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REPORT OF THE
VIRGINIA BAR ASSOCIATION

REPORT ON THE ADJUDICATION OF THE INSANITY DEFENSE IN JUVENILE DELINQUENCY PROCEEDINGS

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 60

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V·B·A
The Virginia Bar Association

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Executive Vice President
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December 6, 1999

TO: The Honorable James S. Gilmore, III, Governor of Virginia

and

Members of the Virginia General Assembly

The 1999 General Assembly, through House Joint Resolution 680, requested the Virginia Bar Association to study the adjudication of the insanity defense in juvenile delinquency proceedings.

The Virginia Bar Association assembled a working group from its relevant substantive sections and committees, and has now completed that study, with the advice and assistance of a broadly representative task force called for by H.J.R. 680. Our study included consideration of applicable jurisprudence as well as of the Commonwealth's policies, procedures and services, with the goal of developing statutory guidance and the mechanisms to implement a new law.

We are pleased to convey this Study Report and to recommend this proposed legislation to codify an insanity defense in juvenile court proceedings. We are grateful to the General Assembly for the opportunity to study this matter, and acknowledge with gratitude the generous participation and assistance of the advisory group.

Respectfully Submitted,

David C Landin

David C. Landin, President
The Virginia Bar Association

HJR 680 Study Group

The Virginia Bar Association wishes to express its appreciation to those named below who have participated so diligently in this study, a number of whom have also served as authors of this Report and proposed legislation. We expressly thank Richard E. Redding, J.D., Ph.D., for his assistance in assembling this Report.

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ATTACHMENTS

EXECUTIVE SUMMARY

The 1999 General Assembly enacted House Joint Resolution 680 requesting The Virginia Bar Association to "study the adjudication of the insanity defense in juvenile delinquency proceedings" and to "examine the state's policies, procedures, and services applicable to these issues with a goal of developing statutory guidance and the mechanisms to implement a new law". In fulfilling this legislative request, The Virginia Bar Association established an advisory task force to assist it in the study reported herein.

The task force included Virginia Juvenile and Domestic Relations District Court Judges, and representatives from the: Office of the Attorney General, Executive Committee of The Virginia Bar Association (and its substantive law sections and committees), Virginia College of Criminal Defense Attorneys, Commonwealth's Attorneys' Services Council, Virginia State Bar Criminal Law Section, Department of Juvenile Justice, Department of Criminal Justice Services, Department of Mental Health, Mental Retardation, and Substance Abuse Services, Virginia Association of Community Service Boards, the University of Richmond School of Law, Washington and Lee School of Law, University of Virginia School of Law, Institute of Law, Psychiatry, and Public Policy at the University of Virginia, and mental health service providers.

The study included five components: task force review and deliberations (convening in full group five times between June and November 1999), a review of the legal and clinical literature, a statewide survey of Juvenile and Domestic Relations Court Judges, a national survey of relevant statutory and case law, and a survey of the experiences of practicing attorneys in other states that have the insanity defense in the juvenile court.

FINDINGS

In Virginia, an adult charged with a criminal offense may defend on the ground that he was insane at the time of the offense. Also, a juvenile 14-years of age or older tried in Circuit Court may defend on the same grounds. However, the Code of Virginia does not address the issue of a juvenile's right to defend on the same grounds in juvenile delinquency proceedings, and, at the time of the enactment of H.J.R. 680, there was no known precedent in Virginia case law for the insanity defense in juvenile court.

During the task force study, it was learned that such a defense had been raised in the juvenile court in twelve different jurisdictions throughout the Commonwealth. Moreover, the Virginia Court of Appeals rendered its opinion in *Chatman v. Commonwealth,* 30 Va. App. 593, 518 S.E.2d 847 (1999), holding that the defense of not guilty by reason of insanity is available in juvenile delinquency proceedings in the juvenile court. The Court's decision was grounded in due process considerations: " . . . an adjudication of delinquency has wide and serious consequences . . . the right to assert an insanity defense is an essential of due process and fair treatment which is required at a juvenile delinquency adjudication." The *Chatman* decision, however, is currently on appeal, leaving no final answer in case law as to whether there is an insanity defense for juveniles in juvenile court proceedings in Virginia.

In reviewing the jurisprudence of the insanity defense and the significant due process concerns arising out of the increasingly serious ramifications of juvenile adjudications, the VBA concluded, as did the Court of Appeals, that due process and fundamental fairness require that the insanity defense be available to juveniles, and that it

would be fundamentally unfair to make such a defense available to adult defendants but not to juveniles. It could also be seen as unfair to make such a defense available to juvenile defendants in the Circuit Court, but not to juvenile defendants in the juvenile court. The consequences of a juvenile adjudication may include, for example, the possibility of a long-term determinate sentence in a juvenile correctional facility, open hearings and no guarantee of confidentiality or expungement of court records, use of juvenile adjudications to enhance an adult sentence, and the possibility that a juvenile adjudication may count as a "strike" under three strikes laws in certain states. These new and very significant consequences of juvenile adjudications can extend into and seriously affect a young person's adult life. Fundamental fairness therefore requires that a juvenile offender have the statutory right to prove that, because of mental illness or mental retardation, he or she should not be held responsible for an alleged delinquent act. If a child is not culpable for the delinquent act, he or she should not suffer the serious consequences that a delinquency adjudication now carries.

The recent judicial recognition of a juvenile insanity defense in Virginia reinforces the need for statutory clarification of the standards and implementation of such a defense, as called for by H.J.R. 680, so that there will be uniformity across the Commonwealth in the adjudication and disposition of these cases. The task force devoted significant attention to such standards, particularly the legal standard itself and the best way to approacn dispositional alternatives. States that already recognize the defense offered little guidance in these matters. The Court of Appeals in *Chatman* did not specify the procedures for adjudicating a juvenile not guilty by reason of insanity nor did it specify the dispositional

alternatives and procedural mechanisms for handling juveniles found not guilty by reason of insanity. The need for a statutory codification of such standards and procedures is evident. For example, a statewide survey of Juvenile and Domestic Relations Court Judges found wide variability in how courts provide for the evaluation of a juvenile's mental status, the criteria and standards used, the dispositional alternatives available and used in handling seriously mentally ill juveniles, and judicial views about the jurisdictional limits of any possible insanity defense in the juvenile court.

As a result of its task force deliberations and review, The Virginia Bar Association recommends that the Code of Virginia be amended to provide a statutory provision for the not guilty by reason of insanity defense in juvenile delinquency proceedings in the juvenile court. The proposed draft legislation would provide needed guidance to Virginia Juvenile and Domestic Relations Courts concerning the criteria, standards, and procedures to be used in determining whether the juvenile lacks responsibility because of mental illness or mental retardation, and it would provide the needed dispositional mechanisms for juvenile insanity acquitees. For the implementation of any insanity defense, however, it is important to emphasize that mechanisms must be developed to provide a continuum of secure and non-secure residential treatment services for juveniles adjudicated not responsible. With that, monitoring implementation of the defense to facilitate the fine-tuning of dispostion and post-disposition mechanisms would be wise.

A proposed draft statute, *"Child Not Responsible Because of Mental Illness or Mental Retardation,"* is attached. The statute is consistent with the *Chatman* decision with respect to the availability of the insanity defense in the juvenile court and closely parallels

current Virginia adult statutes concerning the procedures for evaluation and litigation. The dispositional mechanisms necessarily differ somewhat from those for adults, however. (A comparison of Virginia's current adult insanity defense with the recommended juvenile statute is provided in the Attachments Section of this Report).

The draft legislation reflects the following VBA recommendations:

A. Standard for Finding the Child Not Responsible Because of Mental Illness or Mental Retardation

Recommendation 1

Although this defense is an insanity defense (which actually is somewhat narrower than the current adult standard -- see Recommendation 3, below), the term for the recommended juvenile defense should be "Child Not Responsible Because of Mental Illness or Mental Retardation" (this language mirrors that found in the Texas juvenile code providing for an insanity defense -- "Lack of Responsibility for Conduct") rather than "Not Guilty By Reason of Insanity".

The former terminology is less stigmatizing to the child; the stigma of being found "insane" may have significant future ramifications upon the child's ability to reintegrate into community life. More significantly, the term "insanity," particularly when applied to juveniles, is devoid of any clinical meaning. Inclusion of the terms "mental illness" and "mental retardation" make clear the basis for the finding of lack of responsibility.

Recommendation 2

The statutory definitions of "mental illness" and "mental retardation" are those currently provided in Virginia Code Sections 16.1-336 and 37.1-1, respectively. However,

for purposes of this law, the term "mental illness" shall not include temporary conditions solely induced by substance abuse or voluntary intoxication, which is consistent with Virginia law on the adult insanity defense.

Recommendation 3

The standard for acquittal for lack of responsibility is the McNaghten standard, the standard for insanity adopted by the Virginia appellate courts, including the Virginia Court of Appeals in *Chatman*. A more expansive standard that would include the "irresistible impulse" test has proved unworkable and very difficult to apply in the adult context, and given the nature of child and adolescent development, would likely be even more problematic in its application to juveniles. The current Virginia volitional "irresistible impulse" test (which, notably, the *Chatman* court did not mention) is clinically difficult to assess reliably, and in Virginia, requires that the person understand wrongfulness yet be grossly behaviorally disinhibited, which is highly clinically improbable.

Recommendation 4

A finding under this standard could not be based on the child's age or developmental maturity alone. It is not the intent of this recommendation to expand the legal standard for insanity beyond that available to adult defendants. In addition, this language, designed to avoid automatic findings of lack of responsibility based on tender years or immaturity alone, parallels the language in the recently enacted juvenile competency legislation. The lack of responsibility defense, however, would not affect any existing "infancy" defense which may otherwise be available.

B. Procedures

Recommendation 5

The procedures for the appointment of qualified mental health experts are the same as those currently provided for adults in Virginia Code Sec. 19.2-169.5, with the qualification that the experts have specialized training and experience in the evaluation of juveniles. As required under the recently enacted juvenile competency legislation (Va. Code Sec. 16.1-356, et seq.), the Commissioner of Mental Health, Mental Retardation, and Substance Abuse Services is directed to issue guidelines to juvenile courts to use in determination of qualifying experts.

Recommendation 6

In all other respects, the procedures and protections (i.e., who may raise the defense, court appointment of experts, details of court order for the evaluation, contents of the evaluation, who has access to the evaluation, protection against self-incrimination) are identical to those currently provided for adults under Virginia Code Sec. 19.2-169.5.

C. Notice to the Commonwealth

Recommendation 7

As with current adult procedures for raising the not guilty by reason of insanity defense, the child must provide notice to the Commonwealth of the intent to put in issue his mental status and present evidence to support his claim of lack of responsibility. In all respects, the notice requirements are the same as those for adult defendants pleading not guilty by reason of insanity. See Va. Code Sec. 192-168, et seq.

D. Commonwealth's Evaluation

Recommendation 8

As with current adult procedures for raising the not guilty by reason of insanity defense, the juvenile court shall appoint qualified experts to perform an evaluation of the child's responsibility for the alleged offense. The procedural requirements are the same as those for adult defendants pleading not guilty by reason of insanity, see Va. Code Sec. 19.2-169.5, except that the evaluation must be conducted on an outpatient basis unless the results of the outpatient evaluation indicate that hospitalization is necessary. This is consistent with the preference for the least restrictive alternative, and meets the consistent concern of the Department of Mental Health, Mental Retardation and Substance Abuse Services that inpatient services not be used unless necessary.

E. Findings

Recommendation 9

The trier of fact determines whether the child is not responsible because of mental illness or mental retardation, and if the trier of fact so determines by a preponderance of evidence, the court shall find the child not guilty of the offense charged.

F. Disposition

Recommendation 10

Upon finding that the child is not responsible, the court should determine whether the child poses an unreasonable risk to public safety. The task force recommends this because of the concern expressed by its judicial members, the Commonwealth's Attorneys, and the Community Service Boards, that the need for secure treatment settings

for dangerous mentally ill juveniles must be specifically addressed. The courts need clear dispositional authority in such cases and agency responsibility for such juveniles must be clarified. If the court so determines, the court shall commit the child to the Commissioner of the Department of Mental Health, Mental Retardation, and Substance Abuse Services for placement in a secure treatment facility, which may include a psychiatric treatment facility. The child is not to be placed in a juvenile detention or correctional facility.

Recommendation 11

If the court does not determine that the child poses an unreasonable risk to public safety, the court has broad options:

> enter any disposition authorized under Virginia Code Sec. 16.1-278.4 ("Children in Need of Services"), or, under Sec. 16.1-286, with such child considered a "mandated child" under the Comprehensive Services Act for At-Risk Youth and Families.

In all cases, the least restrictive alternative is to be preferred.

These options provide maximal dispositional flexibility to juvenile court judges, ensure that less restrictive alternatives are preferred (with the attendant reduction in cost, and the enhanced treatment outcomes often demonstrated through less restrictive as compared with more restrictive treatment regimes), and ensure that services will be provided these youth by virtue of their being considered a "mandated child" under the Comprehensive Services Act.

Recommendation 12

As is the case with any current juvenile court disposition, any disposition ordered by the court expires when the child becomes 21 years of age, the jurisdictional limit of the

juvenile and domestic relations court. This provision also guarantees that juveniles not be hospitalized indefinitely -- a frequent problem in the current system for handling adult insanity acquitees.

G. Review

Recommendation 13

Court review of dispositions shall occur every 120 days; additionally, the agency which has assumed responsibility for the child, or the child's attorney, may at any time petition the court for a change of disposition. More frequent dispositional reviews are necessary for children (as compared with adults) because of the relatively malleable nature of child and adolescent mental status, psychopathology and treatment needs. For children, frequent review is particularly important in cases where the child has been placed in inpatient hospitalization, as a significant body of clinical literature has documented a variety of significant negative clinical effects of long-term inpatient psychiatric hospitalization on children. The statute again makes clear that the least restrictive alternative is to be preferred.

Recommendation 14

The agency responsible for the child is required to submit to the court a report concerning the child's current mental health fourteen days before the scheduled hearing on the 120-day dispositional review. Thus, the 120-day court reviews helps ensure agency accountability, adherence to treatment plans, and adequate monitoring of treatment needs and plans.

H. Compensation of Experts

Recommendation 15

As in the adult system, compensation for experts is provided for under Virginia Code Sec. 19.2-175.

CONCLUSION

It is important to note that time was not taken during the present study to develop an alternative system whereby children with severe mental illness could be evaluated and diverted for treatment, pre-adjudication, and whether, on balance, greater benefit might result from such a system. To some extent, but inconsistently across the Commonwealth, evaluation and diversion of such juveniles does occur; the proposed codification of a juvenile "insanity" defense is unlikely to prevent the use of such informal adjudicatory and dispositional options. Moreover, the costs of treatment under such an alternative system would be similar, particularly in the cases of dangerous juveniles for whom a secure treatment facility, not yet available in Virginia, would be necessary.

In any case, the recent judicial recognition of a juvenile insanity defense reinforces the need for statutory clarification of the standards and implementation of such a defense. Since the defense will apply to such a highly restricted juvenile population among the population of juveniles with serious mental illness, the legislature may, in its wisdom, see fit to direct a further study of such possible early evaluation and diversion programs for seriously mentally ill juvenile offenders, while also enacting the proposed legislation that

would clarify the standards and procedures for the already judicially recognized insanity defense in juvenile delinquency proceedings.

It must be emphasized, however, that for the implementation of any insanity defense, mechanisms must be developed to provide a continuum of secure and non-secure residential treatment services for juveniles adjudicated not responsible.

Finally, it is recommended that training programs be provided for the judiciary, the bar, and clinicians, on the statutory standards and provisions and on the assessment of insanity in juveniles, to ensure that the law is implemented as intended.

INTRODUCTION AND METHODOLOGY

The conclusions and recommendations of this Study Report and proposed legislation reflecting them were reached following intensive scrutiny of the subject assigned by H.J.R. 680. Much of the work had to be carried out in smaller groups; consideration of that work in turn occurred in meetings of the full group.

As soon as the broadly representative, multi-disciplinary advisory group was appointed, our first task was to self-organize. This involved preliminary discussions about what the precise focus of the study should be. No assumptions were made, and the impulse to come to quick conclusions was consciously resisted. Instead, the myriad issues possibly implicated by the study were identified and the list then culled to define exactly which questions and issues the study would address in the time available.

Five workgroups were formed around those fundamental areas of inquiry, to help us acquire and analyze the information we needed to facilitate debate and the reaching of

informed conclusions. In addition to acquiring as much information as possible about case and statutory law on the subject, we sought information as to the practical experience in states where such defense is available to juveniles. Medical and legal literature reviews were performed. We also sought an answer to whether this subject is frankly of enough concern in Virginia to merit full-blown attention; to that end a judicial survey was instituted, which led to the surprising and important information that, in fact, the defense had been asserted throughout Virginia with inconsistent responses by the courts. The interest expressed by some members of the judiciary, in response to our survey, in receiving clear guidance as to standards and practice provided additional motivation to the study. Throughout the study, we were aware that issues pertaining to the defense were pending in several Virginia courts and we remained alert to developments in such cases.

The active involvement of forensic clinicians in the study enhanced our discussions greatly as we sought to address the very practical and fundamental questions of whether there is such an individual as a juvenile ill enough to meet this defense standard, and whether the standard can be worded not only to reflect the adult standard applied by the courts but also to guide the forensic evaluators better so that evaluations would be as accurate as possible. Similarly, the active involvement of the provider community added to our discussion by calling to our attention not only the current lack of placement alternatives, but also the practical implementation problems that exist with regard to placement of any juvenile who may be found Not Guilty By Reason of Insanity (NGRI). We did not develop the means to scientifically predict the impact, that is, the numbers of juveniles who could be found NGRI. However, it was repeatedly held out to us that the

cases will be exceedingly rare where the defense would be successfully asserted under this proposal. It was opined by the forensic clinicians that most juveniles who might meet the proposed standard of NGRI would be so ill as to not even pass a competency evaluation.

Once the information was gathered, exchanged and discussed, we were able to debate in full group the fundamental question whether it is advisable to have a codified juvenile insanity defense in Virginia, setting consistent standards of practice. The VBA reached a general agreement with the support of certain representative members of the advisory group that codifying the defense would be valuable. (Dissenting opinion by the Commonwealth's Attorneys' Services Council, and clarification of groups which have not yet taken a position are noted elsewhere in this Report). Having made such a determination, our focus moved on to crafting disposition standards in light of the concerns raised by the provider community.

The following sections of this Study Report summarize the information that was acquired and analyzed in the course of this study and are the foundation on which our recommended legislation is based.

THE INSANITY DEFENSE GENERALLY

The modern insanity defense, in its various forms, is the direct descendant of that stated by the House of Lords in *McNaghten's Case,* 8 Eng. Rep. 718 (1843):

> [T]o establish a defense on ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong.

This language has generally provided the "right/wrong" or "cognitive" prong of the American insanity defense. This "cognitive" test has been criticized as not recognizing that mental illness can take forms in which the actor may know, in some sense, that his conduct is wrongful but is nonetheless compelled by his mental illness to perform it. In response, a substantial fraction of American jurisdictions has added a "volitional" prong to the *McNaghten* test. This "volitional" prong, typically called "irresistible impulse," *Parsons v. State,* 81 Ala. 577, 2 So. 854 (1887), is considered the primary exposition of this portion of the American insanity defense.

In 1962, the American Law Institute, in its Model Penal Code, articulated a new, two-pronged test for insanity. This MPC/ALI formulation was adopted by most of the federal circuits and a number of states. The ALI/MPC test was stated:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

Model Penal Code § 4.01(1). This formulation, of course, includes a cognitive and a volitional prong. It is reminiscent of, although less stringent than, *McNaghten* - plus - irresistible impulse.

The ALI/MPC was the standard that was used in the case of John Hinckley, who tried to assassinate President Reagan and who was found not guilty by reason of insanity The furor following that verdict caused the United States Congress to enact a new federal insanity standard:

> (a) Affirmative Defense. – It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a

> severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts . . .
>
> (b) Burden of Proof. – The defendant has the burden of proving the defense of insanity by clear and convincing evidence. [18 U.S.C. § 20].

The statute is essentially a return to the 1848 statement of *McNaghten*. Irresistible impulse has been abolished; the mental disease or defect must be "severe;" the defendant bears the burden of persuasion and the burden is elevated above that typically assigned to criminal defendants.

At approximately the same time as this federal action, several western states created systems in which the only verdicts are not guilty, guilty or guilty but mentally ill. A defendant found guilty but mentally ill is sentenced, but service of sentence begins in a mental institution rather than a prison.

In the main, however, it can fairly be said that *McNaghten,* with or without an irresistible impulse prong, is the insanity standard in the United States.

Virginia is clearly within this mainstream. The basic Virginia insanity standard is almost *verbatim McNaghten*. See, *Price v. Commonwealth,* 228 Va. 452, 323 S.E.2d 106 (1984). In an early case, *DeJarnette v. Commonwealth,* 75 Va. 867 (1881), Virginia appeared to add an irresistible impulse prong onto its *McNaghten* defense. Later cases, however, have been restrictive on the doctrine. For example, irresistible impulse cannot co-exist with advance planning. *Rollins v. Commonwealth,* 207 Va. 575, 151 S.E.2d 622 (1966); *Kitze v. Commonwealth,* 15 Va. App. 254, 422 S.E.2d 601 (1992), *rev'd on other grounds,* 246 Va. 283, 435 S.E.2d 583 (1993). Virginia also retains the common

procedural system for trial of an insanity case. The defendant must give notice of his intent to rely on the defense. Va. Code § 19.2-168. The defendant cannot have an insanity instruction unless he has presented direct evidence of mental disease. *McCulloch v. Commonwealth,* 29 Va. App. 769, 514 S.E.2d 797 (1999); *Herbin v. Commonwealth,* 28 Va. App. 173, 533 S.E.2d 226 (1998). The defendant bears the burden of persuasion by a preponderance of the evidence. *McCulloch v. Commonwealth,* supra.

THE INSANITY DEFENSE IN JUVENILE COURT

A. States Recognizing the Defense

1. By Statute

Six states have statutes making available the insanity defense to juveniles in juvenile court. These range from the very general to the very specific. The New Jersey code, for example, provides that all defenses available to an adult in adult court shall be available to a juvenile in juvenile court. N.J. S.A. § 2A:4A-40. This was held to include the insanity defense in *Interest of R.G.W.*, 342 A. 2d 869 (N.J. Super. 1975). Neither the code nor the case provide procedural or dispositional guidance. Texas, on the other hand, has a specifically denominated juvenile defense – "not responsible for conduct . . . as a result of mental illness or mental retardation . . ." V.T.C.A. Family Code § 55.05. The Texas statutes include detailed dispositional provisions, but they provide very little procedural guidance.

In addition to New Jersey and Texas, a statutory juvenile insanity defense exists in:

California: Cal. Penal Code § 25

Massachusetts: M.G.L.A. 123 § 15

Nebraska: Neb. Rev. St. § 43-258

New York: McKinney's Family Court Act. § 335.1

An insanity defense may exist in Vermont's juvenile courts. Rule 1(a)(1) of the Vermont Rules for Family Proceedings states that the Rules of Criminal Procedure apply to delinquency proceedings. Rule 1(a)(2) then excludes specific Rules of Criminal Procedure from delinquency proceedings. Rule 12.1 of the Vermont Rules of Criminal Procedure is a notice-of-insanity rule. It is *not* excluded from delinquency proceedings by Rule 1(a)(2) of Vermont Rules for Family Proceedings. Rule 12.1 is therefore applicable in delinquency proceedings and, by implication, there is an insanity defense in those proceedings.

2. By Case

There are some cases specifically holding that the insanity defense is available to a juvenile in juvenile court. Two cases state that proposition as dictum or seem to assume it to be the case. Finally, in two states, there are older cases recognizing the defense, but the legislatures have later created "guilty-but-mentally-ill" systems; the effect of the legislation on the cases is not entirely clear.

Cases specifically holding that the defense is available:

Louisiana: *Interest of Causey,* 363 So. 2d 472 (La. 1978).

Maryland: *In Re Devon T.*, 584 A. 2d 1287 (Md. App. 1991) (until age 14).

Oregon: *Matter of L.J.*, 26 Ore. App. 461, 522 P.2d 1322 (1976).

Wisconsin: *Matter of Winburn*, 32 Wis. 2d 152, 145 N.W. 2d 178 (1966).

Cases which may recognize that the defense is available:

Alabama: *Ex Parte Dept. of Mental Health*, 511 So. 2d 181 (Ala. 1987).

Ohio: *In Re Hamil*, 69 Ohio St. 2d 97, 431 N.E. 2d 317 (1982).

The Supreme Court of Montana specifically held in *Matter of Stapelkemper*, 172 Mont. 192, 562 P.2d 815 (1977), that the defense was available in juvenile court. The Nevada Supreme Court, in *dictum*, stated the same proposition. *Matter of Two Minor Children*, 592 P.2d 166 (Nev. 1979). The legislatures of Montana and Nevada later enacted "guilty-but-mentally-ill" regimes for adult defendants. It is not clear whether those regimes now apply in juvenile court *via Stapelkemper* and *Two Minor Children* or whether the statutory changes somehow overrule the cases.

These cases, including those which specifically hold that the defense is available in juvenile court, give either no guidance or very little guidance about either procedure or disposition.

It should be noted that Virginia has recently (and perhaps temporarily) joined the first group of states in this section. In *Chatman v. Commonwealth*, 30 Va. App. 593, 518 S.E.2d 847 (1999), a panel of the Court of Appeals held that the defense is available in juvenile court. On the matter of procedure and disposition, the court referred only to Va. Code § 19.2-169.5, the statute that controls pre-trial evaluation of adult defendants. In addition, while the Attorney General's petition for an *en banc* rehearing of *Chatman* has been denied, we understand that review by the Virginia Supreme Court is being sought.

Thus, there is still no final answer in case law as to whether there is an insanity defense for juveniles in juvenile court proceedings in Virginia. Moreover, even if *Chatman* is affirmed, its lack of guidance on how an insanity defense would be handled in juvenile court would still leave much in doubt.

Two jurisdictions have expressly rejected an insanity defense in juvenile court:

Arkansas: *K. M. v. State,* 335 Ark. 85, 983 S.W. 2d 93 (1998).

District of Columbia:*Matter of C.W. M.*, 407 A. 2d 617 (D.C. App. 1979).

B. Actual Application in Juvenile Court

Quite clearly, the existence of a rule permitting an insanity defense, whether created by statute or decision, tells nothing about the frequency with which the rule is actually applied. In addition, the lack of guidance in the statutes and cases prevents one from knowing how that rule is actually applied.

Twenty-five letters were sent to judges and practitioners, both defense and prosecution, in California, Massachusetts, New Jersey, New York and Oregon. We received responses from California, New Jersey, New York and Oregon. These responses ranged in scope from telephone calls to large packages of documents. There were twelve responses.

While admittedly not scientific, this survey produced generally consistent information. The striking fact is that the insanity defense is rarely asserted in juvenile court. Several reasons are posited:

1) A juvenile who can meet the insanity standard will almost always be found incompetent; therefore the delinquency proceeding does not go forward.

2) The effect of a successful insanity defense is worse than the effect of an adjudication of delinquency because:

   a) the commitment period after adjudication will be shorter than that following a successful insanity defense, or

   b) the stigma from being found "insane" is worse than that from being found delinquent.

3) Mentally ill and mentally retarded juveniles may be diverted from delinquency proceedings into the "service" side of the juvenile system.

As noted earlier, those jurisdictions which do recognize an insanity defense in juvenile court provide very sparse guidance about procedures and dispositional alternatives. One subtext in the correspondence received is that the uncertainty about procedures and disposition counsels all actors in the juvenile system to avoid the defense when that is possible. *Vide* this statement from a New York prosecutor:

> New York law is not very clear on the use of the insanity defense in Family Court and many judges apply a hodge-podge of provisions from the Family Court Act, the CPL and case law. Virginia would be best served by developing a clear statutory framework whenever the defense is used.

We do not mean to suggest that lack of clarity in the law is the only retardant to assertion of the insanity defense in juvenile court. Our mental health experts (see the section on clinical evaluation of juveniles, herein) predict that juveniles will be able to assert the defense even less often than adults. This prediction is supported by the Texas data. Texas has a detailed juvenile insanity system, yet over 120,000 juvenile arrests in 1998 yielded fewer than five insanity evaluations.

LATER EFFECTS OF JUVENILE ADJUDICATIONS AND COMMITMENTS

A. Federal Sentencing Guidelines

U.S.S.G. § 4A1.1 requires the computation of a convicted defendant's "Criminal History Category." The Criminal History Category establishes the one axis of the sentencing guideline matrix. In effect, the higher the Criminal History Category, the higher the guideline sentence will be. U.S.S.G. § 4A1.2 sets out the number of points to be included in calculating the Criminal History Category; it does so by assigning points based upon sentences previously served. U.S.S.G. § 4A1.2(d)(2) requires that 2 points be added for each juvenile sentence to confinement of at least sixty days and 1 point be added for other juvenile sentences within five years of the current offense. Thus, juvenile adjudications which result in confinement directly impact the severity of later federal adult sentences.

B. Virginia Sentencing Guidelines

Chapter 8 of Title 17.1 of the Virginia Code created and directs the activities of the Virginia Criminal Sentencing Commission. Va. Code § 17.1-805 commands the Commission to establish sentencing guidelines and set specific requirements for those guidelines.

Va. Code § 17.1-805.B provides:

> For purposes of this chapter, previous convictions shall include prior . . . juvenile convictions and adjudications of delinquency based on an offense which would have been at the time of conviction a felony . . .

The Virginia Sentencing Guidelines then classify prior "juvenile felony adjudications of delinquency" and the classification is used in the eventual determination of the sentence to

be imposed. In addition, the Virginia Sentencing Guidelines use prior juvenile commitments to enhance later sentences. Thus, both juvenile adjudications and commitments directly impact the severity of later Virginia adult sentences.

These guideline systems create an anomaly. A defendant tried in adult court and found not guilty by reason of insanity, if he is subsequently convicted of an offense, does not have a prior conviction or commitment. An identical defendant tried in juvenile court, if an insanity defense is not available, is adjudicated delinquent. If he is subsequently convicted of an offense, his sentence will be enhanced.

REVIEW OF THE LEGAL LITERATURE ON THE INSANITY DEFENSE IN THE JUVENILE COURT

The task force reviewed the available legal literature on the insanity defense in the juvenile court. Only three articles were located,[1] reflecting the dearth of scholarly commentary and research on the issue. Because the articles are relatively short, and because two are older articles published before the recent juvenile justice reforms that have raised serious due process concerns about the unavailability of the insanity defense in the juvenile court, the available literature provides little guidance on the jurisprudential issues surrounding the insanity defense in the juvenile court. The literature does raise some important issues for consideration, however, as discussed below.

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[1] Drukteinis, Albert M. "Criminal Responsibility of Juvenile Offenders." *American Journal of Forensic Psychiatry*, 1986, pp. 25-39; Frost, Lynda E. and Robert E. Shepherd. "Mental Health Issues in Juvenile Delinquency Proceedings." *Criminal Justice*, Fall 1996, pp. 52, 58-59; Harrington, Maxine M. & Ann O'Regan Keary. "The Insanity Defense in Juvenile Delinquency Proceedings." *Bulletin of the American Academy of Psychiatry and Law*, 1980, pp. 272-279.

Recently, commentators have noted that "[j]uvenile delinquency proceedings have far more serious consequences now than at any other point in the history of the juvenile or family court."[2] As discussed elsewhere in the report, such long-term consequences raise serious concerns about the unavailability of the insanity defense in the juvenile court. It is fundamentally unfair to make such a defense available to adult defendants but not to juveniles, given that the consequences of a juvenile adjudication now mirror many of the consequences of a criminal adjudication. At the same time, however, in those states currently allowing the insanity defense in the juvenile court, many use flexible dispositional options available in the juvenile court rather than utilizing the formal NGRI dispositional mechanism.[3]

Two older articles discuss the rationales for and against the availability of the insanity defense in the juvenile court. The juvenile court was established to provide rehabilitative and mental health treatment to youthful offenders, many of whom are presumed to have diminished capacity, lower levels of culpability, and perhaps mental health problems. Thus, it could be argued that the insanity defense in juvenile court is unnecessary because the court already considers mental health issues in fashioning juvenile dispositions. "[I]f the insanity defense does address the degree of responsibility because of mental defect, and if the juvenile court system has been founded on the premise that defects of the mind can be corrected by either growing up or proper 'treatment,' the insanity defense in juvenile proceedings is indeed redundant."[4]

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[2] Frost and Shepherd, p. 59.

[3] Frost and Shepherd.

[4] Drukteinis, p. 36.

However, even these commentators, writing 10-15 years ago, recognized that the juvenile court often does not meet the ideal of providing treatment (rather than punishment) to mentally ill juveniles and that juvenile delinquency proceedings often are criminal in nature, having serious consequences for juveniles.[5] At the time these articles were written, only one court (the District of Columbia case in *In re C.W.M.*, 1979) had explicitly rejected the insanity defense in the juvenile court, holding that the consideration of the juvenile's mental status at the disposition hearing ensured that mentally ill juveniles would receive treatment rather than punishment. Even then, commentators criticized this decision for failing to recognize the criminal nature of juvenile delinquency proceedings and dispositions. "[T]he insanity defense is fundamental to juvenile delinquency proceedings . . . Society benefits little from punishing a child for acts which he did not intend to do, or the wrongfulness of which he could not appreciate . . . denying the child the right to plead insanity is pointless from a utilitarian point of view."[6]

JUVENILE INSANITY DEFENSE JURISPRUDENCE IN VIRGINIA

At the time of the enactment of H.J.R. 680, the Virginia law offered no guidance regarding the availability of a juvenile insanity defense. While adults and juveniles transferred to Circuit Court may assert such a defense, there was no corresponding case law or statutory scheme for juveniles in Juvenile and Domestic Relations District Court.

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[5] Drukteinis; Harrington and Keary.

[6] Harrington and Keary, p. 276-277.

As mentioned elsewhere in this report,[7] the lack of statutory guidance or case law precedent has not kept the defense from being asserted, nor evaluations from being ordered. It would appear that defense counsel and judges simply proceeded with the guidance and procedures offered by the case precedent set by Circuit Courts with adults.

As already noted, the Virginia Court of Appeals, sitting as a three-judge panel, recently rendered an opinion in *Chatman v. Commonwealth,* holding that the insanity defense was available to juveniles in Juvenile and Domestic Relations District Court delinquency proceedings. A review of the case, and both parties' arguments, will serve as a summary of the jurisprudential thinking on the availability of the insanity defense to juveniles in Juvenile and Domestic Relations District Court.

Chatman is an unlawful wounding case in which the juvenile sought to have an evaluator appointed for a sanity evaluation. After being convicted in the juvenile court, the juvenile appealed to the Circuit Court. In the Circuit Court trial, the juvenile sought to have a psychiatric evaluator appointed in preparation for an insanity defense. The Circuit Court denied it on the grounds that such a defense is not available to a juvenile, and the juvenile appealed to the Virginia Court of Appeals.

The primary argument in favor of the insanity defense for juveniles is one which undergirds the insanity defense generally: the Commonwealth of Virginia does not hold people responsible for their actions, if, as a result of mental disease or defect, they do not understand the nature, quality and consequences of their acts. If this defense is available to adults, then it is argued that it must also be available to juveniles as a matter of fundamental fairness. In other words, where adults have the opportunity to show that they are not culpable for their actions, it would be so unfair not to allow juveniles the same

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[7]See section on Virginia's Current Experience with the Juvenile Insanity Defense.

opportunity, as to violate the principles of due process and fundamental fairness, principles that are essential to the reasoned administration of justice.

The fundamental fairness and due process argument is bolstered by a complementary argument that the potential consequences of an adjudication of delinquency increasingly resemble those of a criminal conviction. For example, a delinquency adjudication now exposes the juvenile to the risk of a lengthy determinate sentence in a juvenile detention facility and use of the juvenile conviction in adult sentencing considerations. These are consequences which may have an effect on the juvenile over his entire life-span, and that increasingly resemble the punitive consequences and sequelae of the adult criminal justice system. Juvenile court proceedings have previously been held to be civil in nature by the Virginia Supreme Court, but, as the United States Supreme Court made clear in *In re Gault,* 387 U.S. 1 (1967), the juvenile justice system often is punitive in nature, and so the "civil" label is not dispositive, and the Virginia Supreme Court ruling was made prior to the juvenile justice system's addition of juvenile accountability and protection of the community as concerns to be addressed by the juvenile court system.

In *Chatman,* the Commonwealth asserts a variety of arguments against the availability of a juvenile insanity defense: 1) juveniles, by definition, are not held to be fully responsible moral agents, due to infancy; 2) the juvenile court has a rehabilitative emphasis and purpose and not a punitive one; 3) the juvenile court may already provide needed mental health treatment to juveniles through its rehabilitative power; and 4) juvenile proceedings are civil in nature, and thus do not require all the due process protections available to adults. Another argument is grounded in legislative intent and statutory law. The entire juvenile justice and court systems were created by acts of the General

Assembly, that is, by the creation and enactment of a statutory scheme for dealing with juveniles in a fashion separate from that of adults. As such, it has been argued that if the legislature wished to make the insanity defense available to juveniles, the General Assembly would have enacted a statute to that effect. Since no such statute was enacted, then no defense should be available, as the common law defenses are not available in this wholly statutorily-created court. (But, the Virginia Code cannot possibly encompass every aspect of the law needed to operate in such a court. The common law must fill some of the gaps, as it does for adult criminal courts as well. Moreover, it could be argued that, if the legislature did not intend for the common law to serve such a purpose, it could have enacted statutes limiting juveniles to the procedures and defenses solely enumerated in the juvenile justice code provisions, but has not done so).

The three-judge panel in *Chatman*, found that the insanity defense is available to juveniles and remanded the case accordingly. The Court did hold that the "essentials of due process and fair treatment" require that the insanity defense be available in juvenile delinquency proceedings, but the decision did not address dispositional issues. As previously noted, the Commonwealth is in the process of seeking review by the Virginia Supreme Court.

VIRGINIA'S CURRENT EXPERIENCE WITH THE JUVENILE INSANITY DEFENSE

The H.J.R. 680 Study sought to determine Virginia's experiences to date with the insanity defense in juvenile cases where mental status at the time of offense was a significant concern. Information was gathered both anecdotally and through a mail survey to juvenile court judges.

It would appear that in some courts the insanity issue has been handled indirectly. The Juvenile and Domestic Relations Court defers findings, instead issuing an order for an evaluation of the juvenile. In some cases, the Court has ordered mental health treatment as well. It has been reported that these cases often end in a disposition of probation, with mental health treatment compliance included as a condition of probation. Thus, the concern for the juvenile's mental health is addressed, and treatment is provided, without an adjudication of not guilty by reason of insanity. (As part of this Study, a summary of current statutes creating disposition alternatives was prepared; a list of such statutes appears in the Attachments Section of this Report. These statutes are not applicable to juveniles acquitted by reason of insanity.)

In some cases, it would appear the court has handled the issue through the initiation of a Child In Need of Services, or CHINS, petition following an adjudication of delinquency. The CHINS petition allows the court to provide services to the juvenile that might not otherwise be available, and may ultimately lead to a psychiatric civil commitment to a Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) facility.

Several Courts reported ordering formal evaluations of mental status at the time of offense. A mail survey of Juvenile and Domestic Relations District Court Judges was conducted. Out of 100 surveys, 56 were returned. Of those responding, 12 judges had heard a juvenile delinquency case in which an insanity defense was raised,[8] and 44 had

[8]In the Courts of Alexandria, Augusta, Brunswick, Charlottesville, Franklin, Hampton, Henry County, Norfolk, Pittsylvania, Prince William, Richmond, and the 26th District (Warren).

not. The largest volume identified was from the Juvenile and Domestic Relations Court in Norfolk. The Norfolk Court reported that they had fourteen requests for sanity evaluations in 1997, 9 in 1998, and 4 in 1999 (as of June 30).

Since Norfolk had a substantial number of cases, data were compiled from Juvenile and Domestic Relations Court cases in 1997, 1998, and 1999 (through June 30, 1999). While the cases were a small sample of convenience, and are not representative of all Virginia jurisdictions, the data revealed several items of interest. The total number of cases where sanity evaluations were requested were 25, with 6 of those juveniles ultimately being transferred to Circuit Court, for a total of 19 juveniles remaining in the jurisdiction of the Juvenile and Domestic Relations Court. None of the court records reported a finding of not guilty by reason of insanity (NGRI). The vast majority (81%) of the juveniles seeking to raise the defense were 14 years old or older. At least 15 of the juveniles (60%) had a history of prior mental health issues. Five of the juveniles (20%) were mildly mentally retarded, with another five (20%) considered "borderline retarded." In only two of the cases were the juveniles found incompetent to stand trial.

The task force also looked at two cases[9] where Juvenile and Domestic Relations District Courts made findings of NGRI, to gather information on the procedures used following a juvenile NGRI adjudication. The Alexandria Judge reported that the juvenile was committed under Virginia Code § 19.2-182.2,[10] treated, returned to the court in "good mental health" and ultimately released. The Prince William case ordered the juvenile into temporary custody as per § 19.2-182.2, but from a subsequent order issued by the court, it appears the juvenile may have been admitted instead under the civil provision of § 37.1-

[9]One from Alexandria, the other from Prince William County.

[10] The statutory section allowing for the commitment of adult NGRI acquittees.

67.3." In addition, the Prince William juvenile had an evaluation order under a CHINS petition as well. Ultimately, the juvenile turned 18 during the proceedings and was placed at a residential treatment facility pursuant to a recommendation by the local Community Services Board.

Both the Alexandria and the Prince William cases are interesting when viewed from the perspective of the Department of Mental Health, Mental Retardation and Substance Abuse Services' (DMHMRSAS) current policies and facilities. DMHMRSAS does not have a secure forensic unit for juveniles, nor will DMHMRSAS facilities conduct sanity evaluations for juveniles under the jurisdiction of the Juvenile and Domestic Relations Court. The legal advice to DMHMRSAS from the Office of the Attorney General is that the defense is not available in Juvenile and Domestic Relations District Courts, and DMHMRSAS has advised its facilities not to admit juveniles found not guilty by reason of insanity in Juvenile and Domestic Relations Courts, where commitment is sought pursuant to a § 19.2-182.2 court order. However, it does appear that the DMHMRSAS might accept such juveniles under Virginia Code §§ 16.1-335, et seq., if the juveniles met the civil commitment standards of that section, The Psychiatric Inpatient Treatment of Minors Act.

In sum, NGRI defenses have been raised in some juvenile courts and evaluations have been conducted. Few cases seem to result in the adjudication of NGRI. DMHMRSAS does not provide a secure treatment facility for juveniles, nor will they currently accept juveniles committed by a Juvenile and Domestic Relations District Court Judge under the adult NGRI commitment statute, though it appears they might have done

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" The statutory section allowing for the civil commitment of adults. In this case, suicidal ideation by the juvenile was a factor in determining commitment options, as was the fact that the juvenile turned eighteen during the proceedings.

so at least once in the past. Therefore, what dispositional options are available for juveniles found NGRI is a question which still must be addressed. Obviously, other treatment mechanisms already exist, such as the services under the Comprehensive Services Act for At Risk Youth and Families. No treatment options were created to treat a forensic juvenile population, so the actual mechanics of disposition remain unclear, and appear to have been handled on a case-by-case basis to date.

CLINICAL ISSUES IN THE ASSESSMENT AND DISPOSITION OF JUVENILES RAISING THE INSANITY DEFENSE

Community and facility clinicians have traditionally assisted the juvenile courts in Virginia with assessment and diagnostic services to aid in various judicial determinations, including trial competence under recently enacted legislation. Psychiatrists and psychologists can similarly provide information that is reliable and helpful to juvenile courts attempting to determine questions of criminal responsibility. The challenge for clinicians in juvenile court, as in adult court, is to understand the legal context of questions posed by the court, such as the criminal responsibility or sanity of a juvenile, and to apply clinical findings appropriately to that particular issue. Such skills are acquired through the participation in forensic training which focuses specifically on the legal, practical and ethical demands of evaluation work for the courts. Virginia's Department of Mental Health, Mental Retardation and Substance Abuse Services, in collaboration with the Attorney General and the Institute of Law, Psychiatry and Public Policy at the University of Virginia, has provided such training to clinicians for nearly two decades for parallel issues raised in adult court.

More recently, training programs devoted to juvenile forensic evaluation have been initiated as questions of juvenile trial competence have become statutorily defined.

It is also important to note that the issue of legal sanity, as adjudicated in adult court, has a voluminous scholarly, jurisprudential and research literature which has informed clinical training and forensic practice. While some of this work has relevance to juvenile criminal responsibility, much of it may not be directly applicable. The question of juvenile sanity is new enough on the legal landscape that there has not as yet been the opportunity for comparable scrutiny. For example, we can only speculate at this time as to evaluation referral numbers or rates of responsible / non-responsible adjudications in juvenile courts. However, this state of knowledge is comparable in many respects to what was known empirically about adult legal sanity only twenty years ago. Refinements and advances in forensic practice with juveniles will undoubtedly occur as the relevant research knowledge base develops.

In adult cases, the issue of legal sanity is raised in only approximately 1% or less of felony cases. Data from Virginia indicate that, of adults actually evaluated for insanity, positive findings are returned in only 6-10% of cases. Considering that the prevalence of major mental disorder is substantially lower among juveniles, it is reasonable to expect the base rate for non-responsibility adjudications among juveniles to be substantially lower than for adults. The impact of mental retardation on non-responsibility findings for juveniles is more difficult to estimate. For adults in Virginia, mental retardation is seldom the basis for a finding of insanity, probably because such substantially mentally retarded defendants never attain trial competence.

The present draft standard for a child not responsible because of mental illness or mental retardation is phrased in language similar to Virginia's long established adult standard with the important difference that there is no so-called "irresistible impulse" test. This offers a relatively well understood definition to be considered by evaluating clinicians without the controversial volitional prong which has been most prone to odd or abusive application in practice. Similarly, the proposed definitions of mental illness and mental retardation, the "threshold conditions" for a finding of non-responsibility, represent modern terminology which encompasses those serious conditions most likely to impact on criminal responsibility. Other language in the proposed standard excludes findings of non-responsibility solely on the basis of immaturity or voluntary intoxication, thereby maintaining the focus of forensic clinical assessment on more reliably diagnosed serious conditions.

Procedures for the assessment of criminal responsibility in juvenile court should provide broad access to information so that the critical observations of investigating officers or witnesses to the offense can be considered in opinion formulation. Keeping such information from evaluators unnecessarily introduces ambiguity to the assessment and diminishes the reliability of the resulting report.

Court ordered pretrial evaluations in Virginia are largely provided in the community with hospital-based assessments reserved for those cases requiring inpatient care. Maintaining a community-based evaluation capacity for questions of juvenile criminal responsibility offers the advantages of timeliness and cost-efficiency without unnecessarily burdening inpatient treatment resources for children. Therefore, the qualifications of clinicians appointed to conduct juvenile evaluations should ensure that they are properly

licensed, trained and otherwise qualified, but should not be so restrictive that the pool of potential evaluators is severely limited. Guidelines for the appointment of juvenile competency evaluators (beyond those qualifications specified in the Code) have been developed and promulgated by the Department of Mental Health, Mental Retardation and Substance Abuse Services and a similar procedure should be implemented for the appointment of evaluators of juvenile criminal responsibility.

Finally, it is important that there be more frequent dispositional reviews for children (as compared with adults) because of the relatively malleable nature of child and adolescent mental status, psychopathology and treatment needs. For children, frequent review is particularly important in cases where the child has been placed in inpatient hospitalization, as a significant body of clinical literature has documented a variety of significant negative clinical effects of long-term inpatient psychiatric hospitalization on children.[12]

GROUP DELIBERATIONS

Necessarily with such a diverse advisory group, different approaches, interests and ideas were raised during Study deliberations. It would be unwieldy to report fully on our

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[12] *See* RICHARD E. REDDING, DUE PROCESS PROTECTIONS FOR JUVENILES IN CIVIL COMMITMENT PROCEEDINGS (1991); Richard E. Redding, "Children's Competence to Provide Informed Consent for Mental Health Treatment," 50:2 WASH & LEE L. REV. 695 (1993); Lois A. Weithorn, "MENTAL HOSPITALIZATION OF TROUBLESOME YOUTH: AN ANALYSIS OF SKYROCKETING ADMISSION RATES," 40 STANFORD L.REV. 773 (1988).

discussions; we describe in this section some of the more protracted deliberations, ending with a statement of clearly known opposition, and clarification of those groups represented which lent expertise, but have taken no official position on the proposed legislation herein.

One issue raised was whether an insanity defense is too narrow and unsatisfactory an approach to the larger problem of how best to handle children with mental health problems who find their way into the juvenile court system. Texas, for example, has a pre-adjudication treatment diversion program (in addition to an insanity defense). But, the existence of the limited and specialized defense of insanity is distinct from the broader issue just mentioned. To consider that broader issue in place of such defense would require a more detailed, lengthier, funded study of the broad area of juvenile mental health services. It was concluded that the focus and time allowed in this study are more narrow and limited to the jurisprudential question of how to implement a juvenile insanity defense for a population that is much narrower than that of accused juvenile offenders who have mental health problems.

The definition of the legal standard itself drew substantial attention during the study, with careful attention given to Virginia's judicial statements of the adult insanity standard, which is a judicially created standard rather than a statutory one. The concern was repeatedly expressed by the representative of the Office of the Attorney General and by the Commonwealth's Attorneys' Services Council that the standard should not be any broader than the adult standard. The determination was then made by the VBA that we should not recommend a standard any broader than that currently applied by the Virginia courts in adult cases. (In fact, we also decided that the more expansive volitional prong of

the adult standard should be removed from any standard applicable to juveniles, thus applying a *tighter* standard to juveniles).

Having decided upon the intended standard, the next issue was finding the best language for articulating the standard. The Office of the Attorney General's representative to the study, as well as the Commonwealth's Attorneys' Services Council, indicated fear that the broadening of the standard would occur in its actual implementation. After extensive thought was paid this concern, the proposed language ("lack of responsibility due to mental illness or mental retardation" with citations to current statutory definitions of these) is put forth as bearing the least potential for broadening of the standard in its implementation. We could revert to the common law language ("mental disease or defect"), without any statutory definition of mental disease. But, we should not do so with the representation that, as between the two sets of language, that statutory language will provide the greater protection against abusive application (described by some advisory group members as "fuzzy thinking"). It is acknowledged that application of the adult standard to juveniles will bear some differences, however, simply because of differences between juvenile and adult psychology and psychopathology. (But it is important to remember that the anticipated number of juveniles who might be found to meet this standard will be extremely low; any child who is ill enough to meet this standard, we are told by the clinicians, will likely be found to be incompetent to stand trial in the first place). The recommendation of more stringent qualifications for forensic evaluators is similarly tied to the concern for tighter implementation of the standard as applied to juveniles. And, the

recommendation that cooperative training occur following enactment of these standards, to facilitate proper implementation, is an agreed upon safeguard.

Significant consideration was given to the vital question of the disposition of juvenile insanity acquitees. While the general consensus was to apply the juvenile insanity standard as similarly as possible to how the adult insanity acquitee is handled, important concerns were expressed by the provider community, including the Association of Community Service Boards, DMHMRSAS and participants from the Institute of Law, Psychiatry and Public Policy. Automatic inpatient treatment was rejected by them as inappropriate clinically, and as also setting up potential for straining the delivery system impossibly, given that secure treatment facilities do not currently exist. The importance of designating the lead agency for any placement was emphasized so that a passing back and forth of responsibility, without accountability or financial reimbursement, would not occur. The importance of ensuring that the judge is given clear and broad authority was also raised, so that he or she would not be locked into a dispositional scheme that would become outmoded as new, creative solutions are developed by the healthcare delivery system, a system in flux. The importance of giving the judge clear authority in the case of the dangerous juvenile, something judges in Virginia do not have at present in the case of the child requiring treatment, was raised as a fundamental concern. Finally, making the review and release process as clear and practical as possible, to protect all participants in the system, facilitating their doing their jobs effectively, was discussed. This advice and insight all found their way into the VBA's proposed dispositional provisions.

The possibility of delaying these study recommendations largely because of DMHMRSAS' current lack of resources and planning to implement a juvenile insanity defense was raised but not adopted. H.J.R. 680 asked The Virginia Bar Association to address the legalities and the standards, and in so doing to receive the advice of the DMHMRSAS, among others. Such advice was received and in fact significantly influenced the content of this proposal as far as standards and practices are concerned. Moreover, the fact that *Chatman,* although on appeal, recognizes the existence of the insanity defense, to some degree renders academic the issue of when DMHMRSAS must be ready to implement the defense. That decision, together with our understanding that Juvenile and Domestic Relations District Court Judges would benefit from the articulation of standards, procedures and disposition alternatives, reinforced the appropriateness of conveying this Report and proposed legislation promptly.

The name of the defense is another issue that received some attention. The strong reasons for the name we have proposed have already been addressed. There are those who believe that in spite of those valid reasons using the name, insanity defense, or NGRI, will symbolize and possibly effect a tighter application of the standard.

The Commonwealth's Attorneys' Services Council itself has voted to oppose this recommendation for the stated reason that they feel the standard will be broader than the adult standard in its implementation. The Office of the Attorney General has sent a representative who participated fully and lent expertise to the deliberations. At present, a position has not been taken by that Office or by the Executive Branch. The Office of The Attorney General and DMHMRSAS are involved in the pending *Chatman* litigation,

opposing recognition of a juvenile court NGRI defense, without specific statutory statement on the subject. Lastly, the Virginia State Bar also contributed its expertise to this effort through the active involvement of its Criminal Law Section Chairman, but the VSB will not be taking a position on this proposed legislation.

CONCLUSION

The Virginia Bar Association recommends, based on its study, as well as on comments received during advisory group discussions, that, as a matter of fundamental fairness, it makes sense to allow a juvenile in juvenile court to assert the insanity defense since an adult (including a juvenile tried as an adult) has such defense available to him or her in Circuit Court. If you are going to have the defense available to one, it ought to be available to all.

More specifically, changes in the juvenile court system render the proceedings more adversarial and punitive, rather than entirely rehabilitative. Like adult proceedings, they emphasize the accountability of the juvenile for offenses committed. With greater emphasis on accountability, the corollary concept of lack of responsibility as an available defense *where appropriate* becomes more relevant. Furthermore, because juvenile adjudications, by law, affect later mandatory sentencing, due process supports the notion that protecting the integrity of the initial adjudication that will have significant ramifications later is vitally important. Finally, from a purely humane perspective, as opposed to a legalistic one, a juvenile who is so ill as to meet the defense standard doesn't belong in a jail anyhow, but in appropriate treatment (possibly secure) programs.

Given the many concerns raised about how to define and implement the defense, it is also viewed as valuable to Virginia jurisprudence to create the defense in a statutory form which would further clear and consistent standards of practice. It is also viewed as valuable to address disposition in statutory form, to take advantage of the practical knowledge of members of the advisory group, specifically of the pitfalls and specific issues to which attention must be paid to make judicial dispositions workable on a practical level, not just for the courts, but also for the providers who must implement the placement plans.

Finally, statutory clarification would provide a firm foundation for cooperative training of all players in the system, the defense bar, the Commonwealth's Attorneys and the judiciary, to enhance proper implementation of the defense. For the implementation of any insanity defense, mechanisms must be developed to provide a continuum of secure and non-secure residential treatment services for juveniles adjudicated not responsible.

It is acknowledged that the problem in many respects is a small one – that it will indeed be the rare case in which this defense could be successfully asserted. But it is still seen as worth pursuing, as an important addition to the integrity of Virginia's legal system. How we treat the most vulnerable of our citizens in our legal process is so often the true measure of our civilized status.

The attached legislative proposal recommended by the VBA represents an informed and timely proposal for how to govern the application of a juvenile insanity defense in the juvenile courts of Virginia. Additional study to monitor the implementation of such codified defense and to continue to fine-tune disposition and post-disposition mechanisms may well

be seen by The General Assembly as an advisable step in addition to the enactment of this proposed legislation.

ATTACHMENT I

H.J.R. 680

summary | pdf

HOUSE JOINT RESOLUTION NO. 680

Requesting the Virginia Bar Association to study the adjudication of the insanity defense in juvenile delinquency proceedings.

Agreed to by the House of Delegates, February 25, 1999
Agreed to by the Senate, February 23, 1999

WHEREAS, §19.2-167 of the Code of Virginia establishes that an adult must have been sane at the time of the offense alleged against him to stand trial for that offense; and

WHEREAS, the Code, however, does not provide for a juvenile's right to be found sane enough to stand trial or for standards of adjudicating insanity in juvenile delinquency proceedings; and

WHEREAS, no clear guidelines exist in the mental health field to address sanity standards for juveniles; and

WHEREAS, the Commonwealth lacks clear procedures and protocols for the placement and effective treatment of juveniles found to be unable to stand trial as a result of insanity; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia Bar Association be requested to study the adjudication of the insanity defense in juvenile delinquency proceedings. The Association shall examine the state's policies, procedures, and services applicable to these issues with a goal of developing statutory guidance and the mechanisms to implement a new law. The Association shall convene an advisory task force to assist in its work. Membership on the advisory task force shall include juvenile and domestic relations district court judges, and one representative of each of the following organizations: the Virginia College of Criminal Defense Attorneys; the Institute on Law, Psychiatry, and Public Policy; the Commonwealth's Attorneys Services Council; the Department of Juvenile Justice; the Department of Mental Health, Mental Retardation and Substance Abuse Services; and the Virginia Association of Community Services Boards.

All agencies of the Commonwealth shall provide assistance to the Association for this study, upon request.

The Association shall complete its work in time to submit its findings and recommendations to the Governor and the 2000 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Go to (General Assembly Home)

ATTACHMENT II

PROPOSED STATUTE

SENATE BILL NO. _____ HOUSE BILL NO. _____

A BILL to amend and reenact §§ 2.1-757 and 2.1-758 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 11 of Title 16.1 an article numbered 8.1 containing sections numbered 16.1-277.2 through 16.1-277.9, relating to finding of child not responsible because of mental illness or mental retardation.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.1-757 and 2.1-758 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 11 of Title 16.1 an article numbered 8.1 containing sections numbered 16.1-277.2 through 16.1-277.9 as follows:

§ 2.1-757. State pool of funds.

A. Effective July 1, 1993, there is established a state pool of funds to be allocated to community policy and management teams in accordance with the appropriations act and appropriate state regulations. These funds, as made available by the General Assembly, shall be expended for public or private nonresidential or residential services for troubled youths and families.

The purposes of this system of funding are:

1. To place authority for making program and funding decisions at the community level;

2. To consolidate categorical agency funding and institute community responsibility for the provision of services;

3. To provide greater flexibility in the use of funds to purchase services based on the strengths and needs of youths and families; and

4. To reduce disparity in accessing services and to reduce inadvertent fiscal incentives for serving children according to differing required local match rates for funding streams.

B. The state pool shall consist of funds which serve the target populations identified in subdivisions 1 through ~~5~~6 below in the purchase of residential and nonresidential services fo.

children. References to funding sources and current placement authority for the targeted populations of children are for the purpose of accounting for the funds in the pool. It is not intended that children be categorized by individual funding streams in order to access services. The target population shall be the following:

1. Children placed for purposes of special education in approved private school educational programs, previously funded by the Department of Education through private tuition assistance;

2. Children with disabilities placed by local social services agencies or the Department of Juvenile Justice in private residential facilities or across jurisdictional lines in private, special education day schools, if the individualized education program indicates such school is the appropriate placement while living in foster homes or child-caring facilities, previously funded by the Department of Education through the Interagency Assistance Fund for Noneducational Placements of Handicapped Children;

3. Children for whom foster care services, as defined by § 63.1-55.8, are being provided to prevent foster care placements, and children placed through parental agreements, entrusted to local social service agencies by their parents or guardians or committed to the agencies by any court of competent jurisdiction for purposes of placement in suitable family homes, child-caring institutions, residential facilities or independent living arrangements, as authorized by § 63.1-56;

4. Children placed by a juvenile and domestic relations district court, in accordance with the provisions of § 16.1-286, in a private or locally operated public facility or nonresidential program; ~~and~~

5. Children committed to the Department of Juvenile Justice and placed by it in a private home or in a public or private facility in accordance with § 66-14; and

6. Children found not responsible because of mental illness or mental retardation.

C. The General Assembly and the governing body of each county and city shall annually appropriate such sums of money as shall be sufficient (i) to provide special education

services and foster care services for children identified in subdivisions B 1, B 2 and B 3 of this section, ~~and~~ (ii) to meet relevant federal mandates for the provision of these services, and (iii) to provide necessary services to children found not responsible because of mental illness or mental retardation. The community policy and management team shall anticipate to the best of its ability the number of children for whom such services will be required and reserve funds from its state pool allocation to meet these needs. Nothing in this section prohibits local governments from requiring parental or legal financial contributions, where not specifically prohibited by federal or state law or regulation, utilizing a standard sliding fee scale based upon ability to pay, as provided in the appropriation act.

D. When a community services board established pursuant to § 37.1-195, local school division, local social service agency, court service unit, or the Department of Juvenile Justice has referred a child and family to a family assessment and planning team and that team has recommended the proper level of treatment and services needed by that child and family and has determined the child's eligibility for funding for services through the state pool of funds. then the community services board, the local school division, local social services agency, court service unit or Department of Juvenile Justice has met its fiscal responsibility for that child for the services funded through the pool. Each agency shall continue to be responsible for providing services identified in individual family service plans which are within the agency's scope of responsibility and which are funded separately from the state pool.

E. In any matter properly before a court wherein the family assessment and planning team has recommended a level of treatment and services needed by the child and family, the court shall consider the recommendations of the family assessment and planning team. However, the court may make such other disposition as is authorized or required by law, and services ordered pursuant to such disposition shall qualify for funding as appropriated under this section.

§ 2.1-758. Eligibility for state pool of funds.

A. In order to be eligible for funding for services through the state pool of funds, a youth, or family with a child, shall meet one or more of the criteria specified in subdivisions 1 through 4 5 below and shall be determined through the use of a uniform assessment instrument and process and by policies of the community policy and management team to have access to these funds.

1. The child or youth has emotional or behavior problems which:

a. Have persisted over a significant period of time or, though only in evidence for a short period of time, are of such a critical nature that intervention is warranted;

b. Are significantly disabling and are present in several community settings, such as at home, in school or with peers; and

c. Require services or resources that are unavailable or inaccessible, or that are beyond the normal agency services or routine collaborative processes across agencies, or require coordinated interventions by at least two agencies.

2. The child or youth has emotional or behavior problems, or both, and currently is in, or is at imminent risk of entering, purchased residential care. In addition, the child or youth requires services or resources that are beyond normal agency services or routine collaborative processes across agencies, and requires coordinated services by at least two agencies.

3. The child or youth requires placement for purposes of special education in approved private school educational programs.

4. The child or youth has been placed in foster care through a parental agreement between a local social services agency or public agency designated by the community policy and management team and his parents or guardians, entrusted to a local social services agency by his parents or guardian or has been committed to the agency by a court of competent jurisdiction for the purposes of placement as authorized by § 63.1-56.

5. The child or youth has been found not responsible because of mental illness or mental retardation.

B. For purposes of determining eligibility for the state pool of funds, "child" or "youth" means (i) a person less than eighteen years of age and (ii) any individual through twenty-one years of age who is otherwise eligible for mandated services of the participating state agencies including special education and foster care services.

Article 8.1.

Child not responsible because of mental illness or mental retardation.

§ 16.1-277.2. Child not responsible because of mental illness or mental retardation.

A. A child alleged by petition to have engaged in a delinquent act as defined in § 16.1-228 is not responsible because of mental illness or mental retardation if, at the time of the act alleged, as a result of mental illness, as defined in § 16.1-336, or mental retardation, as defined in § 37.1-1, the child did not know the nature and consequences of the act he was doing, or, if he did know, he did not know what he was doing was wrong. For purposes of this article, the term "mental illness" shall not include a temporary condition of mind solely induced by voluntary intoxication or substance abuse.

B. A finding under the standard described in subsection A shall not be based solely on the child's age or developmental maturity. Further, the existence of this standard shall not affect any "infancy" defense that may exist based upon the age of the child at the time of the act alleged.

§ 16.1-277.3. Procedures for finding child not responsible because of mental illness or mental retardation.

A. The claim that a child accused of a delinquent act is not responsible because of mental illness or mental retardation may be raised only by the accused child or his attorney and only by motion.

B. If, at any time before trial, the court finds, upon hearing evidence or representations of the accused child's attorney, that there is probable cause to believe that the child's mental condition at the time of the offense will be a significant factor in his defense, the court shall appoint one or more qualified mental health experts to evaluate the child's mental condition a

the time of the offense and, where appropriate, to assist in the development of a defense of non-responsibility because of mental illness or mental retardation. Such mental health expert shall be (i) a psychiatrist or clinical psychologist and (ii) qualified by specialized training and experience in forensic evaluation of juveniles. The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services shall approve the training and qualification for individuals authorized to conduct juvenile mental condition evaluations. The Commissioner shall also provide all juvenile courts with a list of guidelines for use in the determination of qualifying individuals as experts in matters relating to mental status evaluations. The child shall not be entitled to a mental health expert of his own choosing or to funds to employ such expert.

C. The evaluation shall be performed on an outpatient basis, at a mental health facility or, if the child has been detained pursuant to this chapter, in a detention facility, unless the results of the outpatient evaluation indicate that hospitalization of the child is necessary for further evaluation of the child's mental condition at the time of the offense. If this finding is made, the court shall have the authority to order that the child be sent to a hospital or other appropriate facility designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services as appropriate for evaluation of the child. Such hospitalization shall continue for such period as the facility director deems necessary to perform an adequate evaluation, up to a maximum of thirty days.

D. The court's order for such evaluation shall require the parties to provide to the evaluator any information relevant to the evaluation, including, but not limited to, the following: (i) a copy of the petition or warrant, including any attached affidavit; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the child, and the judge appointing the evaluator; (iii) information pertaining to the alleged act, including statements made by the child to the police, probation officer or others, and transcripts of preliminary hearings, if any; (iv) a summary of the reasons for the evaluation request; (v) any available psychiatric, psychological, medical or social records that are deemed relevant; and (vi) a copy

of the child's court records, including, without limitation, any matters alleging that the child wa delinquent, a child in need of supervision, a child in need of services, or an abused or neglected child.

E. The evaluators shall prepare a full report concerning the child's mental condition at the time of the alleged offense, including an opinion of whether the child suffers from mental illness or has mental retardation and, if so, an opinion as to how and to what extent such condition affected the child's capacity (i) to know the nature and consequences of the act he was doing or (ii) to know that what he was doing was wrong. The report shall be prepared within the time period designated by the court, which time period may be extended by the court, upon request, if additional time is needed to obtain more information or to conduct more detailed testing.

F. The report of the evaluator shall be sent solely to the child's attorney and shall be deemed to be protected by the lawyer-client privilege. However, after the child's attorney gives notice pursuant to § 16.1-277.4 of an intent to present psychiatric or psychological evidence the Commonwealth shall be given the report, the results of any other evaluation of the child's mental condition at the time of the alleged offense, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation. No statement or disclosure made by the child during the evaluation may be used against the child at trial as evidence or as a basis for such evidence, except on the issue of the child's mental condition at the time of the offense.

§ 16.1-277.4. Notice to the Commonwealth.

If the child intends to (i) put in issue his mental condition a the time of the act charged and (ii) present testimony of an expert to support his claim on this issue at his trial, he, or his counsel, shall give notice in writing to the attorney for the Commonwealth, at least twenty-one days prior to trial, of his intention to present such evidence. In the event that such notice is not given, and, the child proffers such evidence at trial as a defense, then the court may, in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances

bar the child from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243.

§ 16.1-277.5. Evaluation by the Commonwealth.

A. If the attorney for the child gives notice pursuant to § 16.1-277.4, and the Commonwealth thereafter seeks an evaluation of the child's mental condition at the time of the act, the court shall appoint one or more qualified mental health experts to perform such an evaluation. The court shall order the child to submit to such an evaluation and advise the child on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the child's expert evidence. The qualification of the experts and the location of the evaluation shall be governed by the provisions of § 16.1-277.3. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in § 16.1-277.3 D. After performing their evaluation, the experts shall report their findings and opinions, and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorney for the Commonwealth and to the child's attorney.

B. If the court finds, after hearing evidence presented by the parties, that the child has refused to cooperate with an evaluation requested by the Commonwealth, it may admit evidence of such refusal or, in the discretion of the court, bar the child from presenting expert psychiatric or psychological evidence at trial on the issue of the child's mental condition at the time of the offense.

§ 16.1-277.6. Findings.

A. The issue of whether the child is not responsible because of mental illness or mental retardation shall be tried by the trier of fact in the adjudication hearing.

B. If the trier of fact finds beyond a reasonable doubt that the child committed the delinquent act alleged, but also finds by a preponderance of evidence that the child is not responsible because of mental illness or mental retardation, in accordance with the standard

set out in § 16.1-277.2, the court shall specifically find and order that the child is not guilty in regard to that act.

§ 16.1-277.7. Disposition.

A. Upon finding that the child is not responsible because of mental illness or mental retardation, the court shall determine whether the child poses an unreasonable risk to the safety of the community.

B. If the court determines that the child does pose an unreasonable risk to the community, the court shall commit the child to the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services for placement in a secure treatment facility, including a psychiatric treatment facility, if appropriate.

C. If the court determines that the child does not pose an unreasonable risk to the safety of the community, the court shall enter a disposition authorized for children in need of services under § 16.1-278.4 and § 16.1-286. In those instances where the court refers a child to the local family assessment and planning team for assessment and recommendation for services, the costs of services or placements subsequently ordered or authorized by the coun shall be paid from the state pool of funds and local pool of funds available under the Comprehensive Services Act for At-Risk Youth and Families, Chapter 46 (§ 2.1-745 et seq.) of Title 2.1, unless the court determines that there is an alternative source for paying such costs. The provisions of this subsection shall not be construed to preclude application of the provisions of Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1.

D. The court shall impose the least restrictive alternative disposition.

E. Any disposition entered by the court under this section shall automatically expire when the child becomes twenty-one years of age.

§ 16.1-277.8. Review.

A. At the time the court orders a disposition under § 16.1-277.7, the court shall schedule another hearing in 120 days. The court shall also order all relevant parties to appear at that time and shall order the agency assuming responsibility for the child to submit the repor

required by this section. This process shall be repeated at 120-day intervals so long as the child remains within the jurisdiction of the courts.

B. The agency that has assumed responsibility for the child shall submit to the court a report concerning the child's current state of mental health fourteen days prior to the scheduled hearing.

C. If the child has been found to present an unreasonable risk to the safety of the community pursuant to § 16.1-277.7, the report shall include an opinion whether the child continues to present an unreasonable risk.

D. At any time, the agency that has assumed responsibility for the child or the child's attorney may petition the court for a change of disposition. If the agency is the petitioner, it shall include with the petition a report containing the material required by this section.

E. Copies of the required reports shall be sent to the child's attorney, the attorney for the Commonwealth in the jurisdiction of the original proceeding, and the community services board in the same jurisdiction.

F. At the scheduled time or upon receipt of a petition, the court shall hold a hearing to determine if the disposition originally ordered under § 16.1-277.7 should be continued or changed.

G. After the hearing, the court may make any disposition set out in § 16.1-277.7, subject to the requirement of § 16.1-277.7 D, or may release the child.

H. The procedures for disposition or change in disposition set out in this section are exclusive and take precedence over any other procedures set out in the Code.

§ 16.1-277.9. Compensation of experts.

Experts appointed pursuant to this article shall be compensated as provided in § 19.2-175.

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ATTACHMENT III

SIDE-BY-SIDE COMPARISON OF VIRGINIA'S ADULT INSANITY DEFENSE WITH PROPOSED JUVENILE DEFENSE

	ADULT	JUVENILE
Standard **Differences:** **1) Adult Standard includes "Irresistible Impulse" test** **2) Juvenile finding not solely based on age/developmental maturity**	If, at time of act alleged, as result of defect of reason from disease of mind* did not know nature and quality (consequences) of act *or* did not know act was wrong *or* unable to control behavior known to be wrong	If, at time of act alleged, as result of mental illness *or* mental retardation did not know nature and consequences of act *or* did not know act was wrong § 16.1-XXX.A
Source of Standard	Price v. Commonwealth, 228 Va. 452, 323 S.E. 2d 106 (1984); Thompson v. Commonwealth, 193 Va. 704, 70 S.E. 2d 284 (1952)	Chatman v. Commonwealth, 30 Va. App.593, 518 S.E. 2d 847, (1999); §§ 16.1-336, 37.1-1
How Claim Raised	Only defendant's attorney § 19.2-169.5.A	Only child's attorney § 16.1-XXX.B.1 and .2
Burden to elicit evaluation	Probable cause § 19.2-169.5.A	Probable cause § 16.1-XXX.B.2
Evaluator **No difference intended**	Psychiatrist, clinical psychologist, or Ph.D. in clinical psychology *and* successfully completed forensic evaluation training as approved by DMHMRSAS and qualified by specialized training and experience to perform forensic evaluations § 19.2-169.5.A	Psychiatrist, or clinical psychologist *and* qualified by specialized training and experience to perform forensic evaluations of juveniles DMHMRSAS to approve training and qualifications § 16.1-XXX.B.2

*Adult standard does not refer to mental retardation; post-acquittal evaluation, however, to determine if acquittee is "mentally ill or mentally retarded." § 19.2-182.2

How Evaluator Chosen	Appointed by court; not entitled to mental health	Appointed by court; not entitled to mental health

	funds to employ such expert § 19.2-169.5.A	funds to employ such expert § 16.1-XXX.B.2
How Evaluation Performed **Difference: juvenile standard assumes availability of outpatient services**	Outpatient basis, at mental health facility or in jail *unless* Outpatient services not available or results of the outpatient evaluation indicate hospitalization is necessary for further evaluation. If hospitalization necessary for further evaluation, court has authority to order defendant to be sent to hospital or other facility designated by DMHMRSAS. Hospitalization shall continue as necessary up to maximum of 30 days § 19.2-169.5.B	Outpatient basis, at mental health facility or in a detention facility, *unless* Results of the outpatient evaluation indicate hospitalization is necessary for further evaluation. If hospitalization necessary for further evaluation, court has authority to order child to be sent to hospital or other facility designated by DMHMRSAS. Hospitalization shall continue as necessary up to maximum of 30 days § 16.1-XXX.B.3
Information to Evaluator	Any/all but not limited to: 1. warrant or indictment 2. names and addresses of both attorneys and judge 3. information pertaining to alleged act, including statements by defendant to police, transcripts of preliminary hearings 4. summary of reasons for evaluation request 5. any available psychiatric, psychological, medical, or social records deemed relevant 6. defendant's criminal record	Any/all but not limited to: 1. petition or warrant and any attached affidavit 2. names and addresses of both attorneys and judge 3. information pertaining to alleged act, including statements by child to police, probation officer and others, and transcripts of preliminary hearings 4. summary of reasons for evaluation request 5. any available psychiatric, psychological, medical, or social records deemed relevant 6. child's court records, including without limitation any matters alleging child delinquent, in need of

	§ 19.2-169.5.C	service, abused or neglected. § 16.1-XXX.B.4
Report by Evaluator Contains **No difference intended**	Full report of sanity at time of offense, including whether suffering from mental disease or defect which rendered insane. § 19.2-169.5.D	Mental condition at time of offense *including* opinion whether child suffers from mental illness or mental retardation *and* opinion as to how and to what extent such condition affected capacity to know 1. nature and consequences of act *and/or* 2. know act was wrong § 16.1-XXX.B.5
Time Period for Report **No difference intended**	Designated by court § 19.2-169.5.D	Designated by court, may be extended § 16.1-XXX.B.5
Who Receives Report	Solely defendant's attorney - protected by lawyer-client privilege. After notice of intent to present psychiatric or psychological evidence, Commonwealth shall be given report, results of any other evaluation, of sanity at time of offense, and copies of psychiatric, psychological, medical, or other records obtained during evaluation. No statement or disclosure made by defendant during evaluation may be used against defendant at trial as evidence, except on issue of mental condition. §§ 19.2-169.5.E and 19.2-169.7	Solely child's attorney-protected by lawyer-client privilege. After notice of intent to present psychiatric or psychological evidence, Commonwealth shall be given report, results of any other evaluation of mental condition at time of offense; and copies of psychiatric, psychological, medical, or other records obtained during evaluation. No statement or disclosure made by child during evaluation may be used against child at trial as evidence, except on issue of mental condition § 16.1-XXX.B.6
Notice	Notice in writing to attorney	Notice in writing to attorney

	for Com. at least 21 days prior to trial. *If* notice not given, and offers such evidence at trial as defense, court may in its discretion either 1. allow a continuance *or* 2. bar such evidence § 19.2-168	for Com. at least 21 days prior to trial. *If* notice not given, and offers such evidence at trial as defense, court may in its discretion either 1. allow a continuance *or* 2. bar such evidence § 16.1-XXX.C
Commonwealth's Evaluation	*If* notice *and* Com. seeks evaluation, *then* court shall appoint qualified mental health experts. Court shall: 1. order the defendant to submit 2. advise the defendant on the record in court that a refusal to cooperate could result in exclusion of the defendant's expert evidence Qualification of the experts same as for appointment of defendant's expert Location-same as for defendant's evaluation After performing their evaluation, the experts shall report their findings and opinions, and provide copies of psychiatric, psychological, medical or other records obtained to the attorneys for the Com. and the defense. § 19.2-168.1A	*If* notice *and* Com. seeks evaluation, *then* court shall appoint qualified mental health experts. Court shall: 1. order child to submit 2. advise the child on the record in court that a refusal to cooperate with Com.'s expert could result in exclusion of child's expert evidence Qualification of the expert-same as for appointment for child's expert Location-same as for child's evaluation After performing evaluation, expert shall report their findings and opinions, and copies of any psychiatric, psychological, medical or other record obtained to both the attorney for the Com. and for the defense. § 16.1-XXX.D.1
Refusal to Cooperate	If the court finds that the defendant has refused to cooperate, it may	If the court finds that child has refused to cooperate, court has discretion to

	1. admit evidence of such refusal *or* 2. bar the defendant from presenting expert psychiatric or psychological evidence at trial on the issue of sanity. § 19.2-168.1.B	1. admit evidence of refusal, *or* 2. bar child from presenting expert psychiatric or psychological evidence at trial on issue of sanity § 16.1-XXX.D.2
Findings - Who makes	Trier of fact at trial § 19.2-182.2	Trier of fact in adjudication § 16.1-XXX.E.1
Burden of Persuasion	defendant's burden; preponderance of evidence McCulloch v. Commonwealth, 29 Va. App. 769, 514 S.E. 2d 797 (1999)	child's burden; preponderance of evidence § 16.1-XXX.E
Verdict **Difference: juvenile verdict different; judge will know basis of not guilty verdict and can make proper disposition.**	not guilty by reason of insanity § 19.2-182.2	not guilty § 16.1-XXX.E.2
Disposition **Difference: significant**	custody of DMHMRSAS for 45 days for evaluation § 19.2-182.2	court determines if danger; if so commit to DMHMRSAS; if not community disposition; disposition ends at age 21 § 16.1-XXX.F
Review **Difference: Significant**	after 45 days; then annually for 5 years; biannually thereafter; DMHMRSAS may petition court. §§ 19.2-182.2 through 19.2-182.6	at 120 day intervals; agency or child's attorney may petition court § 16.1-XXX.G
Compensation of Experts	per § 19.2-175	per § 19.2-175

ATTACHMENT IV

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ATTACHMENT V

CURRENT VIRGINIA STATUTES CONCERNING MENTAL HEALTH STATUS OF JUVENILES AND DISPOSITION AUTHORITY

CURRENT VIRGINIA STATUTES CONCERNING MENTAL HEALTH STATUS OF JUVENILES AND THE DISPOSITION AUTHORITY OF JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT JUDGES

Virginia Code Sections:

16.1-248.21	Mental Health Screening and Assessment for Certain Juveniles
16.1-356, et seq.	Evaluation of Juvenile Competency to Stand Trial and The Provision of Restoration Services for Juveniles
16.1-260D	Referral to Treatment Facility by Intake Officer Prior to Filing Of Any Petition Alleging A Child In Need of Services
16.1-275	Physical and Mental Examinations of Juveniles
16.1-269.1, et seq.	Transfer and Waiver Hearings
16.1-340, et seq.	Inpatient Mental Health Treatment of Minors (part of The Psychiatric Inpatient Treatment of Minors Act)
16.1-273	Social History Investigation (Post Adjudication)
16.1-278.5	Disposition of Children in Need of Supervision
16.1-278.8	Disposition of Delinquent Juveniles
16.1-280	Commitment of Mentally Ill or Mentally Retarded Juveniles
16.1-289.1	Motions to Reconsider Orders for Participation in Continuing Programs
16.1-284	Juvenile Court Authority to Impose Adult Penalties
16.1-284.1	Post Disposition Detention for Juveniles 14 or older
16.1-285.1	Commitment of Serious Juvenile Offenders To DJJ (if 14 or older)