CHAPTER 1

THE INSANITY DEFENSE IN VIRGINIA

The Insanity Defense in Virginia

I. The insanity defense is one of several legal questions that might be raised in a criminal case that requires psychological evidence to reach a resolution.

A. This defense focuses on the defendant's mental state at the time of the offense and asks whether the defendant is criminally responsible for his/her behavior as a result of that mental state. The insanity defense was designed to protect against the conviction and punishment of morally blameless persons.

B. Other legal questions requiring psychological evidence that might be raised in a criminal case include

1. Competency to Stand Trial

a. Focuses on defendant's current mental condition (rather than mental condition at the time of the offense)
b. Asks whether the defendant has an adequate understanding of the proceedings and an ability to assist in his/her defense
c. The goal is to assure a fair, accurate, and dignified trial
d. Most frequently asked referral question

2. Presentence referrals ask whether there is anything about defendant's mental condition that bears on relevant considerations at sentencing

3. Other, less frequent referral questions include "voluntariness" of confessions and competency to waive rights

II. Use of the Insanity Defense

A. Infrequently used and rarely successful

B. National use

1. Raised in approximately 1% of criminal cases

2. Successful only 25% of the time

3. Most states have an insanity defense.

C. Virginia use: There is an average of 35 NGRI acquittals per year

III. Tests for Insanity

A. Vary from state to state

1. Examples: M'Naghten, irresistible impulse, American Law Institute, and product test

2. Mental disorder alone is never sufficient

B. Virginia Test

1. Product of case law (DeJarnette v. Commonwealth, 75 Va. 867 (1881); Price v. Commonwealth, 228 Va. 452, 323 S.E.2d 106 (1984); Thompson v. Commonwealth, 193 Va. 704, 70 S.E.2d 284 (1952))

2. Defendant is insane if, at time of the offense, because of mental disease or defect, he/she

   a. Did not understand the nature, character, and consequences of his/her act, or
   b. Was unable to distinguish right from wrong, or
   c. Was driven by an irresistible impulse to commit the act

3. "Mental disease or defect" is defined as a disorder that "substantially impairs the defendant's capacity to understand or appreciate his conduct"

   a. Psychotic disorders qualify
   b. Mental retardation qualifies
   c. Voluntary intoxication does not qualify
      (1) "settled insanity" due to substance abuse may qualify. The criteria are organic impairment, with psychotic symptoms, resulting from long-term substance use
      (2) voluntary intoxication may negate "premeditation" to reduce homicide offense from first-degree or capital murder to second-degree murder
   d. Involuntary intoxication is an independent defense

4. "Nature, character, and consequences" are not defined. It is not clear whether the defendant must have believed that the act was legally justified or whether belief that act was morally justified suffices.

5. It is frequently unclear whether a defendant with a mental disorder was

legally insane at the time of the offense.

The degree of impairment in cognitive or volitional capacity necessary for a finding of insanity is a social value judgment for the judge or jury.

IV. Expert Evaluations for Indigent Defendants: Indigent defendants who show "probable cause" to believe that sanity will be a significant factor in their defense are entitled to a state-funded expert (psychiatrist or psychologist) to perform an evaluation and, "where appropriate, to assist in the development of an insanity defense" (Va. Code § 19.2-169.5; Ake v. Oklahoma, 470 U.S. 68 (1985)).

V. Presentation of Insanity Defense

A. Only the defendant may raise the defense of insanity at the time of the offense.

The defendant must give notice to the attorney for the Commonwealth of his intention to put his sanity in issue and to present testimony of an expert at least twenty-one days prior to trial (§ 19.2-168).

B. The Commonwealth's Attorney can then seek an evaluation of the defendant's sanity at the time of the offense, pursuant to § 19.2-168.1, after the defense attorney gives notice as described above.

C. The defendant has the burden of proving insanity to the satisfaction of the jury (Boswell v. Commonwealth, 61 Va. 860 [20 Gratt.] (1871)).

D. The judge or jury decides whether the defendant was insane at the time of the offense based on expert testimony and other evidence.

1. Misdemeanor cases are typically tried in district court where there are no jury trials.

2. Felony cases are tried in circuit court where the defendant may insist on a jury trial.

E. The majority of cases are the result of plea bargains in which the defense and the prosecution agree to the finding of insanity at the time of the offense. "Battles of experts" are rare.

VI. Use of the Insanity Defense in Juvenile Courts

The Supreme Court of Virginia has held that the insanity defense is not available to juveniles

in delinquency proceedings. (Commonwealth v Chatman, 260 Va. 562 (2000)).

VII. Disposition of Insanity Acquittees: What happens after an individual is found not guilty by reason of insanity?

A. Acquittees are not subject to penal sanctions (punishment) such as jail or prison sentences, probation, parole, and/or fines.

B. Acquittees may be committed pursuant to special commitment laws that are more restrictive than those that regulate civil commitment.

1. Virginia civil commitment laws (Va. Code § 37.1-67.01 et. Seq.)

2. Virginia insanity disposition and commitment laws (Va. Code §§ 19.2-182.2 through 19.2-182.16)

C. Court controls management of acquittee for an indeterminate period, as long as the acquittee continues to meet the criteria outlined in §§19.2-182.2 through 19.2-182.16.

D. Virginia Code §§ 19.2-182.2 through 19.2-182.16 address the post-adjudication stages, after a person has been found not guilty by reason of insanity.

1. In July 1992, § 19.2-181 was repealed and replaced by §§ 19.2-182.2 through 182.12.

2. In July 1993, these Code sections were further amended to comply with the U.S. Supreme Court decision in Foucha v. Louisiana, 504 U.S. 71 (1992). Sections 19.2-182.13 through 182.16 were also added at that time.

3. In July of 1999, § 19.2-182.7, which addresses the parameters for conditional release, was amended to allow the court to hold an acquittee in contempt of court for violation of the conditional release order.

4. In July of 2002, § 19.2-182.5 of the Virginia Code was amended to limit the period of hospital confinement of individuals found not guilty of a misdemeanor by reason of insanity to one year from the date of the acquittal.

VIII. Highlights of Virginia's Code-Mandated Disposition After a Finding of Not Guilty by Reason of Insanity

The following section provides a brief overview of the legal basis for disposition of

insanity acquittees. Further clarification regarding policy and practice in implementing the law is provided in the following chapters.

A. Initial 45 day temporary custody by the Commissioner of the DMHMRSAS for the purpose of evaluation (§ 19.2-182.2)

1. Two evaluators (one clinical psychologist and one psychiatrist) are appointed by the Commissioner to do independent evaluations.

2. Goal: Assist the court in determining disposition

3. Based on criteria outlined in the Virginia Code, the evaluators recommend

   a. Commitment for inpatient hospitalization;
   b. Conditional release; or
   c. Release without conditions.

4. If either evaluator recommends conditional release or release without conditions, the evaluation period is extended for the preparation of a conditional release or discharge plan by the hospital and the appropriate community services board.

B. Post-evaluation hearing held by the court in which acquittee was found not guilty by reason of insanity (§ 19.2-182.3)

1. Court's options:

   a. Commitment to the custody of the Commissioner for inpatient hospitalization;
   b. Conditional release; or
   c. Release without conditions.

2. Court maintains indeterminate jurisdiction over the acquittee.

   a. Unlike a jail, probation, or prison sentence in which the court sets a maximum length of time the defendant can be held, persons found not guilty by reason of insanity (NGRI) can be maintained indeterminately under the court's jurisdiction, as long as they continue to meet statutory criteria.
   b. Only the court can determine when the acquittee is released without conditions (see later discussion).

3. This and all subsequent proceedings are civil (as contrasted to criminal proceedings).

4. The court shall appoint counsel for the acquittee unless the acquittee waives his right to counsel (§§ 19.2-182.3 and 19.2-182.12).
   a. The acquittee is represented at the commitment hearing by the attorney who represented him/her at the criminal proceedings, unless otherwise ordered by the court (§ 19.2-182.3).
   b. For all subsequent hearings, the Court shall consider the appointment of the attorney who represented the acquittee at the last proceeding (§ 19.2-182.12).

C. Criteria for commitment to the custody of the Commissioner (§ 19.2-182.3)

1. Mentally ill or mentally retarded and in need of inpatient hospitalization based on consideration of the following factors

   a. To what extent the acquittee is mentally ill or mentally retarded, as those terms are defined in § 37.1-1;
   b. Likelihood acquittee will engage in conduct presenting substantial risk of bodily harm to other persons or to himself in the foreseeable future;
   c. Likelihood acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and
   d. Such other factors as the court deems relevant.

2. There must be a finding of mental illness or mental retardation in order to commit an acquittee to inpatient hospitalization. For the purposes of disposition of insanity acquittees, mental illness includes any mental illness, as defined in § 37.1-1, in a state of remission when the illness may, with reasonable probability, become active.

D. Commissioner is responsible for determining acquittee's placement, confinement, and privileges while acquittee remains in Commissioner's custody (grounds privileges, community visits not to exceed 48 hours, civil transfers, etc.) (§ 19.2-182.4).

1. Does not require court permission

2. Commissioner delegates to the Forensic Review Panel (§ 19.2-182.13) the authority to render proper decisions regarding acquittee movement and privileges.

3. Commissioner may grant temporary visits from the hospital not to exceed 48 hours if the visit would be therapeutic for the acquittee and not pose substantial danger to others.

4. Written notification to the Commonwealth's Attorney for the committing

jurisdiction is required when acquittee is authorized to leave the grounds of the hospital in which he or she is confined (§ 19.2-182.4).

E. Any acquittee placed in the temporary custody of the Commissioner or committed to the custody of the Commissioner who escapes from the custody of the Commissioner may be charged with a Class 6 felony, pursuant to § 19.2-182.14.

F. Court permission, after treatment team receives approval from Forensic Review Panel, is required for

1. Conditional release (includes trial visits of over 48 hours as part of conditional release plan); or

2. Release without conditions.

G. Timing of judicial review hearings

1. Annual continuation of confinement hearings (§ 19.2-182.5) start twelve months after date of commitment

a. Yearly intervals for first five years, and
b. Biennial intervals thereafter.

2. Petitions for release (§ 19.2-182.6 and §19.2-182.5(B))

a. Acquittee may petition for release once in each year in which no annual judicial review is scheduled (§ 19.2-182.6(A). The acquittee may also request release at the annual continuation of confinement hearing. If the acquittee requests release at an annual continuation of confinement hearing, the court will order a second opinion evaluation of the acquittee's need for inpatient hospitalization (§ 19.2-182.5(B).
b. The Commissioner of the DMHMRSAS may petition the committing court for conditional or unconditional release of the acquittee at any time he or she believes the acquittee no longer needs hospitalization.
c. Victim notification required: For petitions filed under §19.2-182.6, the Commissioner must give notice of the hearing to any victim of the act resulting in the charges on which the acquittee was acquitted, or the next of kin of the victim, provided the person submits a written request for such notification to the Commissioner.

H. Conditional release

1. Jurisdiction: The Court maintains jurisdiction over an acquittee conditionally released into the community (§ 19.2-182.7).

2. Custody: Upon conditional release, the acquittee is discharged from the custody of the Commissioner.

3. Planning: The community services board must be actively involved with the acquittee and the facility treatment team in planning for the conditional release.

4. Criteria for conditional release

   a. Based on consideration of the factors that the court must consider in its commitment decision (see above), the acquittee does not need inpatient hospitalization but needs outpatient treatment or monitoring to prevent his or her condition from deteriorating to a degree that would require inpatient hospitalization;
   b. Appropriate outpatient supervision and treatment are reasonably available;
   c. There is significant reason to believe that the acquittee, if conditionally released, would comply with the conditions of release specified; and
   d. Conditional release will not present an undue risk to public safety.

5. Implementation and Reporting: Community services board implements the court's conditional release order and submits two types of reports

   a. Written reports to the court on the acquittee's progress and adjustment in the community no less frequently than every six months
   b. Monthly reports on the acquittee's progress and compliance with the conditional release plan to the Office of Forensic Services, of the Division of Facilities Management of the DMHMRSAS.

6. Revocation of conditional release: Return to the custody of the Commissioner for hospitalization (§§ 19.2-182.8 or 19.2-182.9)

   a. Two types of revocation
      (1) non-emergency process (§ 19.2-182.8), or
      (2) emergency process (§ 19.2-182.9)

   b. Criteria for revocation of conditional release
      (1) Acquittee has violated the conditions of his/her release, or is no longer a proper subject for conditional release based on the

criteria for conditional release, and

(2) Is mentally ill or mentally retarded and requires inpatient hospitalization.

c. Acquittee may be returned to conditional release if his condition improves to the degree that within 30 days after the Commissioner has resumed custody, the supervising community services board and facility agree (prior Forensic Review Panel approval is required) that he is an appropriate candidate for conditional release, and the court approves (§ 19.2-182.10).

d. Before recommending the return of the acquittee to conditional release, as part of a thorough risk assessment, the community services board, the facility, and the Forensic Review Panel should review all relevant documents, both current and historical, that pertain to the readiness of the acquittee to be returned to conditional release.

7. Emergency custody of an acquittee: If the acquittee is taken into emergency custody, detained or hospitalized while on conditional release, such action is considered to have been taken pursuant to the laws governing disposition of insanity acquittees (§ 19.2-182.9).

8. Escape of an acquittee placed on conditional release: Any acquittee who is on conditional release who leaves the Commonwealth without the permission of the court may be charged with a Class 6 felony (§ 19.2-182.15).

9. Modification or removal of conditions (§ 19.2-182.11)

a. The committing court may remove conditions placed on release, upon petition of :

(1) community services board,

(2) Commonwealth's Attorney,

(3) motion of the court, or

(4) the acquittee

b. Acquittee may only petition once a year starting six months after the beginning of conditional release.

I. Release without conditions: Discharge into the community and release of court's jurisdiction over acquittee

1. Criteria:

a. Does not need inpatient hospitalization, and

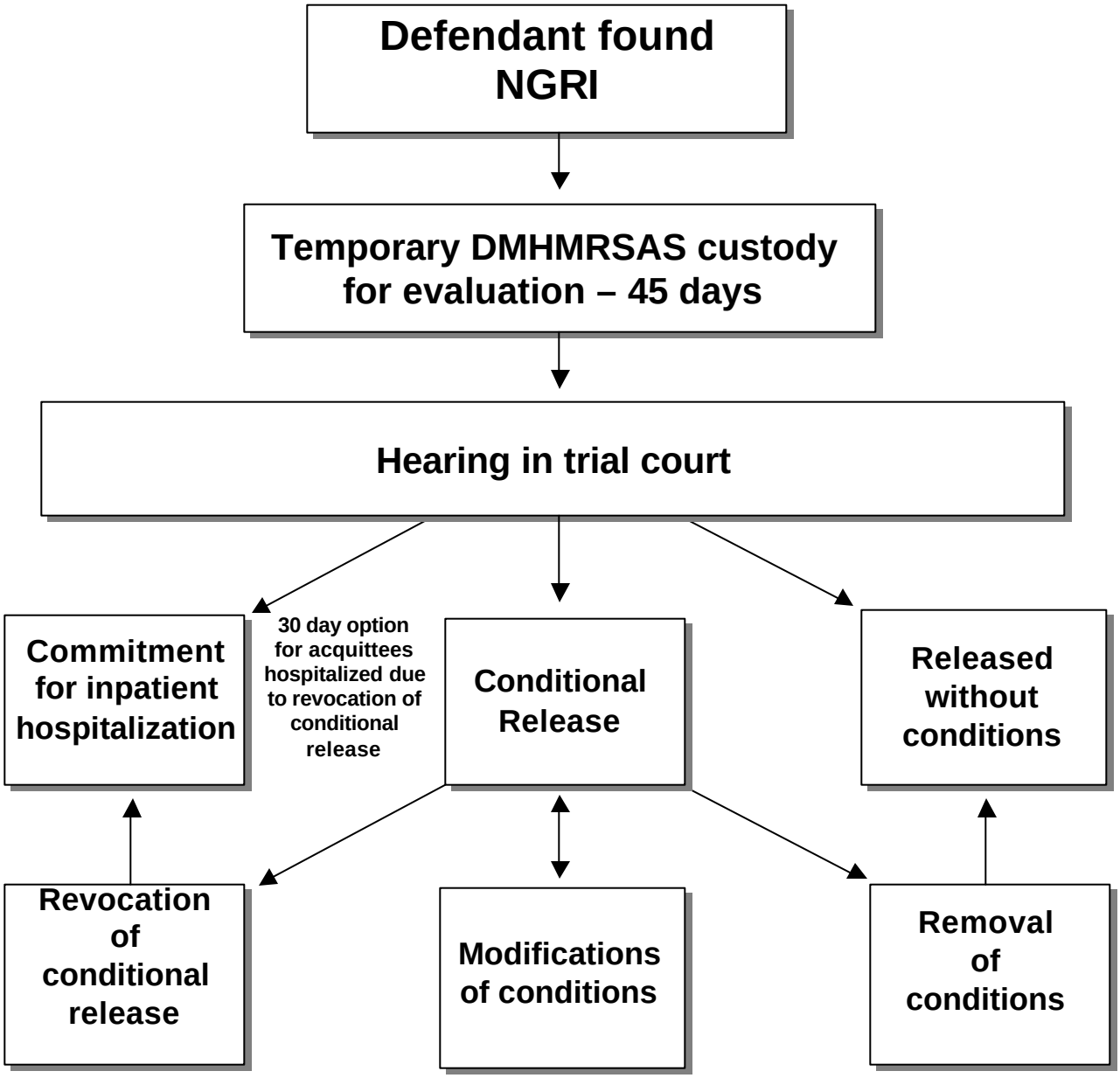
b. Does not meet criteria for conditional release.

2. The court is required to approve a discharge plan jointly prepared by the community services board and the facility (§ 19.2-182.3), when the acquittee is to be released without conditions from hospitalization.

IX. Multiple Courts of Jurisdiction

An acquittee can be found not guilty by reason of insanity by more than one court, for separate offenses. When a defendant has been adjudicated NGRI in multiple courts, each of those courts retains simultaneous jurisdiction over the acquittee. The procedures outlined in this manual relating to courts will apply to every court that has jurisdiction for the individual as an insanity acquittee.

DISPOSITION OF INSANITY ACQUITTEES UNDER VIRGINIA CODE Sections 19.2-182.2 through 19.2-182.16



Note: A new court order is required for each step in this process.