CHAPTER 1

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 in order 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 their 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 a 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 a defendant's mental condition that warrants consideration 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: Between 2017 and 2021 there was an average of 80 NGRI acquittals per year

III. Tests for Insanity

A. Vary from state to state

1. Examples: M'Naghten, Irresistible Impulse Test, American Law Institute Test, and Federal 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, they

   a. did not understand the nature, character, and consequences of their act, or
   b. was unable to distinguish right from wrong, or
   c. was unable to resist the 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. Intellectual disabilities qualify
   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 the belief that the 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.

6. 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 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.

1. At least sixty days prior to trial, the defendant must give notice to the attorney for the Commonwealth of the intention to put sanity at issue and to present testimony of an expert (§ 19.2-168).

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

C. The defendant has the burden of proving insanity to the satisfaction of the judge or 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 general 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.

3. Misdemeanor cases may also be tried in the Juvenile & Domestic Relations court, as in the General District court.

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 in not available to juveniles in delinquency proceedings. (Commonwealth v Chatman, 260 Va. 562 (2000)). Juveniles whose cases are transferred to Circuit court to be prosecuted as adults may raise the insanity defense.

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 for hospitalization pursuant to special commitment laws that are different than those that regulate civil commitment.

1. Virginia civil commitment laws: Va. Code § 37.2-800 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.

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 Virginia's law regarding the disposition of insanity acquittees. Further clarification regarding policy and practice in implementing the law is provided in the following chapters.

A. Initial period in the temporary custody of the Commissioner of the Department of Behavioral Health and Developmental Services (DBHDS) for the purpose of evaluation (§ 19.2-182.2)

1. Two evaluators (one clinical psychologist and one psychiatrist) are appointed by the Commissioner to conduct independent evaluations to determine whether the acquittee has a mental illness or intellectual disability, and to assess the need for hospitalization considering the factors in § 19.2-182.3.

2. Goal: Assist the court in determining disposition

3. Based on criteria outlined in the Virginia Code, the evaluators can 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 temporary custody period is extended for the preparation of a conditional release or discharge plan by the DBHDS and the appropriate CSB/BHA.

B. Post-evaluation hearing is 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 under the court's jurisdiction indeterminately, as long as they continue to meet the statutory commitment criteria.
   b. Only the court can determine when the acquittee is released with or without conditions (see later discussion).

3. This and all subsequent hearings are civil proceedings, as opposed to criminal proceedings (§19.2-182.3).

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 initial 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. Has a mental illness or intellectual disability and is in need of inpatient hospitalization based on consideration of the following factors

a. To what extent the acquittee has a mental illness or intellectual disability, as those terms are defined in § 37.2-100;
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 intellectual disability 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 § 37.2-100, in a state of remission when the illness may, with reasonable probability, become active.

D. The Commissioner is responsible for determining an acquittee's placement (including inter-facility transfers), and privileges (§ 19.2-182.4)

1. The Commissioner may make inter-facility transfers and treatment and management decisions without obtaining prior approval of the court.

2. The Commissioner delegates to the Forensic Review Panel (FRP) (§ 19.2-182.13) the authority to make decisions regarding an acquittee's privileges.

3. Commissioner may grant temporary visits from the hospital not to exceed 48 hours if the visit would be (i) therapeutic for the acquittee and (ii) not pose substantial danger to others. Court approval is not required.

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 the acquittee is confined (§ 19.2-182.4). The Commissioner must also give notice of the granting of an unescorted community visit to any victim of a felony offense against the person punishable by more than five years in prison that resulted in the charges on which the acquittee was acquitted, or the next-of-kin of the victim at the last known address, provided the person seeking notice submits a written

request for such notice to the Commissioner.

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

F. Court permission, after treatment team receives approval from FRP, is required for

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

2. Community visits longer than 48 hours; or

3. 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 and requests for release (§ 19.2-182.6 and §19.2-182.5(B))

a. An 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 evaluating the acquittee's need for inpatient hospitalization (§ 19.2-182.5(B)). If an acquittee petitions for release outside of the annual continuation of confinement hearing the court shall order two evaluations to report on the acquittee's need for inpatient hospitalization.
b. The Commissioner of the DBHDS may petition the committing court for conditional or unconditional release of the acquittee at any time he believes the acquittee no longer needs hospitalization.
c. Victim notification: For conditional release 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 has submitted 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 CSB/BHA 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 condition from deteriorating to a degree that he would need 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 specified; and
   d. Conditional release will not present an undue risk to public safety.

5. Implementation and Reporting: CSB/BHA 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 Forensic Services of the DBHDS. These reports are due for the first twelve months following conditional release.

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 processes for 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 release, or is no longer a proper subject for conditional release based on the criteria for conditional release, and
(2) acquittee has a mental illness or intellectual disability and requires inpatient hospitalization.

c. Acquittee may be returned to conditional release if his/her condition improves to the degree that within 60 days after the Commissioner has resumed custody, the supervising CSB/BHA and facility agree (prior FRP approval is required) that the acquittee 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 CSB/BHA, the facility, and the FRP 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 involuntarily hospitalized while on conditional release, such action is considered to have been taken pursuant to § 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 modify or remove conditions placed on release upon petition of:

(1) CSB/BHA;
(2) Commonwealth's Attorney; or
(3) the acquittee.

b. The committing court may also modify or remove conditions of release on its own motion.

c. Acquittee may only petition for change or modification of conditions 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:

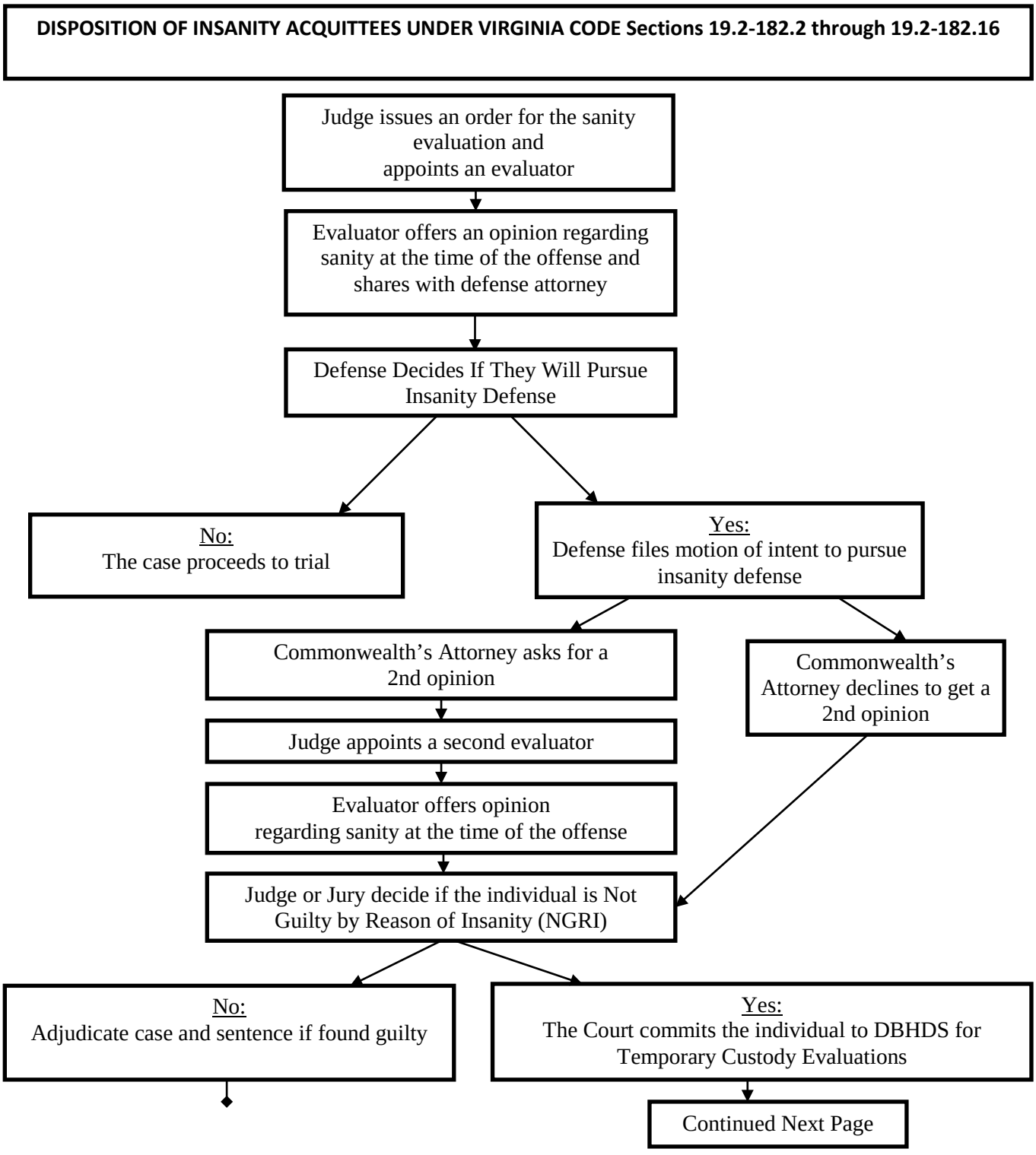
   a. Does not need inpatient hospitalization, and
   b. Does not meet criteria for conditional release.

2. The court is required to approve a discharge plan jointly prepared by the CSB/BHA and the facility (§ 19.2-182.3, §19.2-182.6), when the acquittee is to be released without conditions.

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.

CHART 1.1


DISPOSITION OF INSANITY ACQUITTEES UNDER VIRGINIA CODE Sections 19.2-182.2 through 19.2-182.16
Judge issues an order for the sanity evaluation and appoints an evaluator
Evaluator offers an opinion regarding sanity at the time of the offense and shares with defense attorney
Defense Decides If They Will Pursue Insanity Defense
No: The case proceeds to trial
Yes: Defense files motion of intent to pursue insanity defense
Commonwealth's Attorney asks for a 2nd opinion
Commonwealth's Attorney declines to get a 2nd opinion
Judge appoints a second evaluator
Evaluator offers opinion regarding sanity at the time of the offense
Judge or Jury decide if the individual is Not Guilty by Reason of Insanity (NGRI)
No: Adjudicate case and sentence if found guilty
Yes: The Court commits the individual to DBHDS for Temporary Custody Evaluations
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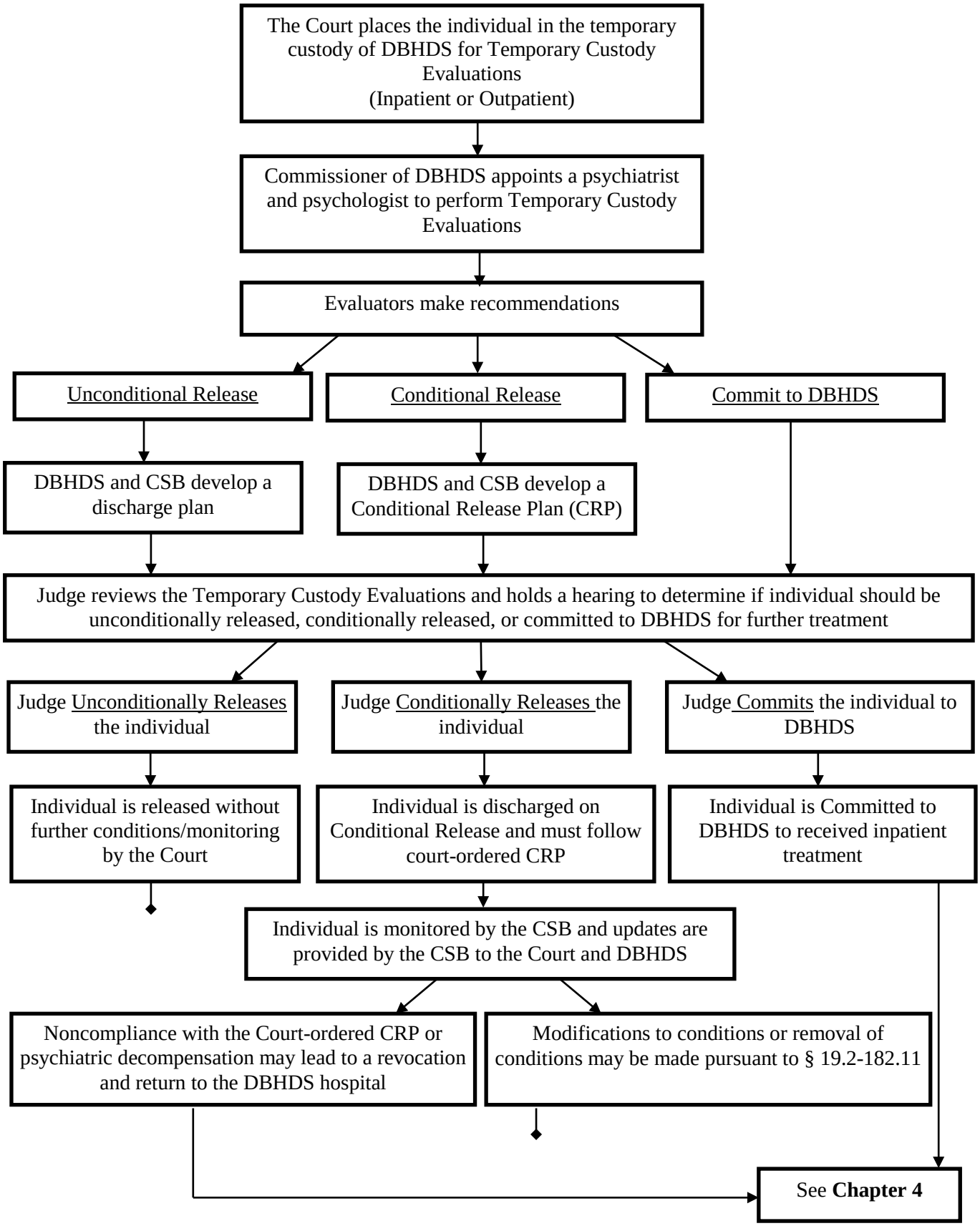
The Court places the individual in the temporary custody of DBHDS for Temporary Custody Evaluations (Inpatient or Outpatient)
Commissioner of DBHDS appoints a psychiatrist and psychologist to perform Temporary Custody Evaluations
Evaluators make recommendations
Unconditional Release
Conditional Release
Commit to DBHDS
DBHDS and CSB develop a discharge plan
DBHDS and CSB develop a Conditional Release Plan (CRP)
Judge reviews the Temporary Custody Evaluations and holds a hearing to determine if individual should be unconditionally released, conditionally released, or committed to DBHDS for further treatment
Judge Unconditionally Releases the individual
Judge Conditionally Releases the individual
Judge Commits the individual to DBHDS
Individual is released without further conditions/monitoring by the Court
Individual is discharged on Conditional Release and must follow court-ordered CRP
Individual is Committed to DBHDS to received inpatient treatment
Individual is monitored by the CSB and updates are provided by the CSB to the Court and DBHDS
Noncompliance with the Court-ordered CRP or psychiatric decompensation may lead to a revocation and return to the DBHDS hospital
Modifications to conditions or removal of conditions may be made pursuant to § 19.2-182.11
See **Chapter 4**