are guilty beyond a reasonable doubt. The Commonwealth's Attorney makes the first opening statement where he/she explain to the jury how they plan to prove their case against you. Then your defense attorney makes an opening statement.

**Commonwealth's presentation of evidence:** The Commonwealth's Attorney presents the evidence against you by calling witnesses and by introducing physical evidence. Witness testimony is the statements a witness makes when they are sworn under oath to tell the truth. The witness can only answer the questions asked by the attorneys and must testify only about what they saw or heard. A witness cannot testify to something

someone else told them and cannot give a conclusion. If a witness tries to do this, the opposing attorney will object. Following direct testimony, which is brought out by the attorney who called the witness, the opposing attorney questions the witness; this is called cross-examination.

**Defense presentation of evidence:** After the Commonwealth's Attorney presents their case, your attorney will then call witnesses and present your evidence. Your witnesses also are subject to cross-examination from the Commonwealth's Attorney. You are not required to testify.

**Closing arguments and instructions:** After all the evidence is presented, the Commonwealth's Attorney presents the first argument in closing the case. Then your defense attorney gives your arguments. The Commonwealth has the option to make a final rebuttal argument. After the closing arguments, the Judge gives the jury instruction on the law as it relates to your case.

**Verdict:** The jury reaches a verdict (decision) about whether you are guilty or not guilty. The verdict must be unanimous among all jurors. The jury also may make a recommendation about punishment. The Judge decides the final verdict.

**Sentence:** If you are found guilty, the Judge will decide your sentence. Your sentence could include jail or prison time, a suspended sentence, probation, etc. Probation allows you to leave jail or prison but requires you to report to a probation officer and follow the rules of probation.

**Appeal:** You have the right to request an appeal of your verdict or sentence, but your request must be made soon after your conviction.

#### **Questions for Proceedings of a Trial:**

- What does testimony mean?
- Who gives testimony?
- What does cross-examination mean?
- What does verdict mean?
- Who decides the verdict?

#### **(9) APPROPRIATE COURTROOM BEHAVIOR**

When you go to court, the way you look and act is important and could affect the impression you give the Judge and the jury. You will help your attorney defend you by dressing in clean, neat clothing. You can help your attorney defend you by behaving respectfully in court. Some of the ways you show respect for the court are:

- When the Judge enters the courtroom, the bailiff will announce that the Judge is about to enter and will ask everyone to rise. You, along with everyone else in the

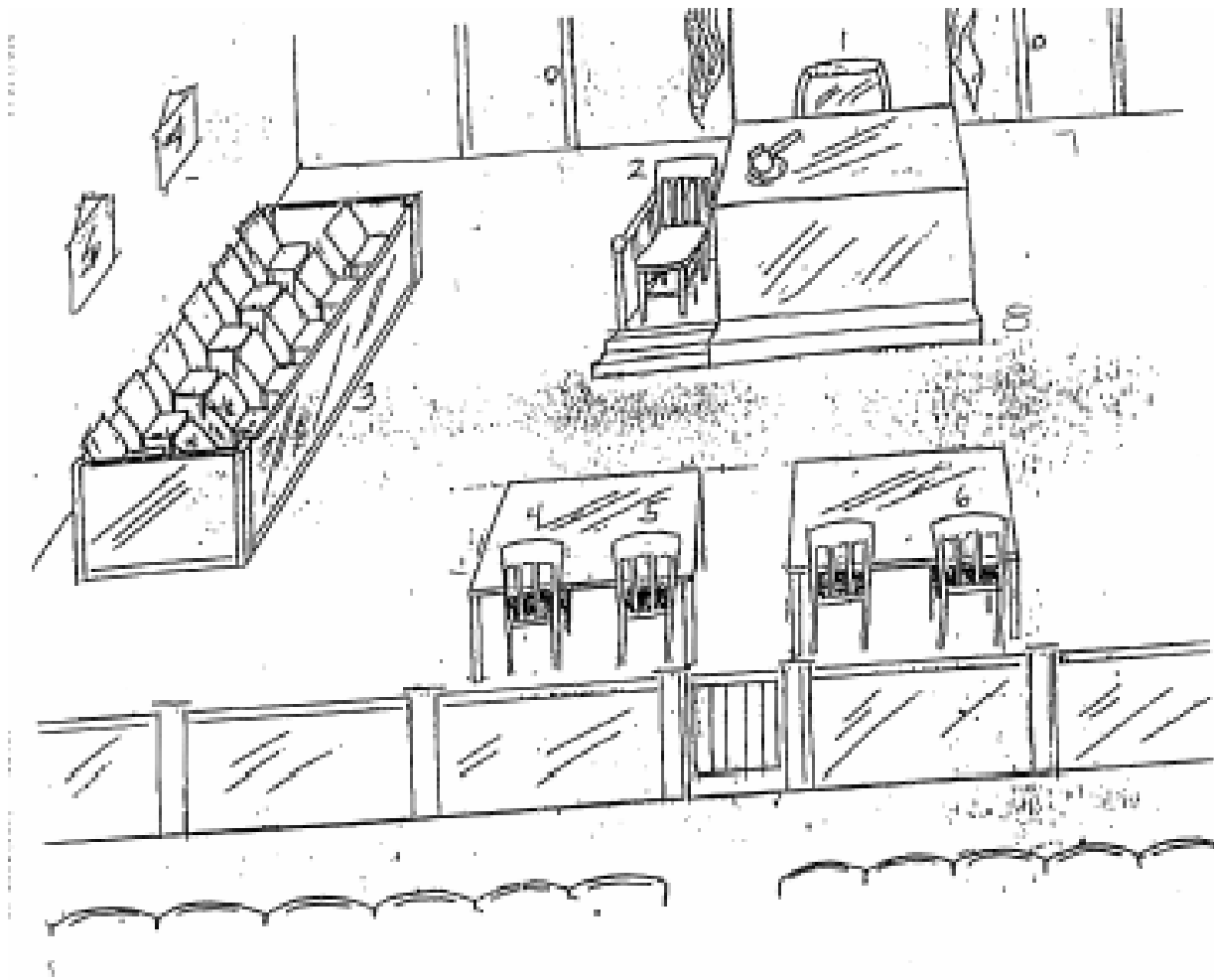


room, will stand up and remain standing until the Judge sits down and tells you to sit down.

- You must never speak out unless the Judge asks you to speak. You should stand or sit when your attorney tells you.
- If you are confused, have a question, or don't understand what's going on, whisper your question to your attorney or write a note and quietly give it to your attorney.
- You may not chew gum.
- You should only speak if you are asked a question. If you are asked a question, answer **ONLY** the questions asked of you. **Do not try to add any other information.** If you want to say something, you should tell your attorney and let your attorney talk for you.
- You must not speak too loudly, yell, get angry or curse in the courtroom. If you do, you may be held in contempt of court and taken out of the room. The Judge can also impose a sentence (i.e., fine you or give you more time in jail).
- If you become upset and feel you can't remain quiet, you should tell your attorney that you need a break.
- You should listen and pay careful attention to what is being said so you understand what is happening and can help your attorney. If you don't understand something, you should ask your attorney to explain it.
- If one of the witnesses says something about you that is not true, you should let your attorney know.

#### **Questions for Appropriate Courtroom Behavior:**

- Is it important for the defendant to dress nicely?
- Can the defendant speak directly to the judge during the trial?
- How are people in the courtroom supposed to behave?
- What do you do if you become upset in the courtroom?
- What do you do when a witness tells a lie about you?



**KEY FOR COURTROOM DIAGRAM:**

1. Where the judge sits
2. Where the witness sits
3. Where the jury sits
4. Where the defendant sits
5. Where the defense attorney sits
6. Where the Commonwealth's attorney sits
7. Where the bailiff stands
8. Where the court stenographer sits

## CHAPTER 4: WHEN IS RESTORATION TRAINING FINISHED AND WHAT ELSE IS REQUIRED?

### FOR THE RESTORATION TRAINER- Assessing restoration services completion:

1. Give a post-test to the defendant. See the post-test at the end of this chapter. This post-test should be administered with the understanding that it includes the required elements for competency. The required elements for competency are summarized below:

- Defendant's understanding of the seriousness of the charges and likely consequences
- Defendant's ability to participate in the trial and ability to understand the court proceedings
- Defendant's ability to assist his attorney
- Defendant's ability to maintain the dignity of the courtroom

2. Review and assess the following:

- Review initial competency evaluation and any follow-up competency evaluations (if appropriate) for statements regarding defendant's previous inabilities or problem areas
  - Assess whether defendant has made any progress in those areas
  - Assess whether defendant might make any additional progress in those areas

3. Ask yourself the following questions:

- Do you believe the defendant's symptoms will improve with further treatment or are they at their optimal level of functioning?
- Is there evidence of a learning curve or has the defendant reached their learning plateau?
- Are the clinical problems contributing to the defendant's incompetence such that they are not likely to improve (e.g. mental retardation) or possibly worsen over time (e.g. dementia)?

4. Discuss defendant's progress with your supervisor. Keep the following outcomes and time frames in mind throughout the process:

- The defendant is competent. Tell your supervisor as soon as this determination is made.
- The defendant is likely to remain incompetent for the foreseeable future. Tell your supervisor as soon as this determination is made.
- The defendant is incompetent but restorable to competency in the foreseeable future. Tell your supervisor one (1) month prior to the expiration of the restoration court order.
- If the defendant is charged with certain targeted misdemeanor offenses and is under a 45 day restoration order, tell your supervisor about the short time frame. The possible outcomes remain the same as above – competent, incompetent for the foreseeable future or incompetent but restorable in the foreseeable future.
- NOTE: Do not repeat any statements of the defendant about the time period of the offense.

**FOR THE RESTORATION TRAINER'S SUPERVISOR:**

5. Notify the CSB/BHA Executive Director (or designee) of the restoration worker's recommendations at the appropriate time in order to obtain a follow-up competency evaluation (often called a restoration outcome evaluation) in a timely manner. The appropriate time could be at any time after the initiation of restoration services if the defendant appears competent or incompetent for the foreseeable future. If the defendant is incompetent but restorable in the foreseeable future, the CSB/BHA Executive Director (or designee) should be notified at least one (1) month in advance of the expiration of the current restoration court order. The CSB/BHA Executive Director (or designee) should be notified upon initiation of restoration services for the defendant with targeted misdemeanor charges under a 45 day restoration order.

**FOR THE CSB/BHA EXECUTIVE DIRECTOR OR DESIGNEE:**

6. The CSB/BHA Executive Director (or designee) should arrange for follow-up competency evaluation (often called a restoration outcome evaluation) to be performed by a forensically trained evaluator for all restoration court orders and outcomes. See #4 on the previous page and #5 above. According to § 19.2-169.1D, the evaluator's report should address (1) the defendant's capacity to understand the proceedings against him; (2) the defendant's ability to assist his attorney; and (3) the defendant's need for treatment in the event he is found incompetent. The CSB/BHA Executive Director (or designee) may consider contacting the original competency evaluator to perform this follow-up competency evaluation.

7. The CSB/BHA Executive Director (or designee) is responsible for reporting back to the court within the appropriate time frame. The report to the court should be addressed to the judge and copied to the attorneys of record. The report should include a cover letter stating the competency evaluation findings (with a copy of the competency evaluation attached) and the CSB/BHA recommendations. A summary of the findings and recommendations are listed below:

- The defendant is competent. Continued restoration services are not necessary. (See § 19.2-169.2B for reference)
- The defendant is incompetent but restorable in the foreseeable future; continued restoration services and other mental health treatment are recommended. (See § 19.2-169.3B for reference)
- The defendant is likely to remain incompetent for the foreseeable future. The CSB/BHA should review the recommendations detailed in § 19.2-169.3A. Some of these Code recommendations, however, are more hospital-based in nature, e.g., civil commitment and certification. Because restoration services were ordered in the community, the court is probably interested in community-based treatment recommendations that would include risk reduction strategies.
- For the defendant with targeted misdemeanor charges and a 45 day restoration order, the findings can be any of the those listed above. The CSB/BHA should review the recommendations detailed in § 19.2-169.3C. Some of these Code recommendations, however, are more hospital-based in nature, e.g., release, civil

commitment and certification. Because restoration services were ordered in the community, the court is probably interested in community-based treatment recommendations that would include risk reduction strategies.

- An exception to the points above occurs in the cases of defendants who are opined to be unrestorable on sexually violent charges, as defined in § 37.2-900. The Code of Virginia § 19.2-169.3 ( E ) provides that such individuals “shall be reviewed for commitment pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.” The court will order that the defendant be held in the custody of the Department of Behavioral Health and Developmental Services “for secure confinement and treatment.”

8. For each restoration court order received, the CSB/BHA Executive Director will need to arrange for restoration services to be provided and then report back to the court in the same manner described in #6 and #7 on the previous page.

### POST-TEST

**Assess the defendant's understanding of the seriousness of the charges and likely consequences, including pleas and plea bargains.** Can the defendant sufficiently explain the following?

- Formal name of charge(s)
- Ability to describe the events surrounding the incident(s) that led to his/her arrest and being charged with the offense.
- Type of charge(s) involved – felony and/or misdemeanor
- If convicted, what are the likely consequences (e.g., jail or prison sentence, probation, etc.)?

**Assess the defendant's ability to describe the role of trial participants and the proceedings, including the adversarial nature of the proceedings.** Can the defendant sufficiently explain the following?

Role of the participants in the trial:

- What is the role of the judge? (Defendant should be able to explain that the judge makes decisions in courtroom, should be fair/neutral and decides guilt or innocence if it's a bench trial)
- What is the role of the defense attorney? (Defendant should be able to explain that the defense attorney is “on the side” of the defendant and tries to get him/her off or the least possible sentence)
- What is the role of the Commonwealth's attorney? (Defendant should be able to explain that the Commonwealth's attorney is “against” the defendant and will try to get him/her convicted)
- What is the role of jury? (Defendant should be able to explain that the jury decides whether the defendant is guilty or not guilty)
- What is a witness? (Defendant should be able to explain that a witness is someone who tells the court what they know)

Description of the trial proceedings:

- The defendant should be able to explain available pleas
- The defendant should be able to describe direct testimony and cross examination
- The defendant should be able to describe possible penalties for a guilty verdict

**Assess the defendant's ability to work collaboratively with and assist their attorney.**

Can the defendant sufficiently explain the following?

- Can the defendant tell a complete and accurate story about the incident and the charges to their attorney?
- Can the defendant explain when an attorney would be doing a "good" job? (Defendant should be able to explain that the attorney would listen to the defendant, explain things to the defendant, and/or relay that this attorney defended an acquaintance and "got them off")
- Can the defendant describe how "strong" the case is against the defendant? (Defendant should be able to describe the evidence that is available and if that makes it a "strong" or "weak" case)
- Can the defendant describe how the attorney and the defendant would decide to take a plea bargain? (The defendant should be able to explain the concept of "the stronger the case, the more attractive a plea bargain should be".)
- Can the defendant describe an effective working relationship with his attorney?
- Is there any evidence of paranoid delusions or other clinical symptoms that may interfere with the defendant's ability to assist their attorney?

**Assess the defendant's ability for appropriate behavior in the courtroom.** Can the defendant sufficiently and accurately describe the following?

- How are you supposed to dress in the courtroom? (Defendant should be able to explain that clothing should be neat and that the defendant should be clean)
- How are you supposed to behave in the courtroom? (Defendant should be able to explain that they should be quiet unless spoken to by the judge or on the witness stand and remain in their seat)
- What do you do when a witness is on the stand and says something that is not true? (Defendant should be able to explain that they should write a note to their attorney or quietly whisper to the attorney)
- What do you do when you do not understand what is going on in the courtroom? (Defendant should be able to explain that they should write a note to their attorney or quietly whisper to the attorney)
- What will happen if you "act out" in the courtroom? (Defendant should be able to explain that they will "get in trouble" and could be held in contempt, get extra jail time, be put in restraints, etc.)
- When is it ok to talk in the courtroom? (Defendant should be able to explain that they should be quiet unless spoken to by the judge or called to the witness stand)

**§ 19.2-169.1. Raising question of competency to stand trial or plead; evaluation and determination of competency.**

A. Raising competency issue; appointment of evaluators. - If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant, whether a juvenile transferred pursuant to § [16.1-269.1](#) or adult, lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who is qualified by training and experience in forensic evaluation.

B. Location of evaluation. - The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless the court specifically finds that outpatient evaluation services are unavailable or unless the results of outpatient evaluation indicate that hospitalization of the defendant for evaluation on competency is necessary. If the court finds that hospitalization is necessary, the court, under authority of this subsection, may order the defendant sent to a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for evaluations of persons under criminal charge. The defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the defendant's competency, but not to exceed 30 days from the date of admission to the hospital.

C. Provision of information to evaluators. - The court shall require the attorney for the Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) a copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the evaluation request. The court shall require the attorney for the defendant to provide any available psychiatric records and other information that is deemed relevant. The court shall require that information be provided to the evaluator within 96 hours of the issuance of the court order pursuant to this section.

D. The competency report. - Upon completion of the evaluation, the evaluators shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for treatment in the event he is found incompetent but restorable, or incompetent for the foreseeable future. No statements of the defendant relating to the time period of the alleged offense shall be included in the report.

E. The competency determination. - After receiving the report described in subsection D, the court shall promptly determine whether the defendant is competent to stand

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

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

(1982, c. 653; 1983, c. 373; 1985, c. 307; 2003, c. 735; 2007, c. 781; 2009, cc. 813, 840.)

#### **§ 19.2-169.2. Disposition when defendant found incompetent.**

A. Upon finding pursuant to subsection E of § [19.2-169.1](#) that the defendant, including a juvenile transferred pursuant to § [16.1-269.1](#), is incompetent, the court shall order that the defendant receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal charge. Any reports submitted pursuant to subsection D of § [19.2-169.1](#) shall be made available to the director of the community services board or behavioral health authority or his designee or to the director of the treating inpatient facility or his designee.

B. If, at any time after the defendant is ordered to undergo treatment under subsection A of this section, the director of the community services board or behavioral health authority or his designee or the director of the treating inpatient facility or his designee believes the defendant's competency is restored, the director or his designee shall immediately send a report to the court as prescribed in subsection D of § [19.2-169.1](#). The court shall make a ruling on the defendant's competency according to the procedures specified in subsection E of § [19.2-169.1](#).

C. The clerk of court shall certify and forward forthwith to the Central Criminal Records Exchange, on a form provided by the Exchange, a copy of an order for treatment issued pursuant to subsection A.

(1982, c. 653; 2003, c. 735; 2007, c. 781; 2008, cc. 751, 788; 2009, cc. 813, 840.)



**§ 19.2-169.3. Disposition of the unrestorably incompetent defendant; capital murder charge; referral to Commitment Review Committee.**

A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § [19.2-169.2](#), the director of the community services board or behavioral health authority or his designee or the director of the treating inpatient facility or his designee concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the board, authority, or inpatient facility director's or his designee's opinion, the defendant should be released, committed pursuant to Article 5 (§ [37.2-814](#) et seq.) of Chapter 8 of Title 37.2, committed pursuant to Chapter 9 (§ [37.2-900](#) et seq.) of Title 37.2, or certified pursuant to § [37.2-806](#) in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection E of § [19.2-169.1](#). If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be (i) released, (ii) committed pursuant to Article 5 (§ [37.2-814](#) et seq.) of Chapter 8 of Title 37.2, or (iii) certified pursuant to § [37.2-806](#). However, if the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future and the defendant has been charged with a sexually violent offense, as defined in § [37.2-900](#), he shall be reviewed for commitment pursuant to Chapter 9 (§ [37.2-900](#) et seq.) of Title 37.2. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § [19.2-169.2](#).

B. At the end of six months from the date of the defendant's initial admission under subsection A of § [19.2-169.2](#) if the defendant remains incompetent in the opinion of the board, authority, or inpatient facility director or his designee, the director or his designee shall so notify the court and make recommendations concerning disposition of the defendant as described in subsection A. The court shall hold a hearing according to the procedures specified in subsection E of § [19.2-169.1](#) and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described in subsection A. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § [19.2-169.2](#) for additional six-month periods, provided a hearing pursuant to subsection E of § [19.2-169.1](#) is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. If any defendant has been charged with a misdemeanor in violation of Article 3 (§ [18.2-95](#) et seq.) of Chapter 5 of Title 18.2 or Article 5 (§ [18.2-119](#) et seq.) of Chapter 5 of Title 18.2, other than a misdemeanor charge pursuant to § [18.2-130](#) or Article 2 (§ [18.2-415](#) et seq.) of Chapter 9 of Title 18.2, and is being treated pursuant to subsection A of § [19.2-169.2](#), and after 45 days has not been restored to competency, the director of the community service board, behavioral health authority, or the director of the treating inpatient facility, or any of their designees, shall send a report indicating the defendant's status to the court. The report shall also indicate whether the defendant

should be released or committed pursuant to § [37.2-817](#) or certified pursuant to § [37.2-806](#). Upon receipt of the report, if the court determines that the defendant is still incompetent, the court shall order that the defendant be released, committed, or certified, and may dismiss the charges against the defendant.

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

E. If the court orders an unrestorably incompetent defendant to be reviewed for commitment pursuant to § [37.2-904](#), it shall order the attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of Behavioral Health and Developmental Services to provide the Commitment Review Committee established pursuant to § [37.2-902](#) with any information relevant to the review, including, but not limited to: (i) a copy of the warrant or indictment, (ii) a copy of the defendant's criminal record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to § [19.2-169.1](#), and (v) a copy of the report prepared by the director of the defendant's community services board, behavioral health authority, or treating inpatient facility or his designee pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Behavioral Health and Developmental Services for secure confinement and treatment until the Commitment Review Committee's and Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice that the Attorney General has declined to file a petition for the commitment of an unrestorably incompetent defendant as a sexually violent predator after conducting a review pursuant to § [37.2-905](#), the court shall order that the defendant be released, committed pursuant to Article 5 (§ [37.2-814](#) et seq.) of Chapter 8 of Title 37.2, or certified pursuant to § [37.2-806](#).

F. In any case when an incompetent defendant is charged with capital murder, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the capital murder case may order that the defendant receive continued treatment under subsection A of § [19.2-169.2](#) for additional six-month periods without limitation, provided that (i) a hearing pursuant to subsection E of § [19.2-169.1](#) is held at the completion of each such period, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others.

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

(1982, c. 653; 1999, cc. 946, 985; 2003, cc. 915, 919, 989, cls. 4, 5, 1018, cls. 4, 5, 1042, cls. 10, 11; 2006, cc. 863, 914; 2007, cc. 781, 876; 2008, cc. 406, 796; 2009, cc. 813, 840.)

**ORDER FOR PSYCHOLOGICAL EVALUATION**

Case No. ....

Commonwealth of Virginia Va. Code §§ 19.2-168, 19.2-168.1, 19.2-169.1, 19.2-169.5, 19.2-176

.....  
COURT NAME AND ADDRESS

Commonwealth of Virginia v. ....

**TYPE OF EVALUATION AND REPORT**

- COMPETENCY TO STAND TRIAL:** It appearing to the Court, on motion of
  - Commonwealth's Attorney       defendant's attorney       the Court
 and upon hearing evidence or representations of counsel, that there is probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against him or to assist in his own defense, the Court therefore appoints the evaluator(s) listed below to evaluate the defendant and to submit a report, on or before the date shown below, to this Court, the Commonwealth's Attorney and the defendant's attorney, concerning: (1) the defendant's capacity to understand the proceedings against him; (2) his ability to assist his attorney; and (3) his need for treatment in the event that he is found to be incompetent but restorable, or incompetent for the foreseeable future. No statement of the defendant relating to the time period of the alleged offense shall be included in the report.
- SANITY AT THE TIME OF THE OFFENSE:** It appearing to the Court, upon hearing evidence or representations of counsel for the defendant, that there is probable cause to believe that the defendant's sanity may be a significant factor in his defense and that the defendant is financially unable to pay for expert assistance, the Court therefore appoints the evaluator(s) listed below to evaluate the defendant's sanity at the time of the offense and, where appropriate, to assist in the development of an insanity defense. They shall prepare and submit a full report, on or before the date shown below, solely to the defendant's attorney, concerning the defendant's sanity at the time of the offense, including whether he may have had a significant mental disease or defect which rendered him insane at the time of the offense. If further evaluation on this issue is necessary, the evaluator(s) shall so state.
- The motion for the evaluation having been made by the Commonwealth after receiving notice pursuant to Virginia Code § 19.2-168, the Court also orders the defendant to submit to an evaluation and has advised the defendant that a refusal to cooperate with the Commonwealth's evaluator(s) could result in the exclusion of defendant's expert evidence. The Court further orders the evaluator(s) to submit to the attorneys for the Commonwealth and defendant copies of the report and the records obtained during the evaluation.
- INSANITY FOLLOWING CONVICTION BUT PRIOR TO SENTENCING:** It appearing to the Court, on motion of
  - Commonwealth's Attorney       defendant's attorney       the Court
 that there are reasonable grounds to question the defendant's mental state, the Court appoints the evaluator(s) listed below to evaluate the defendant's mental state and to submit a report, on or before the date shown below, to this Court, the Commonwealth's Attorney and the defendant's attorney, concerning whether (1) the defendant is mentally ill and (2) the defendant requires treatment in a mental hospital.

**DESIGNATION OF EVALUATOR(S)**

The Court finds and concludes that:

- the evaluation shall be performed on an outpatient basis at a mental health facility or in jail, as indicated below.
- as outpatient services are unavailable, the evaluation of competency shall be performed on an inpatient basis, as indicated below.
- the evaluation shall be conducted on an inpatient basis at a hospital designated by the Commissioner of the Department of Behavioral Health and Developmental Services because:
  - no outpatient services are available
  - the results of outpatient evaluation (copy attached) indicate that hospitalization for further evaluation is necessary
  - a court of competent jurisdiction has found, pursuant to Virginia Code §§ 19.2-169.6 or 37.2-814, that the defendant requires emergency treatment on an inpatient basis at this time.

The Court therefore appoints the following evaluator(s) to conduct the evaluation:

.....  
EVALUATOR(S): NAME(S) AND TITLE(S) OR NAME OF FACILITY

qualified staff at a hospital to be designated by the Commissioner of the Department of Behavioral Health and Developmental Services or his designee. Hospitalization for evaluation shall not extend beyond 30 days from the date of admission.

**DUE DATE AND TIME:** .....

The Court further orders that the Commonwealth's Attorney and the defendant's attorney forward appropriate background information to the evaluator(s) as required by law.

**TO EVALUATORS AND ATTORNEYS:** See reverse for additional instructions.

.....  
DATE

.....  
JUDGE

**ADDITIONAL INSTRUCTIONS TO EVALUATOR(S) AND ATTORNEYS**

FORM DC-342 (MASTER, PAGE ONE OF TWO) 07/09

### **Providing Background Information**

1. **Competency to Stand Trial:** Prior to an evaluation of competency to stand trial, the Commonwealth's Attorney must forward to the evaluator(s) within 96 hours of the issuance of this order:
  - a. a copy of the warrant;
  - b. the names and addresses of the Commonwealth's Attorney, the defendant's attorney, and the judge ordering the evaluation;
  - c. information about the alleged crime; and
  - d. a summary of the reasons for the evaluation request.

The defendant's attorney must provide any available psychiatric records and other information that are deemed relevant within 96 hours of the issuance of this order. Va. Code § 19.2-169.1(C).

2. **Sanity at the Time of the Offense:** Prior to an evaluation of sanity at the time of the offense, the party making the motion for the evaluation must forward to the evaluator(s):
  - a. a copy of the warrant;
  - b. the names and addresses of the Commonwealth's Attorney, the defendant's attorney, and the judge ordering the evaluation;
  - c. information about the alleged crime, including statements by the defendant made to the police and transcripts of preliminary hearings, if any;
  - d. a summary of the reasons for the evaluation request;
  - e. any available psychiatric, psychological, medical or social records that are deemed relevant; and
  - f. a copy of defendant's criminal record, to the extent reasonably available.

Va. Code § 19.2-169.5(C).

### **Use of Information Obtained During Evaluation**

No statement of disclosure by the defendant concerning the alleged offense made during the evaluation may be used against the defendant at the trial as evidence, or as a basis for such evidence, except on the issue of his/her mental condition at the time of the offense after the defendant raises the issue pursuant to § 19.2-168 of the Code of Virginia. Va. Code § 19.2-169.7.

**SAMPLE INITIAL COMPETENCY EVALUATION**

**Henrico County Jail  
Mental Health Office  
Louis Fox, Psy.D.  
Clinical Supervisor – Forensics  
Henrico Area MH/MR  
P.O. Box 27032  
Richmond, Virginia 23273-7032  
501-4590**

8-20-03

Honorable Burnett Miller, III  
Henrico General District Court  
P.O. Box 27032  
Richmond, Va. 23273

Re: Mary Smith  
Competency to Stand Trial

Dear Judge Miller:

I am writing in response to your court order dated 7-9-03 to evaluate Mary Smith's competency to stand trial (CST) and mental status at the time of the offense (MSO) pursuant to Virginia Code 19.2-169.1 and 19.2-169.5. I completed the CST evaluation on 7-29, 8-13 and 8-20-03. My findings are summarized below.

**Data Base**

Clinical Interviews (4 hours)

Henrico County Jail mental health records

Community Corrections report (7-1-03)

Summary of police report and defendant's statements (7-8-03)

Warrant (Grand Larceny)

Treatment summary from William James, M.D. (12-11-2000)

Treatment summary from John Smith, M. D. (8-13-2002)

### **Limits of Confidentiality**

The undersigned reviewed the limits of confidentiality during the first two evaluation contacts with Ms. Smith. She stated she understood a summary of the entire evaluation would go to her lawyer, the Commonwealth's Attorney and the judge.

### **Psychiatric History**

The client is a very poor historian. Her psychiatric history was reconstructed through medical records and collateral data from her mother (also, a poor historian). Ms. Smith apparently has a long history of treatment for psychotic symptoms. Her mother reports that her symptoms increased after the death of her husband eight years ago. Her most recent diagnosis (William James, M.D.) was Schizophrenia, Paranoid type. Grandiose, paranoid and somatic delusions are her most prominent symptoms. Grandiose delusions include being on the "Board of Directors of Wall Street", being a judge, having a Ph.D., a trust fund and doing "executive management stuff" for the Virginia Employment Commission. Paranoid delusions include believing her food and drink were "contaminated" and that clothes and other items were stolen from her car and home. Somatic delusions include believing that her heart has stopped and an intense preoccupation with aches, pains and bodily functions. Loose associations are also evident. This means that her speech often does not make sense. For example, she said, "My mom doesn't need to know my business. It's attached to widowhood". Other symptoms included pressured speech, significantly reduced sleep and appetite and poor hygiene. In the past she apparently had experienced auditory hallucinations. Ms. Smith does not believe she is mentally ill, and does not believe she needs psychotropic medication. She has a documented history of refusing anti-psychotic medication.

Past treatment includes three psychiatric hospitalizations at Westbrook and some inconsistent treatment at CSB's in the region. Her mother states that she will not attend treatment or take medications. She saw a private psychiatrist, William James, M.D. briefly in 2000. He prescribed Zyprexa and reported that she responded positively to the medication. In the jail she refused anti-psychotic medication for four weeks. When her paranoid delusions greatly reduced her food and fluid intake the undersigned attempted to TDO Ms. Smith to Central State Hospital. They refused her admission because she did not "reach the threshold" for admission. After much encouragement by the jail treatment team she began taking Zyprexa (5 mg. at bedtime) on 8-2-03. On 8-18-03 the dose was increased to 10 mg. It was noted that she agreed to take the Zyprexa because she believed it would help her "nerves" and improve her sleep and appetite. She is also on Neurontin (300 mg. 3 times a day) for seizures. John Smith, M.D. is her neurologist.

Ms. Smith denies using illicit substances or symptoms of alcohol abuse.

### **Mental Status Examination**

It should be noted that Ms. Smith refused to cooperate with a formal mental status examination the first two times the undersigned attempted a CST evaluation. The mental status examination below was conducted after Ms. Smith had been on anti-psychotic medication for 10 days.

The client is a 41 year-old African American female who looks older than her stated age. Her hygiene was poor and she appeared unkempt. During this evaluation she was alert and oriented to person, place

### **Page 3, Smith CST**

and time. Her mood appeared mildly agitated/depressed as evidenced by her facial expression and tone of voice. She was guarded with the examiner. She denied auditory or visual hallucinations. Grandiose and paranoid delusions were still evident. The content of the delusions are outlined above. The somatic delusions described above were less prominent. The loose associations noted above appeared almost in remission. Only the misuse of words was noted. Her memory was intact. She could recall three words after five minutes with interference. She denied suicidal/homicidal ideation or intent. She reports that her sleep and appetite were within normal limits on the medication. Ms. Smith denied social isolation, crying spells or hopelessness. She has no insight into her current situation. Her judgment as assessed by formal testing was poor.

### **Competency Evaluation**

It should be noted that Ms. Smith was evaluated several times over a month. She was so psychotic and guarded that a competency evaluation was not possible on 7-24-03. On 7-29-03 the evaluation was stopped early during the process. Her speech was very pressured. She evidenced paranoid delusions about her attorney and resisted recounting the alleged offense. She had grandiose delusions about hiring a private attorney with her “trust fund”. As noted above, attempts to TDO her to Central State Hospital were unsuccessful. Four days later she began taking an anti-psychotic medication. The evaluation below was conducted on 8-13 and 8-20 after taking the medication regularly for two and three weeks respectively.

Ms. Smith states that she is charged with “larceny”. When asked direct questions she stated the charge was “grand larceny”. When asked about the seriousness of the charge she replied, “I don’t know”. When asked if it was a misdemeanor or a felony, she said, “I guess it is a felony”. She was very vague about the possible consequences of a conviction. Ms. Smith said, “Depends on how much time the judge gives me”.

The client stated knew her attorney’s name, James Brown. She expressed a great deal of concern about her attorney. She said, “I don’t know him. He doesn’t know me. That’s bad”. She was not able to talk about how she could assist her attorney. She could state abstractly that she should talk honestly to an attorney. However, on both 8-13 and 8-20 she said she would not talk about the alleged incident with her attorney. Specifically, she said, “he wouldn’t understand about Wall Street”. Though pressed at length, she stated that she would not talk about her thinking or behavior with this or any other attorney (and the undersigned).

It was noted that when the undersigned attempted to explore the role of a judge, Ms. Smith remained preoccupied and agitated about her attorney. Eventually, she responded to some questions based on her previous experience in court on this charge. She stated that the judge appointed her a lawyer. She also said he could release her by doing some “paperwork”. Even when asked direct questions, she did not understand being bonded. In response to open ended questions she said the judge “listens”. When asked who decided if you were guilty or not guilty, she said, “The jury, if there is one”. When asked directly about the judge’s role on deciding guilt or innocence she said, “Is judge going to do that”? After some education she described the judge as someone who “listens” and is “independent”.

When asked about the Commonwealth’s Attorney or prosecutor, she said, “Is it a person”? After further questioning she stated she did not know what the Commonwealth’s Attorney did in court. After some

## **Page 4, Smith CST**

education, she stated that the Commonwealth's Attorney told the judge what she did and was "against me".

When asked about pleas she said, "I don't know. I'm at a loss". When asked what it meant to plead guilty, she said, "I don't know. I have no idea". She refused to try and answer what not guilty and NGRI might mean. The evaluator provided some education. Later she stated that if you plead not guilty you "go to trial". She had to be prompted to state they would "let me go" if found not guilty. She did state that there would be no trial if she pleaded guilty, and that they would "sentence me". Ms. Smith stated that if she were found not guilty by reason of insanity the result would be "mental health stuff". She also clearly stated that an NGRI defense did not apply to her since she did not have a mental illness. Even after education she refused to answer any questions about a plea bargain.

### **Impressions and Recommendations**

Ms. Smith meets the diagnostic criteria for Schizophrenia, Paranoid Type. The symptoms are outlined above. Even after three weeks on anti-psychotic medication (Zyprexa) she evidences paranoid and grandiose delusions. It is my opinion that Ms. Smith cannot meaningfully assist her attorney in the preparation of her defense. Her paranoid delusions interfere with her willingness to trust her attorney or to recount the events (and her thinking) surrounding the alleged offense. Due to her poor insight into her mental illness she refuses to consider all possible pleas. Her knowledge of the participants and procedures in a criminal trial is limited. It is not clear that she understands that a criminal trial is an adversarial system. Ms. Smith could benefit from additional treatment and education to restore her to competence. She has responded positively to Zyprexa, but psychotic symptoms remain. She will require continued psychiatric evaluation and medication monitoring to further reduce (or eliminate) her psychotic symptoms. Special attention should be paid to the paranoid delusions that make her distrust her attorney and the grandiose delusions that prevent her from fully describing the alleged offense to her attorney. When the delusions have resolved restoration efforts should focus on a more thorough knowledge of the participants in a trial, her rights, possible pleas and the adversarial nature of a criminal procedure. Also, after the symptoms have resolved Ms. Smith will benefit from education about her illness and medication(s).

Given Ms. Smith's refusal to talk about the alleged offense this examiner was unable to perform the court ordered mental status at the time of the offense (MSO) evaluation. Once restored to competency I am willing to re-evaluate Ms Smith's criminal responsibility.

Please call me at the above address or phone number if you have any questions about this report.

Sincerely,

Louis Fox, Psy.D.  
Licensed Clinical Psychologist  
Clinical Supervisor-Forensics



**ORDER FOR TREATMENT OF  
INCOMPETENT DEFENDANT**

Case No. \_\_\_\_\_

Commonwealth of Virginia VA. CODE §§ 19.2-169.2, 19.2-169.3

\_\_\_\_\_  
COURT NAME AND ADDRESS

Commonwealth of Virginia v. \_\_\_\_\_

The Court having found, pursuant to Virginia Code § 19.2-169.1(E), that the Defendant is incompetent to stand trial, and having found further, based on the attached report or other evidence, that the Defendant can be treated to restore his or her competency

- on an outpatient basis in jail or through a local mental health facility  
 solely on an inpatient basis in a hospital

the Court therefore ORDERS

\_\_\_\_\_  
NAME OF OUTPATIENT THERAPIST OR FACILITY

- qualified staff at a hospital to be designated by the Commissioner of Behavioral Health and Developmental Services or his or her designee

to treat the Defendant in an effort to restore him to competency.

If, at any time after treatment commences, the director of the community services board or behavioral health authority or his designee or the director of the treating inpatient facility or his designee believes the defendant's competency is restored, the director or his designee shall immediately send a report to the court concerning (1) the defendant's capacity to understand the proceedings against him and (2) the defendant's ability to assist his attorney.

If, at any time after treatment commences, the director of the community services board or behavioral health authority or his designee or the director of the treating inpatient facility or his designee concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating and indicating whether, in the board, authority, or inpatient facility director's or his designee's opinion, the defendant should be (1) released from state custody; (2) committed pursuant to Virginia Code § 37.2-814 et seq.; or (3) certified pursuant to § 37.2-806 in the event he is found to be unrestorably incompetent.

- Defendant charged with a misdemeanor crime enumerated in Virginia Code § 19.2-169.3(C). If the defendant has not been restored to competency after forty-five (45) days from the date of commencement of treatment, the director of the community services board or behavioral health authority, or the director of the treating inpatient facility, or any of their designees, shall send a report indicating the defendant's status to the court. The report shall also indicate whether the defendant should be released or committed pursuant to § 37.2-817 or certified pursuant to § 37.2-806.*

If the defendant has not been restored to competency by six (6) months from the date of the commencement of treatment, the board, authority, or inpatient facility director or his designee shall send a report to the court so stating and indicating whether, in the director's opinion, the defendant remains restorable to competency or whether the defendant should be (1) released from state custody; (2) committed pursuant to Virginia Code § 37.2-814 et seq.; or (3) certified pursuant to Virginia Code § 37.2-806 in the event he is found to be unrestorably incompetent.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
JUDGE

**WARNING TO DEFENDANT: PURSUANT TO § 18.2-308.1:3, YOU SHALL NOT PURCHASE, POSSESS, OR TRANSPORT A FIREARM UNLESS AND UNTIL YOU ARE RELEASED FROM TREATMENT AND OBTAIN A COURT ORDER RESTORING YOUR RIGHT TO DO SO.**

FORM DC-345 MASTER 07/09

**SAMPLE LETTER – Found competent to stand trial**

[date]

The Honorable Alfred B. Carr (judge)  
Wachovia County Circuit Court  
P.O. Box 100  
Wachovia, Virginia 12345

RE: Defendant, The  
Case No.: 04-6789

Dear Judge Carr:

The above captioned defendant has been receiving treatment to restore his competency to stand trial pursuant to your order, dated \_\_\_\_\_. Enclosed you will find an evaluation of competency to stand trial in accordance with requirements of Section 19.2-169.2 of the Code of Virginia, as amended. The evaluator, \_\_\_\_\_, has opined that the defendant is now competent to stand trial. We agree with these finding and recommend that restoration services have been completed.

I hope that this information is sufficient for the court to proceed with a hearing. Should you have any questions or concerns in this matter, please feel free to contact me at (phone number) or \_\_\_\_\_ (Executive Director designee) at (phone number).

Respectfully,

\_\_\_\_\_, Executive Director or designee  
\_\_\_\_\_, CSB/BHA

ATTACHMENT (Follow-up Competency Evaluation)

cc: \_\_\_\_\_, Attorney for the Commonwealth  
\_\_\_\_\_, Attorney for the Defense

**SAMPLE LETTER – Found incompetent to stand trial at the present time, but restorable in the foreseeable future**

[date]

The Honorable Alfred B. Carr (judge)  
Wachovia County Circuit Court  
P.O. Box 100  
Wachovia, Virginia 12345

RE: Defendant, The  
Case No.: 04-6789

Dear Judge Carr:

The above captioned defendant has been receiving treatment to restore his competency to stand trial pursuant to your order, dated \_\_\_\_\_. Enclosed you will find an evaluation of competency to stand trial in accordance with requirements of Section 19.2-169.2 of the Code of Virginia, as amended. The evaluator, \_\_\_\_\_, has opined that the defendant remains incompetent to stand trial at this time, but may be restorable in the near future. We agree with this finding and recommend that restoration services be continued. A model order for (continued) treatment of an incompetent defendant is enclosed for your convenience.

I hope that this information is sufficient for the court to proceed with a hearing. Should you have any questions or concerns in this matter, please feel free to contact me at (phone number) or \_\_\_\_\_ (Executive Director designee) at (phone number).

Respectfully,

\_\_\_\_\_, Executive Director or designee  
\_\_\_\_\_  
CSB/BHA

**ATTACHMENTS (2)**

Follow-up Competency Evaluation

Model court order for restoration services, Virginia Code 19.2-169.2

cc: \_\_\_\_\_, Attorney for the Commonwealth  
\_\_\_\_\_, Attorney for the Defense

**SAMPLE LETTER – Found likely to remain incompetent for the foreseeable future (unrestorably incompetent to stand trial)**

[date]

The Honorable Alfred B. Carr (judge)  
Wachovia County Circuit Court  
P.O. Box 100  
Wachovia, Virginia 12345

RE: Defendant, The  
Case No.: 04-6789

Dear Judge Carr:

The above captioned defendant has been receiving treatment to restore his competency to stand trial pursuant to your order, dated \_\_\_\_\_. Enclosed you will find an evaluation of competency to stand trial in accordance with requirements of Section 19.2-169.2 of the Code of Virginia, as amended. The evaluator, \_\_\_\_\_, has opined that the defendant is likely to remain incompetent to stand trial for the foreseeable future. We agree with this finding. In keeping with the Virginia Code Section 19.2-169.3, our recommendations for Mr. Defendant are \_\_\_\_\_.

I hope that this information is sufficient for the court to proceed with a hearing. Should you have any questions or concerns in this matter, please feel free to contact me at (phone number) or \_\_\_\_\_ (Executive Director designee) at (phone number).

Respectfully,

\_\_\_\_\_, Executive Director or designee  
\_\_\_\_\_  
CSB/BHA

ATTACHMENT (Follow-up Competency Evaluation)

cc: \_\_\_\_\_, Attorney for the Commonwealth  
\_\_\_\_\_, Attorney for the Defense

**SAMPLE LETTER – For a defendant who has targeted misdemeanor charges and is under a 45 day restoration order**

[date]

The Honorable Alfred B. Carr (judge)  
Wachovia County Circuit Court  
P.O. Box 100  
Wachovia, Virginia 12345

RE: Defendant, The  
Case No.: 04-6789

Dear Judge Carr:

The above-captioned defendant has been receiving treatment to restore his/her competency to stand trial pursuant to your order, dated \_\_\_\_\_. Another evaluation of restoration to competency to stand trial has been completed for Mr. \_\_\_\_\_ (defendant) who has been in restoration status with a qualifying misdemeanor offense for 45 days. The evaluator, Dr. \_\_\_\_\_, has opined that Mr. \_\_\_\_\_(defendant) is (choose one: competent to stand trial, incompetent but restorable in the foreseeable future or incompetent for the foreseeable future). Virginia Code § 19.2-169.3C indicates that after 45 days of restoration, the court shall order that the defendant be released, committed, or certified, and may dismiss the charges against the defendant. Based on the evaluation of Dr.\_\_\_\_ and our restoration work with Mr. \_\_\_\_\_ (defendant), our recommendation is \_\_\_\_\_.

I hope that this information is sufficient for the court to proceed with a hearing. Should you have any questions or concerns in this matter, please feel free to contact me at (phone number) or \_\_\_\_\_ (Executive Director Designee) at (phone number).

Respectfully,

\_\_\_\_\_, Executive Director or designee  
\_\_\_\_\_  
CSB/BHA

ATTACHMENT (Follow-up Competency Evaluation)

cc: \_\_\_\_\_, Attorney for the Commonwealth  
\_\_\_\_\_, Attorney for the Defense

**Adult Restoration:  
Code Sections Specifically Referenced for Misdemeanor Charges and  
Limitation to 45 days of restoration pursuant to § 19.2-169.3C**

<b>Article 3 (§ 19.2-95 et.seq.) of Chapter 5 of Title 18.2</b>	<b>This Code section basically includes larceny charges. Misdemeanors would relate to those <u>larceny charges listed below involving value of \$200 or less</u></b>
18.2-95	n/a – This is grand larceny and always a felony
18.2-96	Petit Larceny
18.2-96.1	Identification of certain personalty
18.2-97	Larceny of certain animals & poultry
18.2-97.1	Removal of dog collar; penalty
18.2-98	Larceny of bank notes, checks, etc., or any book of accounts
18.2-99	Larceny of things fixed to the freehold
18.2-100	Removal of crop by tenant before rents and advances are satisfied
18.2-101	Selling, etc., of goods distrained or levied on
18.2-102	Unauthorized use of animal, aircraft, vehicle, or boat; consent; accessories or accomplices
18.2-102.1	Removal of shopping cart from store premises.
18.2-102.2	Unauthorized use of dairy milk cases or milk crates; penalty
18.2-103	Concealing or taking possession of merchandise; altering price tags; transferring goods from one container to another; counseling, etc., another in performance of such acts.
18.2-104	n/a – Punishment for conviction of misdemeanor larceny
18.2-104.1	n/a – Liability upon conviction under § 18.2-103
18.2-105.1	n/a – Detention of suspected shoplifter
18.2-105.2	Manufacture, sale, etc., of devices to shield against electronic detection of shoplifting prohibited; penalty
18.2-106	n/a – “Agents of Merchants” defined
18.2-107	n/a – Theft/destruction of public records (felony)
18.2-108	Receiving, etc., stolen goods
18.2-108.01	n/a – Larceny with intent to sell or distribute (felony)
18.2-108.1	n/a – Receipt of stolen firearm (felony)
18.2-109	n/a – Receipt or transfer of possession of stolen vehicle, aircraft or boat (felony)
<b>Article 5 (§ 18.2-119 et seq.) of Chapter 5 of Title 18.2</b>	<b>This Code section basically includes <u>trespassing charges</u></b>
18.2-119	Trespass after having been forbidden to do so; penalties
18.2-119.1	Validity of signs forbidding trespass; penalty
18.2-120	Instigating, etc., such trespass by others; preventing service to persons not forbidden to trespass
18.2-121	Entering property of another for purpose of damaging it, etc.
18.2-121.1	Permitting animals to run at large
18.2-121.2	Trespass by spotlight on agriculture land
18.2-124	Jurisdiction over offenses committed in Capitol Square

<b>Article 5 (§ 18.2-119 et seq.) of Chapter 5 of Title 18.2</b>	<b>This Code section basically includes <u>trespassing charges</u></b>
18.2-125	Trespass at night upon any cemetery
18.2-126	n/a – Violation of sepulture; defilement of a dead human body; penalties (felony)
18.2-127	Injuries to churches, church property, cemeteries, burial grounds, etc.; penalty
18.2-128	Trespass upon church or school property
18.2-130	n/a - Specifically EXCLUDED from new misdemeanor restoration Code: Peeping or spying into dwelling or enclosure
18.2-131	Trespass upon licensed shooting preserve
18.2-132	Trespass by hunters and fishers
18.2-133	Refusal of person on land, etc., of another to identify himself
18.2-134	Trespass on posted property
18.2-134.1	n/a – Method of posting lands
18.2-135	Destruction of posted signs; posting land of another
18.2-136	Right of certain hunters to go on lands of another; carrying firearms or bows and arrows prohibited.
18.2-136.1	n/a – Enforcement of §§ 18.2-131 through 18.2-135
<b>Article 2 (§ 18.2-415 et seq.) of Chapter 9 of Title 18.2</b>	
18.2-415	Disorderly conduct in public places

July 23, 2009

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