# Virginia State Crime Commission

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## Unrestorably Incompetent Defendants

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2011

# Unrestorably Incompetent Defendants

## Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced House Joint Resolution 626 (HJR626), which directed the Crime Commission to study the disposition of unrestorably incompetent defendants, and assess whether the available disposition options are adequate to deal with all defendants who are found to be unrestorably incompetent regardless of the underlying reason for the incompetency. While House Joint Resolution 626 (HJR 626) was left in the House Rules Committee, the patron of the resolution directly requested the Crime Commission to study its general subject matter.

In Virginia, when a criminal defendant is found incompetent to stand trial, the court issues an order directing that the defendant receive treatment, with the goal of restoring him to competency. In the event the treatment provider reports to the court that the defendant has not been restored to competency, and is not likely to be restorable to competency in the foreseeable future, and the court agrees with this determination, the defendant is then usually subject to a civil commitment petition. In those rare instances where, in the separate civil proceeding, the defendant is found to not meet the standard for involuntary civil commitment, he must be released back into the general public. If the defendant is still suffering from a mental disorder, it creates the possibility that he could commit a new crime, be found incompetent to stand trial on the new criminal charges, and the process would repeat itself.

The Crime Commission considered the possibility of creating a new standard for involuntary civil commitment for respondents recently found incompetent to stand trial in a criminal case. However, creating two sets of standards for civil commitment cases could be problematic. Instead, the Crime Commission recommended that the involuntary commitment statute be modified, to emphasize to judges and special justices that if a respondent has recently been found incompetent to stand trial, that fact may be considered, provided it is properly admitted into evidence.

## Background

During the 2011 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced HJR 626, which directed the Crime Commission to study the disposition of unrestorably incompetent defendants, and assess whether the available disposition options are adequate to deal with all defendants who are found to be unrestorably incompetent regardless of the underlying reason for the incompetency.[1] While HJR 626 was left in the House Rules Committee, the patron of the resolution directly requested

the Crime Commission to study its general subject matter: what options are available when a criminal defendant is found to be unrestorably incompetent to stand trial, and is later found in a civil commitment hearing to not meet the standard for involuntary commitment? Are the available statutory dispositions, created by the legislature, adequate to deal with those defendants who might repeatedly commit crimes, repeatedly be found incompetent to stand trial, and then, in a civil proceeding, be found to not meet the standard for involuntary commitment?

## Analysis

In Virginia, when a criminal defendant is found to be incompetent to stand trial, the court issues an order that the defendant receive treatment to restore him to competency.[2] Such treatment may be provided on an outpatient basis, or, if the court specifically finds that the defendant needs inpatient hospital treatment, he may be ordered to receive treatment at a hospital designated by the Commissioner of the Department of Behavioral Health and Developmental Services.[3] The treatment provider must send a report to the court within six months, stating whether the defendant has been returned to competency, or has not been restored to competency, but is restorable to competency in the foreseeable future, or is incompetent and is likely to remain so for the foreseeable future.[4] If the court finds that the defendant is incompetent, but is restorable to competency in the foreseeable future, it may order that the defendant continue to receive treatment in six month intervals.[5]

If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, i.e., is unrestorably incompetent, then there are four dispositional options available:[6]

- the defendant can be released;
- the defendant can be committed pursuant to the regular involuntary civil commitment process as outlined in Va. Code § 37.2-814 et seq.;
- if the defendant has mental retardation, he can be certified as eligible for placement in a training center, pursuant to the certification process outlined in Va. Code § 37.2-806 et seq.; or,
- if the defendant is charged with having committed a sexually violent offense, he <u>must</u> be reviewed for possible commitment as a sexually violent predator, as provided for in Va. Code § 37.2-900 et seq.

Normally, if the defendant does not have mental retardation and is not charged with a sexually violent offense, the second option will be followed, and the defendant will be the subject of a petition to have him civilly committed. The standard for a person to be involuntarily civilly committed is provided in Va. Code § 37.2-817(C). The judge or special justice must find by clear and convincing evidence that:

> (a) the person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (2) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, and (b) all available less restrictive treatment alternatives to involuntary inpatient treatment, pursuant to subsection D, that would offer an opportunity for the improvement of the person's condition have been investigated and determined to be inappropriate…

This standard was created in 2008 as part of the revisions that were made to Virginia's mental health statutes, and was designed to make it easier for respondents to be involuntarily civilly committed.[7] The former standard, prior to 2008, required a showing that the respondent "presents an imminent danger to himself or others."[8]

Even with this easier standard, though, it is possible for a respondent, who begins the involuntary civil commitment process as a result of being found unrestorably incompetent to stand trial on a criminal charge, then to be found by a judge or special justice to not meet the standard required for civil commitment. In that event, the respondent would have to be released, either completely free or on the condition of receiving out-patient treatment.[9] This, in turn, could lead to a scenario where the respondent then commits another crime, is evaluated for competency, is found by the criminal court to be unrestorably incompetent, and the process repeats itself.

This presents an important public policy question for Virginia's legislature--do Virginia's statutes provide enough protection to the public? Currently, the statute that governs the possible dispositions for defendants found unrestorably incompetent directly cites the general involuntary commitment statutes.[10] Should the civil commitment standard that is used for those respondents who have recently been found unrestorably incompetent be the same as for respondents in general, i.e., those respondents who have not been recently charged with a crime?

The United States Supreme Court has held that due process and equal protection concerns apply to state civil commitment proceedings involving defendants who have been found incompetent to stand trial.[11] A state may not create a process whereby an incompetent defendant is automatically civilly committed, and is then denied the opportunity to have a meaningful review of his condition after institutionalization, while at the same time, other committed individuals have a much easier chance of eventually being released.[12] However, the Supreme Court has not mandated that the civil commitment process applicable to criminal defendants must be identical to the general involuntary commitment process.[13] While most state statutes are like Virginia's, in that the statute that governs unrestorably incompetent defendants directly references the statute or statutes governing general involuntary commitments,[14] or uses the same standard and essentially the same language as found in the general statute,[15] some states do have a slightly different process for those respondents who were initially referred for possible commitment after being found incompetent to stand trial for a criminal charge.[16]

Therefore, as long as Virginia's procedures satisfied the basic elements of due process, it would probably be constitutional for the legislature to create a slightly different standard for the involuntary commitment of unrestorably incompetent defendants, than the standard used for all other respondents. Three possible new standards, suggested by current language in the Code of Virginia, would be:

- A standard similar to that used for the commitment of sexually violent predators—because of his mental illness, the respondent finds it difficult to control his violent or predatory behavior;[17]

- A standard similar to that used for determining if a mental patient should be released after having been involuntarily committed—will the respondent engage in behavior that is detrimental to the public welfare or injurious to himself;[18] or,

- A standard that slightly modifies the existing language of Va. Code § 37.2-817(C)—will the respondent cause physical harm to himself or others, rather than the higher standard of "serious physical harm."

## Conclusion

The Crime Commission discussed the possibility of creating a slightly different standard for the involuntary commitment of respondents who were recently found to be unrestorably incompetent to stand trial for a criminal charge. The Crime Commission decided that a different standard should not be created for this group of respondents. Instead, the existing statute, Va. Code § 37.2-817(C), could have language inserted that would emphasize to the judge or special justice that the fact that the respondent had recently been found to be unrestorably incompetent to stand trial, or had recently been charged with a crime, could be considered in making his ruling. Already, Virginia's statute allows the judge or special justice to consider "any past actions of the person," "any examiner's certification," and "any other relevant evidence that may have been admitted."[19] Therefore, adding language that would include the phrase "including the fact that the person has recently been found to be unrestorably incompetent to stand trial for a criminal charge," would not be a substantive change in the law. Rather, it would simply provide an emphasis to the judge or special justice that this fact should not be forgotten or deemphasized in determining whether or not the respondent might, in the near future, cause serious physical harm to himself or others.

The Crime Commission unanimously voted to recommend that this language be added to Virginia's involuntary commitment statute.

During the 2012 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced House Bill 972, which added the Crime Commission's recommended language to the involuntary commitment statute.[20] After passing both the House of Delegates and the Senate, this bill was signed into law by the Governor on March 30, 2012.[21]

[1] H.J. Res. 626, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[2] VA. CODE ANN § 19.2-169.2(A) (2011).
[3] Id.
[4] VA. CODE ANN §§ 19.2-169.2(B), 19.2-169.3(A)-(B) (2011).
[5] VA. CODE ANN § 19.2-169.3(B) (2011).
[6] VA. CODE ANN § 19.2-169.3(A) (2011).
[7] 2008 Va. Acts chs. 779, 780, 782, 793, 850, 870.
[8] VA. CODE ANN § 37.2-817(B) (2007).
[9] VA. CODE ANN § 37.2-817(D) (2011).
[10] As discussed *supra*, Va. Code § 19.2-169.3 directly references Va. Code § 37.2-814 et seq. as a process to be followed when a defendant is determined to be unrestorably incompetent to stand trial.
[11] Jackson v. Indiana, 406 U.S. 715 (1972).
[12] Id.
[13] Jones v. United States, 463 U.S. 354 (1983). *See also*, United States v. Sahhar, 917 F.2d 1197 (9th Cir. 1990).
[14] *See, e.g.*, N.C. GEN. STAT. § 15A-1002(b1) (2011), KY. REV. STAT. ANN. § 504.080(7) (West 2011); TENN. CODE ANN. § 33-7-301(b)(1)(B) (West 2011).
[15] *See, e.g.,* MD. CODE ANN., CRIM. PROC. § 3-106 (West 2011).
[16] *See, e.g.,* W. VA. CODE § 27-6A-3 (2011).
[17] *Cf.* VA. CODE ANN § 37.2-900 (2011).
[18] VA. CODE ANN §§ 37.2-837, 37.2-838 (2011). This is not an evidentiary standard used in legal hearings, but is the standard of evaluation that the director of a hospital is to use when determining whether or not a mental patient can be discharged.
[19] VA. CODE ANN § 37.2-817(C) (2011).
[20] H.B. 972, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).
[21] 2012 Va. Acts ch. 451.