REPORT OF THE
VIRGINIA STATE CRIME COMMISSION

SJR 381
Not Guilty By Reason of Insanity

A BILL REFERRAL STUDY TO THE
SENATE RULES COMMITTEE AND
THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
RICHMOND
MAY 2002

CRIME COMMISSION

From the Senate of Virginia

Kenneth W. Stolle, Chairman
Janet D. Howell
Thomas K. Norment, Jr.

From the Virginia House of Delegates

Robert F. McDonnell, Vice Chairman
David B. Albo
H. Morgan Griffith
Terry G. Kilgore
Kenneth R. Melvin
Brian J. Moran

Gubernatorial Appointments

Michael L. Ball
Terry W. Hawkins
William G. Petty

Office of the Attorney General

Jerry W. Kilgore

Virginia State Crime Commission Staff

Kimberly J. Echelberger, Acting Executive Director
Cynthia L. Coleman, Senior Policy Analyst
Jaime H. Hoyle, Legal Analyst
Kristen M. Jones, Legislative Policy Analyst
G. Stewart Petoe, Staff Attorney
Sylvia A. Reid, Executive Assistant
James O. Towey, Former Legal Analyst
Peter L. Trible, Jr., Legal Analyst

TABLE OF CONTENTS

List of Attachments

I. Authority for Study

During the 2001 Virginia General Assembly Session, Senator Janet D. Howell sponsored Senate Joint Resolution 381, which directs the Virginia State Crime Commission to study the issues and processes involved with the plea of not guilty by reason of insanity by a person charged with a misdemeanor.

Section 30-156 of the *Code of Virginia* establishes the Virginia State Crime Commission and directs it "to study, report, and make recommendations on all areas of public safety and protection." The Virginia State Crime Commission, in fulfilling its legislative mandate, undertook the study of the issues and processes involved with the plea of not guilty by reason of insanity by a person charged with a misdemeanor.

II. Executive Summary

During the 2001 Virginia General Assembly Session, Senate Joint Resolution 381 was introduced directing the Virginia State Crime Commission to study the issues and processes involved with the plea of not guilty by reason of insanity by a person charged with a misdemeanor.[1] This request was prompted by concerns regarding the length of time misdemeanants acquitted by reason of insanity may be confined in an institution. Accordingly, the focus of the study concentrates on Virginia's statutory provisions pertaining to the disposition of misdemeanants acquitted by reason of insanity with the objective of rectifying any flaws and improving the statutory scheme.

The *Virginia Code* allows for individuals, including those who have committed only misdemeanors, to be confined in a state hospital indefinitely. Although the *Virginia Code* provides the insanity acquittee with regular hearings, the standards used and the lack of a burden placed on the government to demonstrate why confinement must continue, may render the hearings nothing more than ineffective formalities. As a result, insanity acquittees often find themselves confined for periods of time far in excess of the amount of time that would have been served had the defendant simply pleaded guilty. This result is particularly harsh for individuals acquitted of non-violent misdemeanors. Misdemeanants acquitted by reason of insanity have spent ten years or more in state hospitals for the offenses of spitting, urinating in public, or cursing. While confinement for some of these individuals may be warranted and necessary, for others, less restrictive alternatives would serve their best interests. Furthermore, these extended lengths of confinement are an expense to the state.

A statutory scheme that is excessively hesitant to release misdemeanants from confinement has unintended detrimental consequences to our criminal justice system. As it stands, mentally ill misdemeanants are better served pleading guilty rather than exercising their right to use their insanity as a defense. Some lawyers even suggest it

[1] SJ 381 (2001) requested a study. The bill was left in the Senate Rules Committee with the understanding that the Crime Commission would conduct the study. **(See Attachment 1)**

would constitute malpractice to advise a mentally ill client charged with a misdemeanor to plead the defense. Therefore, the threat of indefinite confinement has effectively eliminated the use of the insanity defense for misdemeanants, resulting in the removal of this constitutionally protected defense from Virginia practice (although it does remain in the *Virginia Code*). Additionally, of paramount concern from a public safety standpoint, is the fact that mentally ill misdemeanants who are dissuaded from using the not guilty by reason of insanity defense will not be subject to evaluation and necessary treatment. Instead, they will plead guilty, get short jail terms, and be released without being evaluated for dangerousness. As a result, Virginia will have missed its opportunity to confine and treat individuals who will pose a serious threat to public safety.

Staff Findings

The Crime Commission found:

- Virginia's statutory scheme is constitutional and provides periodic opportunities for release. However, these opportunities are ineffective and seem to exist only in theory, not in practice.

- While a misdemeanant who pleads guilty to the offense will spend no more, and probably much less, than one year in prison, the same misdemeanant who pleads not guilty by reason of insanity will be subject to indefinite incarceration pursuant to the disposition provisions for persons acquitted by reason of insanity.

- Many mentally ill misdemeanants acquitted by reason of insanity languish in confinement for extended periods of time. For example, one individual, charged with breaking a window, has remained incarcerated in Central State for thirteen years.

- Knowledge of the possibility of this indefinite confinement prompts experienced defense attorneys to advise their mentally ill clients charged with misdemeanors to plead guilty as opposed to not guilty by reason of insanity. As a result, the insanity defense for misdemeanants has been effectively eliminated.

- The effective elimination of the insanity defense for misdemeanants may have a detrimental impact on public safety. Dissuading mentally ill misdemeanants from pleading the defense will prevent those individuals from receiving the treatment they need. Instead, they will simply serve short prison sentences before being released back into society.

- Confinement in the custody of the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) of misdemeanants who should be considered for less restrictive alternatives is at the expense of the state.

- A statutory scheme that limits the amount of time a person remains in the custody of the Commissioner after being acquitted of a misdemeanor by reason of insanity to the one-year maximum sentence allowed by law for misdemeanors can coexist with the government's interest in protecting society from dangerous individuals.

Recommendations

Based on these findings, Crime Commission staff has concluded that misdemeanants acquitted by reason of insanity should be subjected to less restrictive disposition standards than their felonious counterparts. Such a distinction is permissible and constitutes the practice of several states. Accordingly, Crime Commission staff recommended that misdemeanants acquitted by reason of insanity should remain subject to the disposition provisions for insanity acquittees for a period of time not to exceed one year. Continued confinement beyond one year should require the initiation of civil commitment proceedings.

III. Methodology

According to SJR 381, the Crime Commission's study of the issues and processes involved with a plea of not guilty by reason of insanity by a person charged with a misdemeanor is to be completed and presented to the Governor and the 2002 General Assembly Session.

Accordingly, concerns that a person who pleads not guilty by reason of insanity can be committed by the court and held in the custody of the Commissioner of Mental Health, Mental Retardation, and Substance Abuse Services indefinitely, and that the potential for such extended commitment as an inpatient is especially daunting for persons charged with misdemeanors, the punishment for which is serving up to a year in confinement, prompted an investigation into the sufficiency and effectiveness of Virginia's statutory provisions pertaining to the disposition of misdemeanants acquitted by reason of insanity. In addressing this issue, staff relied on a well-developed research design, grounded in qualitative data collection methods with the goal of enhancing both the reliability and validity of this report's findings.

Specifically, Crime Commission staff conducted an extensive study of the provisions related to the disposition of insanity acquittees, located in §§ 19.2-182.2 through 19.2-182.16 in the *Code of Virginia*. A responsible analysis, however, could not result from a review of Virginia's statutes alone. This study, therefore, involves all related issues, constitutional concerns, statutes, and applicable case law, as well as a review of the statutes of other states.

With a knowledge foundation established from this statute and case law review, staff developed questions and hypotheses that served as the basis for both discussion and interviews with those qualified to comment knowledgeably on the subject area.

Specifically, staff met with experts from the Commonwealth of Virginia, Department of Mental Health, Mental Retardation and Substance Abuse Services.

IV. Background

Society's concern with the release of the criminally insane is certainly justified, particularly in cases where the acquittee was charged with a violent, or otherwise serious, offense. However, it can be argued that the justification diminishes as the magnitude and seriousness of the offense diminishes. For those charged with misdemeanors, particularly non-violent misdemeanors, there may be little or no justification at all for extended confinement.

The confinement of individuals acquitted by reason of insanity gives rise to due process, equal protection, and ex post facto challenges. The case law deliberating the validity of these challenges has allowed for some disparity of treatment of insanity acquittees from other persons committed. However, it is clear that such treatment, and statutes delineating such treatment, must incorporate the constitutional safeguards pertaining to one's fundamental right to liberty.

Any analysis pertaining to the confinement of individuals acquitted by reason of insanity inevitably leads to the intricate balancing between the government's interest in protecting society from danger and the substantial liberty interest of individuals. This analysis seems to place the insanity acquittee somewhere between the convicted and the civilly committed individual. In short, while an insanity acquittee must be afforded more rights and procedural safeguards than a prisoner convicted of a crime, the insanity acquittee may not expect the same rights and procedural safeguards as one civilly committed.

It has therefore been resolved that insanity acquittees must be treated differently than prisoners and may be treated differently than persons civilly committed. What has not been resolved, however, is the question of whether all insanity acquittees should be treated alike for the purposes of confinement, regardless of the crime for which they were charged and their level of dangerousness. There may be less justification for continuing the confinement of insanity acquittees charged with misdemeanors than that which exists for insanity acquittees charged with felonies. If there is less justification for the continued confinement of those charged with misdemeanors, the pursuit of justice may demand the application of less stringent standards. For example, will considerations of fairness and justice allow us to continue holding an insanity acquittee charged with breaking a window to the same stringent standards applied to an insanity acquittee charged with murder? Whether mentally ill misdemeanants acquitted by reason of insanity should be treated differently from their felonious counterparts is the issue of this study.

The question of the defendant's sanity involves two separate considerations: 1) the defendant's mental competency to stand trial, and 2) the defendant's mental responsibility for the alleged offense.[2] The defense of not guilty by reason of insanity pertains to the latter consideration and must not be confused with the defendant's competency to stand trial. Insanity at the time of the offense is a defense that, if successful, necessitates an acquittal. It is an affirmative defense that goes beyond the

[2] Ronald J. Bacigal, Virginia Criminal Procedure 431 (4th ed. 1999).

issue of guilt or innocence by raising the separate issue of the defendant's sanity at the time of the offense.

"The essence of the insanity defense is that the defendant, while he may have done the acts complained of, is not legally responsible. Unlike other defenses, which if successful result in a reduction in the grade of criminality or an acquittal, a successful insanity defense results in a verdict of not guilty by reason of insanity, and at least temporary commitment to a mental institution."[3]

It must be understood that a verdict of not guilty by reason of insanity is not equivalent to a verdict of not guilty, which infers innocence. In fact, a verdict of not guilty by reason of insanity results, in part, from proof that the defendant did in fact commit the criminal offense alleged. A verdict of not guilty by reason of insanity normally means that the defendant committed the crime but was able to establish incapacity to distinguish right from wrong. Insanity does not negate the state's proof, it merely exempts the defendant from criminal responsibility. The United States Supreme Court has acknowledged as much stating, "A verdict of not guilty by reason of insanity establishes two facts:

1) The defendant committed an act that constitutes a criminal offense, and
2) He committed the act because of mental illness." [4]

As will be discussed in greater detail below, the element of guilt provides a basis for treating the commitment of insanity acquittees differently from those committed due to a lack of competency to stand trial, where the issue of guilt or innocence has not even been examined. The criminal aspect also warrants different treatment from those civilly committed pursuant to *Virginia Code* § 37.1-67.3.

Because *Virginia Code* § 19.2-182.2 specifies that people who plead not guilty by reason of insanity may be confined in a public hospital for as little as 45 days for the purpose of examination, less experienced attorneys often advise clients with mental illness to plead the defense. It often goes unnoticed that the statutory provisions do not prevent indefinite confinement. As a result, it is theoretically possible that a mentally ill misdemeanant who pleads not guilty by reason of insanity may be committed to a state hospital indefinitely as a result of an offense for which, had he pleaded guilty, he would have served no more than a year. Statistics reveal that this theoretical possibility is a realty for some. For example, one mentally ill person charged with a misdemeanor for breaking a window has been confined in a state hospital for over thirteen years.[5]

Therefore, the issue of whether misdemeanants acquitted by reason of insanity should be treated differently than their felonious counterparts for the purposes of post-acquittal disposition requires a careful balancing between the substantial liberty interests

---

[3] Roger D. Groot, Criminal Offenses and Defenses in Virginia 301 (4th ed. 1998).
[4] Jones v. United States, 463 U.S. 354, 364 (1983).
[5] David Ress and Michael Martz, *Road to Freedom Long, Slow*, Richmond Times-Dispatch, June 20, 1999, at A12.

of the acquittee and the government's interest in protecting the acquitee and others from danger. This task necessitates a review of the various provisions pertaining to commitment in Virginia, constitutional parameters surrounding the commitment of individuals, information revealing the magnitude of the problem in Virginia, and what, if anything, other states have done or are doing to handle similar situations.

Statutory History

Currently, *Virginia Code* §§ 19.2-182.2 through 19.2-182.16 regulates the disposition of persons who plead not guilty by reason of insanity.[6] A thorough understanding of these provisions, however, requires an understanding of how these statutes have evolved.

Statutory provisions for the disposition of insane criminals existed at least as early as 1836.[7] Until the 1919 Code, the language required that one found not guilty by reason of insanity be sent to an asylum or, if dangerous, to jail. The 1849 Code provided:

> When a prisoner, tried for an offense, is acquitted by reason of his being insane, the verdict shall state the fact; and thereupon the court may, if it deems him dangerous, order him to be committed to jail, until he can be sent to one of the said asylums.[8]

The *Code* further provided that the board of an asylum or the court could deliver the lunatic confined in the jail or asylum to any friend who would give bond and promise to restrain and take proper care of the lunatic.[9] In addition, the *Code* provided that where the superintendent of the asylum deems the lunatic to be both harmless and incurable, the board could deliver without bond to any friend willing and able to take care of him.[10]

By 1919, the *Code* removed the language specifying that dangerous persons be sent to jail.[11] The changes appearing by 1919 also reveal that the court was no longer required to order the commitment of an insanity acquittee unless it determined he was dangerous. If dangerous, however, an acquittee would be held in an asylum indefinitely until becoming sane. Therefore, under the 1919 *Code*, once an insanity acquittee was found to be dangerous, he could be committed for as long as he remained insane, even if dangerousness vanished. However, a strict reading of the language would have also required the release of such person once he became sane, even if he remained extremely dangerous.[12]

---

[6] **See Attachment 2.**
[7] See note to Va. Code Ann. Title 24, Chapter 85, § 24 (1849).
[8] Va. Code Ann. Title 55, Chapter 208, § 21 (1849).
[9] Va. Code Ann. Title 24, Chapter 85, § 25 (1849).
[10] Id.
[11] Minor amendments to this section took place in 1887. Va. Code Ann. Title 53, Chapter 197, § 4035 (1887).
[12] The language provided:

The 1950 *Code* revealed that the legislature fixed the problem alluded to above by requiring that, once deemed dangerous and committed, confinement would continue until pronounced both sane and safe. Like the 1919 *Code*, once found not guilty by reason of insanity, commitment was conditioned upon a finding of dangerousness, regardless of sanity at the time of commitment. The *Code* as it appeared in 1950, remained unchanged in 1960.[13]

Minor amendments to the statute occurred in 1964.[14] Then, the 1966 and 1968 amendments made significant changes to the statute, making it more similar in appearance to its current form.[15] The 1976 amendment allowed the Commissioner, to

---

"When the defense is insanity of the defendant at the time the offense was committed, the jury shall be instructed, if they acquit on that ground, to state the fact with their verdict. If the jury so find the court shall thereupon, if it deem his discharge dangerous to the public peace or safety, order him to be committed to one of the State hospitals for the insane until he becomes sane." Va. Code Ann. Title 41, Chapter 195, § 4913 (1919).

[13]The *Code* provided:

"When the defense is insanity or feeble-mindedness of the defendant at the time the offense was committed, the jury shall be instructed, if they acquit him on that ground, to state the fact with their verdict. If the jury so find the court shall thereupon, if it deem his discharge dangerous to the public peace or safety, order him to be committed to one of the State hospitals for the insane and be confined there under special observation and custody until the superintendent of that hospital and the superintendent of any other State hospital or feeble-minded colony shall pronounce him sane and safe to be at large." Va. Code Ann. § 19-214 (1950) and Va. Code Ann. § 19.1-239 (1960).

[14] Amendments passed in 1964 were limited to clarifying that the acquittee be sent to a "proper" state hospital. "Proper" meant Southwestern State Hospital, if white, and Central State Hospital, if "colored". 1964 Va. Acts, c. 231.

[15] The 1966 changes consisted of:

- Requiring the court to commit, for a minimum of three months, NGRI acquittees regardless of tendency for dangerousness.
- Requiring the superintendent of the hospital to apply to the court for the detainee's discharge or release after three months if the detainee could be discharged or released without danger to himself or others.
- Requiring the superintendent, at yearly intervals beginning six months after commitment, to report to the court on the detainee's condition.
- Establishing procedures for the discharge or release of one confined. Upon receipt of the annual report, the court can either order discharge or release if it finds the detainee is not a danger to himself or others or it may order a hearing to determine whether such person may safely be discharged or released.
- The hearing deemed a civil proceeding with the burden on the committed person to prove that he may be safely discharged or released, the court then determines if he should be released with or without conditions or recommitted.
- Allowing the committed person to file an application for release once a year beginning after six months of confinement.1966 Va. Acts, c. 659.

The 1968 amendments consisted of the following:

- Once acquitted, the acquittee must be placed in the temporary custody of the Commissioner of Mental Hygiene and Hospitals and that evaluators be appointed to determine if, at the time of examination, the person is insane or feebleminded and whether his discharge would be dangerous to public peace and safety or to himself.

recommend, in lieu of discharge, release, or recommitment, that the person be treated according to the civil commitment provisions of §§ 37.1-67.1 through 37.1-67.4.[16] The 1980 amendments required that the court hold a hearing prior to commitment to determine if the defendant is insane or feebleminded and that his discharge would be dangerous to public peace and safety or to himself. The court was not required to hold a pre-commitment hearing.[17] A hearing occurred pursuant to an application by the Commissioner, at his discretion, and upon the application of the defendant at yearly intervals commencing six months after confinement. This amendment was significant, therefore, in that it created the only judicially required hearing for insanity acquittees.

Significant statutory changes were again made in 1991, resulting in the statutes' current form.[18] The amendments provided the following:

- Required that the pre-commitment hearing take place within 45 days of the Commissioner's assumption of custody.
- Provided that the acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross examine witnesses at the hearing.
- Provided that, at the conclusion of the hearing, the court should commit the acquittee based upon the consideration of a combination of factors.

    1) Whether and to what extent the acquittee is mentally ill;
    2) The likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to himself or others in the foreseeable future;
    3) The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and,
    4) Any other factors that the court deems relevant.

- Provided for a judicially required hearing twelve months after the date of commitment, at yearly intervals for the first five years, and biennially

---

- If the court is satisfied that the person is either insane or feebleminded or that his discharge would be dangerous to public peace and safety or to himself, the court shall order him committed. Only if he is neither insane nor would pose a danger, should he be discharged.
- Required that the superintendent shall make application for release if he is of the opinion that the committed person is neither insane or feebleminded and may be discharged or released without danger to the public peace or safety or to himself.
- Required the court to order the discharge or release only if it is satisfied both that the acquittee is not insane or feebleminded and is not a danger. If the court is not so satisfied, it shall order a hearing to determine if the committed person is insane or feebleminded and his discharge would be dangerous to the public peace and safety or to himself.

[16] 1976 Va. Acts, c. 677. Located in § 19.2-181.

[17] 1980 Va. Acts, c. 200.

[18] The 1984 amendments merely replaced the words "feeblemindedness" and "feebleminded" with "mental retardation" and "mentally retarded". It also specified that errors could be appealed to the Court of Appeals rather than the Supreme Court.1984 Va. Acts, c. 703.

thereafter. For such hearings, the acquittee must be provided with the same rights accorded him for the initial commitment hearing.

- Provided that the Commissioner can petition for release at any time he believes the acquittee no longer needs inpatient hospitalization.
- Provided that the acquittee can petition the court for release annually in any year that a judicial hearing is not required.
- Significant guidance was also provided as to when the court should consider release or conditional release.

Final amendments were made to the statute in 1993.[19]

The Insanity Defense in Virginia

A thorough understanding of the issues revolving around *Virginia Code* §§ 19.2-182.2 through 19.2-182.16 requires a review of the insanity defense in Virginia, as well as an overview of the current dispositional procedures relating to a plea of not guilty by reason of insanity.

A. McNaughten and Irresistible Impulse Tests

The Virginia Supreme Court has adopted both the McNaughten "right from wrong" test and the irresistible impulse test.[20] To establish an insanity defense, the defendant must show that he did not know the difference between right and wrong or that he did not understand the nature and consequences of his acts. The defendant has the burden of affirmatively raising the issue of insanity and proving his mental disease or defect by a preponderance of the evidence.[21] He is presumed to be sane and has the burden of offering evidence to establish insanity.[22]

Once there is some evidence of mental disease in the case, the jury must be instructed that if it finds the defendant not guilty by reason of insanity, the verdict shall so state.[23] This serves to highlight the distinction between not guilty and guilty by reason of insanity. A defendant found not guilty by reason of insanity is acquitted of the charged offense but is subject to the disposition provisions of §§ 19.2-182.2 through 19.2-182.16. These disposition provisions are the subject of this study.

---

[19] These amendments consisted of :

- Providing that the attorney who represented the defendant at the criminal proceedings shall represent the acquittee through the proceedings of these provisions.
- Defining mental illness as including any mental illness in a state of remission when the illness may, with reasonable probability, become active.
- Ordering a discharge plan if release without conditions is ordered.
- Allowing the Commissioner to approve for visits out of the hospital, not to exceed 48 hours. 1993 Va. Acts, c. 295.

[20] Dejarnette v. Commonwealth, 75 Va. 867 (1881).
[21] McCulloch v. Commonwealth, 29 Va. App. 769 (1999).
[22] Ronald J. Bacigal, Virginia Criminal Procedure 432 (4th ed. 1999).
[23] Va. Code Ann. § 19.2-182.2.

B. Disposition

Pursuant to Virginia Code § 19.2-182.2, a defendant acquitted by reason of insanity shall be placed in the temporary custody of the Commissioner of The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) for evaluation as to whether the acquittee may be released without conditions, with conditions, or whether he requires commitment.[24] The evaluators, consisting of one psychiatrist and one clinical psychologist, shall determine whether the acquittee is currently mentally ill or mentally retarded and in need of hospitalization with respect to factors set forth in Virginia Code § 19.2-182.3.[25] These factors include:

- To what extent the acquittee is mentally ill or mentally retarded, as those terms are defined in § 37.1-1;[26]
- The likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to other persons or to himself in the foreseeable future;
- The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and,
- Such other factors as the court deems relevant. [27]

The evaluators shall conduct their examinations and report their findings separately within 45 days. Copies of the report shall be sent to the acquittee's attorney, the attorney for the Commonwealth for the jurisdiction where the person was acquitted and the community services board servicing the locality where the acquittee was acquitted.

If either evaluator recommends conditional release or release without conditions, the court shall extend the evaluation period to permit the hospital in which the acquittee is confined and the appropriate community services board to jointly prepare a conditional release or discharge plan, as applicable, prior to the hearing.

According to *Virginia Code* § 192-182.3, upon receipt of the evaluation report and, if applicable, a conditional release or discharge plan, the court shall schedule the matter for a civil hearing on an expedited basis, giving the matter priority over other civil matters before the court, to determine the appropriate disposition of the acquittee. The acquittee shall be provided with adequate notice of the hearing, of the right to be present

[24] Va. Code Ann. § 19.2-182.2.
[25] Id. § 19.2-182.3, in turn, states that after a hearing upon a receipt of the evaluator's report, the court shall commit the acquittee if it finds that he is mentally ill or mentally retarded and in need of inpatient hospitalization. The decision of the court shall be based upon the following four factors: to what extent the acquittee is mentally ill or mentally retarded; the likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to other persons or to himself in the foreseeable future; the likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis and; such other factors as the court deems relevant.
[26] The term "mental illness, as used in this section, is not limited solely to the definition of "mentally ill" in § 37.1-1. Mercer v. Commonwealth, 259 Va. 235 (2000).
[27] Va. Code Ann. § 19.2-182.3.

at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing.

At the conclusion of the hearing, the court shall commit the acquittee if it finds that he is mentally ill or mentally retarded and in need of inpatient hospitalization. The decision of the court shall also be based upon consideration of the following factors set forth in *Virginia Code* § 19.2-182.3.

Pursuant to those factors, if the court determines that an acquittee does not need inpatient hospitalization solely because of treatment or habilitation he is currently receiving, but the court is not persuaded that the acquitttee will continue to receive such treatment or habilitation, it may commit him for inpatient hospitalization. Alternatively, the court shall order the acquittee released with conditions pursuant to *Virginia Code* §§ 19.2-182.7 through 19.2-182.9 if it finds that he is not in need of inpatient hospitalization but that he meets the criteria for conditional release set forth in *Virginia Code* § 19.2-182.7.[28] If the court finds that the acquittee does not need inpatient hospitalization nor does he meet the criteria for conditional release, it shall release him without conditions, provided the court has approved a discharge plan prepared jointly by the hospital staff and the appropriate community services board.

If the acquittee is committed, *Virginia Code* § 19.2-182.5 then provides that the committing court shall conduct a hearing twelve months after the date of commitment to assess the acquittee's need for inpatient hospitalization. A hearing for assessment shall be conducted at yearly intervals for five years and at biennial intervals thereafter.

Prior to the hearing, the Commissioner shall provide to the court a report evaluating the acquittee's condition and recommending treatment. If the examiner recommends release or the acquittee requests release, the acquittee's condition and need for inpatient hospitalization shall be evaluated by a second person with credentials who is not currently treating the acquittee. A copy of any report shall be sent to the attorney for the Commonwealth for the jurisdiction from which the acquittee was committed.

---

[28] **§ 19.2-182.7. Conditional release; criteria; conditions; reports.**
At any time the court considers the acquittee's need for inpatient hospitalization pursuant to this chapter, it shall place the acquittee on conditional release if it finds that;

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

The court shall subject a conditionally released acquittee to such orders and conditions it deems will best meet the acquittee's need for treatment and supervision and best serve the interests of justice and society.
The community services board serving the locality in which the acquittee will reside upon release shall implement the court's conditional release orders and shall submit written reports to the court on the acquittee's progress and adjustment in the community no less frequently than every six months.
After a finding by the court that the acquittee has violated the conditions of his release but does not require inpatient hospitalization pursuant to § 19.2-182.8, the court may hold the acquittee in contempt of court for violation of the conditional release order.

As with the initial commitment proceeding pursuant to Virginia Code § 19.2-182.3, the acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. Written notice of the hearing shall be provided to the attorney for the Commonwealth for the committing jurisdiction. The hearing is a civil proceeding.

According to the determination of the court following the hearing, and based upon the report and other evidence provided at the hearing, the court shall;

- Release the acquittee from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in Virginia Code § 19.2-182.7, provided the court has approved a discharge plan prepared jointly by the hospital staff and the appropriate community services board;
- Place the acquittee on conditional release if he meets the criteria for conditional release, and the court has approved a conditional release plan prepared jointly by the hospital staff and the appropriate community services board; or
- Order that he remain in the custody of the Commissioner if he continues to require inpatient hospitalization based on consideration of the factors set forth in Virginia Code § 19.2-182.3.

Persons committed pursuant to this chapter shall be released only in accordance with the procedures set forth governing release and conditional release.[29] Pursuant to Virginia Code § 19.2-182.6, The Commissioner may petition the committing court for conditional or unconditional release of the acquittee at any time he believes the acquittee no longer needs hospitalization. The acquittee may petition the committing court for release only once in each year in which no annual judicial review is required pursuant to Virginia Code § 19.2-182.5.

---

[29] At any time the court considers the acquittee's need for inpatient hospitalization pursuant to this chapter, it shall place the acquittee on conditional release if it finds that;

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

The court shall subject a conditionally released acquittee to such orders and conditions it deems will best meet the acquittee's need for treatment and supervision and best serve the interests of justice and society. The community services board serving the locality in which the acquittee will reside upon release shall implement the court's conditional release orders and shall submit written reports to the court on the acquittee's progress and adjustment in the community no less frequently than every six months. After a finding by the court that the acquittee has violated the conditions of his release but does not require inpatient hospitalization pursuant to Virginia Code § 19.2-182.8, the court may hold the acquittee in contempt of court for violation of the conditional release order. Virginia Code § 19.2-182.7.

Table One: Opportunity for Release		
Length of Confinement	***Statutory Provision***	***Opportunity for Release***
45 days from acquittal	19.2-182.2 and 19.2-182.3	Prior to a hearing, the acquittee is evaluated by two evaluators. If **either** evaluator recommends conditional release, a conditional release or discharge plan shall be prepared. After the hearing, the court shall either commit the acquittee, order conditional release, or release the acquittee without conditions.
1 year after date of commitment	19.2-182.5	Committing court holds a hearing to assess the need for inpatient hospitalization annually for the first 5 years. Based upon evidence at the hearing and a report prepared by the evaluators, the court shall either order that the acquittee remain in custody, be released with conditions, or be released without conditions.
2 years after date of commitment	19.2-182.5	Committing court holds a hearing to assess the need for inpatient hospitalization annually for the first 5 years.
3 years after date of commitment	19.2-182.5	Committing court holds a hearing to assess the need for inpatient hospitalization annually for the first 5 years.
4 years after date of commitment	19.2-182.5	Committing court holds a hearing to assess the need for inpatient hospitalization annually for the first 5 years.
5 years after date of commitment	19.2-182.5	Committing court holds a hearing to assess the need for inpatient hospitalization annually for the first 5 years.
6, 8, 10, 12, etc., years after date of commitment	19.2-182.6	The acquittee may petition the committing court for release only once in each year in which no annual judicial review is required pursuant to § 19.2-182.5.
7, 9, 11, 13, etc., years after date of commitment	19.2-182.5	Required hearing by committing court to be conducted at yearly intervals for five years and at biennial intervals thereafter.
AT ANY TIME	**19.2-182.6**	**Commissioner may petition the committing court for conditional or unconditional release of the acquittee at any time he believes the acquittee no longer needs hospitalization.**
NOTE	**At all hearings conducted pursuant to §§ 19.2-182.3, 19.2-182.5, and 19.2-182.6, the acquittee "shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing."**	

Disposition of Insanity Acquittees: Constitutional Parameters and the Justification for Different Treatment.

A. Justification for Treating Not Guilty by Reason of Insanity (NGRI) Acquittees Differently

> "We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. This holding accords with the widely held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment."
>
> - U.S. Supreme Court in *Jones v. United States*.[30]

Jones v. United States establishes that insanity acquittees may be treated differently in some respects from persons subject to civil commitment.[31] The unique nature of the insanity defense, and its successful use resulting in a verdict of not guilty by reason of insanity, renders any comparison between the differing commitment procedures irrelevant. Those who are acquitted by reason of insanity are treated differently, in part because they initially, and upon their own volition, established that they were not guilty because they were insane. The fact that insanity is difficult to prove in Virginia only adds to the significance of a successful insanity plea. The United States Supreme Court has recognized that the fact that a successful insanity plea is "sufficiently probative of mental illness and dangerousness to justify commitment of the acquittee for the purposes of treatment and the protection of society. Such a verdict establishes that the defendant committed an act constituting a criminal offense, and that he committed the act because of mental illness."[32]

In *Jones v. United States*[33] the Supreme Court drew distinctions between civil commitment procedures and the commitment procedures applied to persons found not guilty by reason of insanity. Previously, the Supreme Court held that to commit an individual to a mental institution in a civil proceeding, the Due Process Clause requires proof by clear and convincing evidence that the individual is mentally ill and requires hospitalization for his own welfare and the protection of others.[34] Proof of these two factors beyond a reasonable doubt was not required but the proof had to be by more than a preponderance of the evidence.[35]

However, the Court in *Jones* pointed out that the concerns critical to the prior decision were based on the risk of error that a person might be committed for mere idiosyncratic behavior. The *Jones* Court pointed out that these concerns were diminished

---

[30] Jones v. United States, 463 U.S. 354, 354-355 (1982).
[31] Foucha v. Louisiana, 504 U.S. 71, 85 (1992).
[32] Jones v. United States, 463 U.S. 354, 354-355 (1982).
[33] Id.
[34] Addington v. Texas, 441 U.S. 418 (1979).
[35] Id.

or absent in the case of insanity acquittees and, therefore, the same standard of proof was not required in both cases. In the case of not guilty by reason of insanity, proof that the acquittee committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere idiosyncratic behavior.[36] Accordingly, it was decided that the state could commit a person without satisfying the civil burden with respect to mental illness and dangerousness.

The Court compared the standard for the commitment of an insanity acquittee, who must prove that he is no longer mentally ill and dangerous by a preponderance of the evidence, with the civil commitment standard, requiring clear and convincing proof by the government that the individual is mentally ill and likely to injure himself or others. The *Jones* Court determined that "a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society"[37] and affirmed the holding of the Court of Appeals that the "various differences between civil commitment and commitment of insanity acquittees were justified under the equal protection component of the Fifth Amendment."[38] The Court emphasized that equating insanity acquittees with individuals civilly committed ignores important differences that justify different standards of proof.[39] Since automatic commitment "follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error."[40] In addition, the "proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere idiosyncratic behavior."[41]

A verdict of not guilty by reason of insanity establishes two facts; 1) that the defendant committed an act that constitutes a criminal offense and 2) he committed the act because of mental illness.[42] As the Jones Court pointed out, "Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person."[43] The Court declared it could not find unreasonable the determination of Congress that, "Where the accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered."[44] Nor did the court think it unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness because it "comports

[36] Jones, at 355.
[37] Id. at 366.
[38] Id. at 356.
[39] Id. at 367.
[40] Id.
[41] Id.
[42] Id. at 364.
[43] Id.
[44] Id. Citing S. Rep. No. 1170, 84th Cong., 1st Sess., 13 (1955).

with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment."[45]

Significant to this study is the fact that the *Jones* Court rejected the argument that the requisite dangerousness is not established by proof that a person committed a nonviolent crime against property.[46] In rejecting this argument that different standards be applied to dangerous and non-dangerous offenses, the Court argued, "This Court has never held that violence, however that term might be defined, is a prerequisite for a constitutional commitment."[47] Although the precise evidentiary force of the insanity acquittal may vary from case to case, "the Due Process Clause does not require Congress to make classifications that fit every individual with the same degree of relevance."[48]

In summary, the Jones Court decided that these reasons revealed that there is no reason for adopting the same standard of proof for both civil commitment and the commitment of insanity acquittees. Accordingly, Constitutional requirements do not prohibit different treatment and comparisons between the two are unwarranted. This, however, does not necessarily suggest that they should be treated differently. It only establishes that states are allowed to treat them differently.

In *Foucha v. Louisiana*,[49] the Supreme Court examined a statute that allowed an insanity acquittee to be committed to a mental institution until he was able to prove that he was not dangerous to himself or others, regardless of whether or not he continued to suffer from mental illness. At a release hearing, the acquittee had the burden of proving that he was not dangerous. If the acquittee was found to be dangerous, he could be returned to the mental institution even if he was no longer mentally ill. A post commitment evaluation found that Foucha was no longer mentally ill, but evaluators could not certify that he would not constitute a menace to himself or others if released. It was determined that Foucha probably suffered from a drug-induced psychosis at the time of the offense but that he had recovered from that temporary condition and was in good shape mentally. However, he had an anti-social personality (not a mental disease but untreatable) and had been in several altercations while hospitalized. The doctor testified that he would not "feel comfortable in certifying that Foucha would not be a danger to himself or to other people."[50] Louisiana asserted that it could indefinitely confine him in a mental hospital because, although not mentally ill, he might be dangerous to himself or others if released.[51]

The Supreme Court held that since Foucha was no longer mentally ill, the basis for holding him in a psychiatric facility as an insanity acquittee had disappeared and the

[45] Id. at 365.
[46] The Jones case dealt with the criminal offense of attempted petit larceny of a jacket from a store. Id. at 359.
[47] Id. at 365.
[48] Id. at 366. Citing Marshall v. United States, 414 U.S. 417, 428 (1974).
[49] Foucha v. Louisiana, 504 U.S. 71 (1992).
[50] Foucha, at 75.
[51] Foucha, at 86.

state was no longer entitled to hold him on that basis.[52] In so holding the Court relied upon *Jones* which held that the committed acquittee is entitled to release when he has recovered his sanity **or** is no longer dangerous. The *Foucha* Court therefore interpreted *Jones* as holding that acquittees may be held only so long as they are **both** mentally ill **and** dangerous.[53]

The Court cited *O'Connor v. Donaldson*, which held as a matter of due process that it was unconstitutional for a state to continue to confine a harmlessly mentally ill person.[54] In *O'Connor*, the Court stated that even if the initial commitment was permissible, "it could not constitutionally continue after that basis no longer existed."[55]

In summary, one of the premises of *Jones* is that the Constitution permits the government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or to society.[56] Since due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed, the petitioner in *Foucha* could not be held in the mental institution unless he continued to suffer from a mental disease or illness **and** was a danger to himself or others. Since he did not continue to suffer from a mental disease or illness, the state lost its basis for confining him, even though he was still dangerous.[57] The statute was unconstitutional because it permitted Louisiana to hold indefinitely an insanity acquitee who was not mentally ill so long as it could be shown that he had a personality disorder that could lead to criminal conduct.[58]

However, it also appears that, in certain narrow circumstances, persons who pose a danger to others or to the community may be subject to limited confinement. In her concurrence in *Foucha*, Justice O'Connor emphasized this by stating that it might be permissible to confine an insanity acquittee who has regained sanity if the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." [59]

Unlike the statute in *Foucha*, which did not require the state to prove anything to justify continued detention, the case of *United States v. Salerno*, concerned a statute that allowed for continued confinement only in limited circumstances and upon clear and convincing evidence that the detainee was demonstrably dangerous to the community.[60] In holding the statute constitutional, the Court stated that the " 'government's interest in preventing crime by arrestees is both legitimate and compelling' and the statute was a

[52] Foucha, at 77.
[53] Id.
[54] O'Connor v. Donaldson, 422 U.S. 563 (1975).
[55] O'Connor , at 575.
[56] Jones, at 368.
[57] Foucha, at 79.
[58] Foucha, at 82.
[59] Foucha, at 88.
[60] United States v. Salerno, 481 U.S. 739 (1987).

constitutional implementation of that interest."[61] What was significant in finding the statute constitutional was the fact that it was carefully limited to circumstances involving the most serious of crimes, such as those punishable by life imprisonment or death, and certain repeat offenders, and was "narrowly focused on a particularly acute problem in which the government interests are overwhelming."[62] Furthermore, the statute required the government, in an adversary hearing, to prove by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.[63] These same circumstances serve as the basis for the civil commitment of sexually violent predators discussed above.

What can be gathered from the *Jones*, *Salerno*, and *Foucha* decisions is that, although insanity acquitees may be treated differently in some respects from those persons subject to civil commitment, freedom from physical restraint is a fundamental right and the state has no basis for continuing the confinement of a person who has either regained sanity or is no longer a danger to society. The state may discriminate against insanity acquittees who are no longer mentally ill, but only upon clear and convincing evidence and only where the state has a particularly convincing reason.

B. Length of Incarceration: Comparison Between Time Spent in Custody and the Maximum Sentence Imposed on Those Convicted of a Misdemeanor is Without Merit.

> *There simply is no necessary correlation between the length of the acquittee's hypothetical criminal sentence and the length of time necessary for his recovery.*
>
> - Jones v. United States, (1982)[64]

Just as any comparison between civil commitment and NGRI acquittee commitment is unjustified and unwarranted, so too is any comparison between the length of time an insanity acquittee is held in custody to the maximum length of incarceration allowed by law for the crime charged. Any comparisons drawn between the length of time a mentally ill misdemeanant spends in the custody of the Commissioner and the maximum, one year incarceration for those convicted of misdemeanors are irrelevant and without merit. Unlike those convicted of a criminal offense, misdemeanants acquitted by reason of insanity are not held in custody for the purpose of punishment. After all, although it has been established that they committed the offense, they have been found not guilty due to their insanity. They are in the custody of the Commissioner, in part, because they are a danger to themselves or to others.

The Supreme Court has recognized that the Due Process Clause "requires that the nature and duration of commitment bear some reasonable relation to the purpose for

[61] Foucha, at 81. Citing United States v. Salerno, 481 U.S. 739, 749 (1987).
[62] Id.
[63] Id.
[64] Jones, at 355.

which the individual is committed."[65] The purpose of commitment following an insanity acquittal, like that of civil commitment but unlike that of imprisonment, is "to treat the individual's mental illness and protect the individual and society from his potential dangerousness. The acquittee is entitled to release when he has recovered his sanity or is no longer dangerous."[66] Due to the fact that it is impossible to predict how long it will take any individual to recover, Congress chose, on the federal level, to leave the length of commitment indefinite, subject to periodic review.[67] Virginia has done the same.

In *Jones v. United States* (supra), the Supreme Court addressed the issue of whether the petitioner, "is entitled to his release because he has been hospitalized for a period longer than he might have been incarcerated if convicted."[68] Although the criminal offense in *Jones*, attempted petit larceny involving a jacket, was only a misdemeanor punishable by up to a year in prison, the defendant was hospitalized for more than a year. On that basis, the defendant demanded release or recommitment pursuant to the civil commitment standards, including a jury trial and proof by clear and convincing evidence of his mental illness and dangerousness.[69] The Court of Appeals rejected petitioner's argument that the length of the prison sentence he might have received determines when he is entitled to either release or civil commitment proceedings and the Supreme Court affirmed, stating:

> An insanity acquittee is not entitled to his release merely because he has been hospitalized for a period longer than he could have been incarcerated if convicted. The length of a sentence for a particular criminal offense is based on a variety of considerations, including retribution, deterrence and rehabilitation. However, because an insanity acquittee is not convicted, he may not be punished. The purpose of his commitment is to treat his mental illness and protect him and society from his potential dangerousness. There simply is no necessary correlation between the length of the acquittee's hypothetical criminal sentence and the length of time necessary for his recovery.[70]

A chosen sentence of imprisonment is a reflection of society's view of the proper response to commission of a crime, based upon considerations such as retribution, deterrence, and rehabilitation. Accordingly, a state may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes.[71] These considerations do not exist for the purposes of committing an insanity acquittee who may not be punished and whose continued confinement is justified only by his continued illness and dangerousness.

---

[65] Jackson v. Indiana, 406 U.S. 715, 738 (1972).
[66] Jones, at 368. Citing O'Connor v. Donaldson, 422 U.S. at 575 –576 and n. 16; H.R. Rep. No. 91-907, pp. 73-74 (1970).
[67] Jones, at 366.
[68] Jones.
[69] Jones, at 360.
[70] Jones, at 355.
[71] Jones, at 368-369.

As a result, under Virginia law, it is possible that a person who has been proven to have committed a horrible, violent crime but who is nevertheless acquitted by reason of insanity, may be released from confinement after 45 days if he has recovered and is no longer dangerous. What goes hand in hand with this is the fact that a person who merely committed a non-violent misdemeanor may be confined for the rest of his life if he remains ill and dangerous. While this result may appear harsh, the irrelevance of the length of the acquittee's hypothetical criminal sentence for the purpose of comparing the length of the acquittee's confinement is clearly justified.

However, this result does not mean that Virginia may not limit the length of custody to the maximum potential prison term. It only means that such a comparison is without basis. In short, there is no magic number in one year for NGRI acquittees charged with a misdemeanor.

C. Case Law Pertaining to Virginia's Statutory Provisions

Virginia's statutory provisions, as they existed in 1982, survived the judicial scrutiny of the Fourth Circuit Court of Appeals. In *Harris v. Ballone*, the Fourth Circuit tackled issues similar to those handled by the United States Supreme Court in the above cited cases. The facts of the *Harris* case concerned § 19.2-181, which has since been repealed. Pursuant to that provision, if the judge was "satisfied" that the insanity acquitee was either insane **or** dangerous, the insanity acquitee would be committed to a mental hospital. Once committed, the insanity acquittee could apply for release once a year, beginning six months after being committed, and the hospital could apply for his release at any time and as often as it wished. The statute assigned the burden of proof in release hearings to the acquittee. At the release hearing, if the judge was "satisfied" that the insanity acquitee was no longer insane or dangerous, he **may** have ordered release, but the judge was empowered to continue the confinement if he so chose, regardless of insanity or dangerousness.[72]

The facts of *Harris* involved an acquittee charged with murder and malicious wounding and found not guilty by reason of insanity. The subsequent exam concluded that while he was not insane, he was dangerous, a conclusion that resulted in his commitment. Harris applied for release pursuant to the statute but was denied release because the same examiners again concluded that he was dangerous.[73]

The Fourth Circuit examined the issue of whether it violated due process to allow for an insanity acquittee to be committed merely because the judge is "satisfied" that the insanity acquittee qualifies for commitment, rather than because there is clear and convincing evidence that the insanity acquittee qualifies for commitment. The Fourth Circuit held that the requirement that the judge be "satisfied" "invokes at least a preponderance of the evidence standard", and stated, "[W]e think the use of that standard is constitutionally permissible."[74] The Court also pointed out that, although the clear and

[72] Harris v. Ballone, 681 F.2d 225, 226-227 (4th Cir. 1982).
[73] Id, at 227.
[74] Id. at 228.

convincing evidence standard is required for the commitment of persons other than insanity acquittees, a lesser standard is allowable for insanity acquittees because they have already been shown beyond a reasonable doubt to have committed at least one dangerous act.[75]

Another issue analyzed by the Court in *Harris* was whether an insanity acquittee could be incarcerated solely on account of dangerousness. The Court acknowledged the holding of *O'Connor v. Donaldson* (supra), in which the U.S. Supreme Court held that a person may not be incarcerated solely because he is **insane**. However, the Court distinguished *Harris* from *O'Connor* and specified that the issue before them was whether an acquittee could be incarcerated solely on account of **dangerousness**. The Court held it was not a denial of due process for a person who has committed a criminal act to be incarcerated as long as he is dangerous. Furthermore, the Court added, "Nor do we think that this aspect of Virginia's scheme denies equal protection because a different standard (i.e., insane **and** dangerous) is used for persons other than insanity acquittees."[76] In so holding the Court again emphasized such different treatment was justified due to the fact that the insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act.

In response to the question of whether a one-per-year restriction for applications for release is a denial of due process because it creates the possibility that an acquittee will remain committed for nearly a year after the justification for the commitment has ceased to exist, the Court stated that such a possibility was diminished by the fact that the hospital could apply for release at any time.[77] The Court also added that the one-per-year rule was not unconstitutional under the equal protection clause due to the lack of a similar restriction imposed on committed persons other than insanity acquittees. The purpose for the restriction, the Court pointed out, is to encourage a dangerous patient to cooperate with the treating physicians. This purpose legitimizes the different treatment.

Finally, the Court determined the denial of a jury trial and automatic release after 180 days did not amount to a denial of equal protection of the laws. Again, "[T]he fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act provides a rational basis for the distinctions drawn here by the Virginia legislature."[78]

In the 1994 case of *Williams v. Commonwealth*, the Virginia Court of Appeals held that the statutes in effect at the time of appellant's petition for release, requiring

---

[75] Id. at 228. Citing Warren v. Harvey, 632 F.2d 925 (2 Cir.), *cert. Denied,* 449 U.S. 902, 101 S.Ct. 273, 66 L. Ed. 2d 133 (1980).

[76] Id.

[77] Id. at 229. Citing Benham v. Edwards, 501 F. Supp. 1050, 1073 (N.D.Geo. 1980), which struck down a restriction on the frequency of release requests by the hospital while apparently approving a restriction on the frequency of release requests by the insanity acquittee.

[78] Id. Citing United States v. Ecker, 543 F.2d 178 (D.C.Cir. 1976), *cert. Denied,* 429 U.S. 1063, 97 S.Ct. 788, 50 L. Ed. 2d. 779 (1977). Upheld the District of Columbia's scheme for the commitment of insanity acquittees even though insanity acquittees could be released only if a court approved, while other committed persons could be released by the hospital acting alone.

appellant to prove herself not insane **and** not dangerous, were unconstitutional.[79] Virginia's provisions pertaining to the disposition of insanity acquittees were significantly amended in 1991. The changes appear to rectify the constitutional shortcomings alluded to above.

Comparison to Other Commitment Provisions.

Although *Virginia Code* sections 19.2-182.3, 19.2-182.5, and 19.2-182.6 specify that the hearings are civil proceedings, the commitment proceedings of persons acquitted by reason of insanity are treated differently than the civil commitment proceedings for those not acquitted by reason of insanity. Such disparity in treatment has been justified by the unique nature of the not guilty by reason of insanity plea. Because the unique characteristics of the not guilty by reason of insanity plea serve as the justification for this disparity in treatment, the differences between commitment provisions for persons acquitted by reason of insanity and those otherwise committed are relevant.

Competency to Stand Trial

1. Distinction

While both the insanity defense and lack of competency to stand trial may involve the insanity of a defendant, they are unrelated, independent issues dealing with distinct situations. Competency to stand trial is dealt with in *Virginia Code* § 19.2-167, which provides:

> "No person shall, while he is insane or feebleminded, be tried for a criminal offense."

This provision pertains to one's competency to stand trial, depending on the individual's competency at the time of trial. The defense of not guilty by reason of insanity, however, is based upon the defendant's insanity "at the time the offense was committed", regardless of the defendant's mental state at the time of trial.[80] As such, the insanity defense is an affirmative defense that results in a finding of guilt or innocence. A claim of lack of competency, however, is not an affirmative defense related to guilt or innocence and merely states that regardless of whether the defendant was innocent or guilty at the time of the offense, he cannot even be tried for the crime if he is insane or feebleminded. Therefore, when a defendant is found incompetent to stand trial, no determination about his guilt or innocence can be made or even argued and the defendant is not permitted to plead guilty. If the defendant later regains his competency, he may then be tried and convicted. If an incompetent is later found competent to stand trial, he may still raise the issue of his sanity at the time of the offense.[81]

---

[79] Williams v. Commonwealth, 18 Va. App. 384, 444 S.E.2d 16 (1994).
[80] Va. Code Ann. § 19.2-182.2.
[81] If the defense intends to present psychiatric evidence of the defendant's insanity, The Commonwealth must be notified in writing at least 21 days prior to trial. Va. Code Ann. § 19.2-168.

2. Procedural Differences

Lack of competency to stand trial merely requires postponement of the proceedings until such time as the defendant becomes competent. The test for mental competency to stand trial requires a determination of whether "the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense."[82]

Competency may be raised at any time after appointment of counsel and before the end of the trial whereas the issue of defendant's sanity must be raised prior to trial.[83] Unlike the report pertaining to the issue of insanity, which is initially given only to the defense, the competency report is furnished to defense counsel, the Commonwealth's Attorney, and the court.[84] Upon receipt of the competency report, the court promptly determines if the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense. A hearing on competency must be held upon request of either counsel or when the court has reasonable cause to believe the defendant will be hospitalized for treatment.[85] If evidence of a defendant's lack of competency appears to the judge, the judge has a constitutional obligation to conduct further inquiry and determine whether in fact the defendant is incompetent.[86]

Upon finding probable cause to believe that the defendant lacks competency, a psychiatric examination may be ordered. If the examination reveals that the defendant is incompetent, the court shall order that the defendant receive treatment to restore his competency.[87] If the defendant is ordered to undergo treatment at a hospital, the court must hold a hearing every six months to determine if the defendant has:

1) Become competent;
2) Is incompetent but restorable to competency in the foreseeable future; or,
3) Is incompetent and likely to remain so for the foreseeable future.[88]

If not dismissed at an earlier time, charges against an unrestorable incompetent defendant shall either be dismissed without prejudice on the date his sentence would have expired had he received the maximum sentence for the crime charged, or five years from

---

[82] Va. Code Ann. § 19.2-169.1.
[83] Va. Code Ann. § 19.2-169.1(A). However, § 19.2-176 makes provisions for a determination of insanity after conviction but before sentencing and § 19.2-177.1 makes provisions for a determination of mental illness after sentencing. Neither of these provisions, however, have any bearing on the issue of the defendant's sanity at the time of the criminal offense or on the finding of guilt.
[84] Va. Code Ann. § 19.2-169.1(D).
[85] Va. Code Ann §19.2-169.1(E).
[86] Pate v. Robinson, 383 U.S. 375 (1966).
[87] Va. Code Ann. § 19.2-169.2. If the defendant is committed under the civil procedures of chapter 2 of title 37.1, he is deemed a patient, not an inmate, and is thus liable to the Commonwealth for expenses incurred for care, treatment, and maintenance at the hospital. Commonwealth v. Jenkins, 224 Va. 456, 297 S.E. 2d 692 (1982).
[88] Va. Code Ann. § 19.2-169.3.

the date of his arrest, whichever is sooner.[89] Dismissal of the charges without prejudice will have no bearing on the defendant's release from custody pursuant to the provisions for involuntary civil commitment.

3. Constitutional Issues Pertaining to Competency to Stand Trial

Competency claims can raise issues of both procedural and substantive due process. A procedural competency claim may arise if the trial court fails to hold a competency hearing after the defendant's mental competency is put in issue; a substantive competency claim may arise if the defendant was tried and convicted while mentally incompetent.[90] Allowing the prosecution of a mentally ill defendant, regardless of whether he is charged with a felony or misdemeanor, would constitute a violation of due process of law. The United States Supreme Court has stated that the "conviction of an accused person while he is legally incompetent violates due process" and "state procedures must be adequate to protect this right."[91] Also, "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, may not be subjected to trial."[92]

4. Detention Comparison

A defendant who has been found incompetent may be detained in a mental hospital for a brief period of time for evaluation and treatment. However, an incompetent defendant cannot be hospitalized indefinitely or for a long period of time simply because he has been found incompetent. This can be done only by way of independent, civil commitment proceedings.[93]

In *Jackson v. Indiana*, the Supreme Court held that the state was entitled to hold a person for lack of competency to stand trial only long enough to determine if he could be cured and become competent. To hold one longer, the state is required to afford protections constitutionally required in a civil commitment proceeding.[94] The Court relied upon its decision in *Baxstrom v. Herold*, where the Court held that a convicted criminal who allegedly was mentally ill was entitled to release at the end of his term unless the state committed him in a civil proceeding.[95]

---

[89] Va. Code Ann. § 19.2-169.3(C). Note that the current language in the *Code of Virginia* misplaces the word "without prejudice". The language should read, "If not dismissed at an earlier time, charges against an unrestorable incompetent defendant shall be dismissed without prejudice on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest, whichever is sooner." During the June 2001 meeting of the Virginia State Crime Commission, the members voted to introduce legislation to correct the mistake. Specifically, Delegate David B. Albo introduced House Bill 595 during the 2002 session of the Virginia General Assembly to address the problem.

[90] Burket v. Angelone, 208 F. 3d 172 (4th Cir. 2000).

[91] Pate v. Robinson, 383 U.S. 375, 378 (1966).

[92] Drope v. Missouri, 420 U.S. 162, 171 (1975).

[93] Jackson v. Indiana, 406 U.S. 715 (1972).

[94] Id. at 738

[95] Baxstrom v. Herold, 383 U.S. 107 (1966).

In contrast, a defendant who has made a successful insanity defense can be confined in a metal hospital for a term longer than the maximum period of incarceration for the offense and is not entitled to a civil commitment hearing at the expiration of the maximum sentence.[96] The issue of the confinement of mentally ill misdemeanants acquitted by reason of insanity will be discussed in greater detail below.

Civil Commitment Pursuant to Title 37.1[97]

1. Standard for Temporary Detention

An order of temporary detention may be issued if it appears from all the evidence that the person is mentally ill and in need of hospitalization, presents an imminent danger to himself or others as a result of mental illness or is so seriously mentally ill as to be substantially unable to care for himself, and is incapable of volunteering or unwilling to volunteer for treatment.[98] With the exception of defendants requiring hospitalization, such persons shall not be detained in a jail or other place of confinement for persons charged with criminal offenses.[99] Moreover, the duration of temporary detention shall not exceed forty-eight hours prior to a hearing.[100]

2. Standard at Involuntary Commitment Hearing

The commitment hearing must be held within forty-eight hours of the execution of the temporary detention order.[101] The person whose involuntary admission is being sought shall be informed of his right to apply for voluntary admission and shall be afforded an opportunity to apply for voluntary admission.[102] If a person is incapable of accepting or unwilling to accept voluntary admission and treatment, the judge shall inform such person of his right to a commitment hearing and right to counsel.[103] If not represented by counsel, the judge shall appoint an attorney to represent him.[104]

---

[96] Jones v. U.S., 463 U.S. 354, 368 (1983).

[97] A copy of Virginia's involuntary civil commitment provisions, located in §§ 37.1-67.01, 37.1-67.1, and 37.1-67.3, can be found in **Attachment 3.**

[98] Va. Code Ann. § 37.1-67.1.

[99] Id. Subsection A 2 of § 19.2-169.6 provides, in part, that a defendant who is not found incompetent pursuant to § 19.2-169.2 may still be hospitalized for psychiatric treatment prior to trial if the person having custody over the defendant has reasonable cause to believe that 1) the defendant is mentally ill and imminently dangerous to himself or others and 2) requires treatment in a hospital rather than jail and the person having such custody arranges for an evaluation of the defendant by a person skilled in the diagnosis and treatment of mental illness provided a judge, as defined in § 37.1-1 or, if a judge is not available, a magistrate, upon the advice of a person skilled in the diagnosis and treatment of mental illness, subsequently issues a temporary order of detention for treatment in accordance with the procedures specified in § 37.1-67.1.

[100] Id.

[101] Va. Code Ann. § 37.1-67.3.

[102] Id.

[103] Id.

[104] Id.

A written explanation of the involuntary commitment process and the statutory protections associated with the process shall be provided to the person prior to the commitment hearing.[105] The individual shall be informed of his right to retain private counsel or be represented by a court-appointed attorney, to present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, to be present during the hearing and testify, to appeal certification for involuntary admission to the circuit court, and to have a jury trial on appeal.[106]

The judge shall require an examination of the detainee by a psychiatrist or a psychologist. The examiner shall certify that he has personally examined the individual and has probable cause to believe whether or not the individual 1) is so seriously mentally ill as to be substantially unable to care for himself, or 2) presents an imminent danger to himself or others as a result of mental illness, and 3) requires or does not require involuntary hospitalization or treatment.[107]

If the judge finds 1) that the person presents an imminent danger to himself or others as a result of mental illness or has proven to be so seriously mentally ill as to be substantially unable to care for himself, and 2) that alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment, the judge shall order that the person be placed in a hospital or other facility for a period of treatment not to exceed 180 days from the date of the court order.[108]

However, if the judge finds specifically 1) that the person presents an imminent danger to himself or others as a result of mental illness or has been proven to be so seriously mentally ill as to be substantially unable to care for himself, and 2) that less restrictive alternatives to institutional confinement and treatment have been investigated and are deemed suitable, and the judge finds specifically that i) the patient has the degree of competency necessary to understand the stipulations of his treatment, ii) the patient expresses an interest in living in the community and agrees to abide by his treatment plan, iii) the patient is deemed to have the capacity to comply with the treatment plan, iv) the ordered treatment can be delivered on an outpatient basis, and v) the ordered treatment can be monitored by the community services board or designated providers, the judge shall order outpatient treatment, day treatment in a hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to § 37.1-134.21, or such other appropriate course of treatment as may be necessary to meet the needs of the individual.[109]

If the patient subsequently fails to adhere to the terms of the outpatient treatment, the judge may, upon notice to the patient and after a commitment hearing, order

[105] Id.
[106] Id.
[107] Id.
[108] Id.
[109] Id.

involuntary commitment for treatment at a hospital.[110] The community services board monitors the person's compliance with the treatment ordered by the court under this section, and the person's failure to comply with the involuntary outpatient treatment may be admitted into evidence in subsequent hearings.[111]

3. Appeal to Circuit Court De Novo

Any person involuntarily committed pursuant to § 37.1-67.3 shall have the right to appeal such order to the circuit court.[112] The appeal shall be heard de novo. An order continuing the commitment shall be entered only if the criteria in § 37.1-67.3 are met at the time the appeal is heard. The person so committed or certified shall be entitled to trial by jury of seven from a panel of thirteen.[113]

Civil Commitment of Sexually Violent Predators

The United States Supreme Court has upheld state statutes that seek to commit sexually violent predators after they are eligible for release from prison. In Kansas v. Hendricks, the Court upheld one such statute stating that it comported with due process requirements, was non-punitive, and neither ran afoul of double jeopardy principles nor constituted impermissible ex post facto lawmaking.[114]

It is imperative that such a statute be non-punitive. To determine if it is non-punitive, the Court will merely see if the statute, on its face, is classified as civil.[115] Evidence that the statute is civil can be found in the fact that it is labeled "civil commitment" or is located among provisions pertaining to civil commitment. For example, the statute's location in the title pertaining to criminal law and procedure, such as Titles 18.2 and 19.2 in Virginia, would serve as evidence that the statute was not civil but, rather, criminal and punitive.

In Hendricks, the Court found additional evidence that the act was civil rather than criminal from the fact that "commitment under the Act does not implicate either of the two primary objectives of criminal punishment; retribution or deterrence."[116] Also

---

[110] Id.
[111] Id.
[112] Id.
[113] Id.
[114] Kansas v. Hendricks, 521 U.S. 346 (1997).
[115] Id. at 361. "The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.' We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislatures stated intent. Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code, as well as its description of the Act as creating a "civil commitment procedure." Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm."
[116] Id. at 361-362. "The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness." "Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by

significant was the fact that the detainee was "placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals."[117]

The Act's classification as civil avoids constitutional problems with the Double Jeopardy and Ex Post Facto clauses. The Double Jeopardy Clause, which provides that no person may be subject to prosecution for the same offense twice, only applies to criminal prosecutions. Because the Act was held to be civil in nature, initiation of its commitment proceedings does not constitute a second prosecution.[118] For the same reason, the Ex Post Facto Clause, which prohibits the application of any new punitive measure to a crime already consummated, pertains only to penal statutes and, hence, is not violated.

In a recent case involving a challenge to a statute substantially similar to the one found constitutional in Hendricks, the Supreme Court held that an act found to be civil, cannot be deemed punitive "as applied" to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses.[119]

Current Provisions May Prevent Worthy Candidates From Obtaining Release.

Although the current statutory provisions relating to the defense of not guilty by reason of insanity are constitutional and provide opportunities for release, the current provisions may be ineffective in preventing worthy candidates for release or conditional release from remaining incarcerated. As Table One demonstrates, individuals acquitted of a criminal offense by reason of insanity are provided ample opportunities for release in the event they no longer require hospitalization. Why then, do many acquittees charged with misdemeanors remain incarcerated for extended lengths of time? If those who remain in custody, do so because they continue to require hospitalization and are a danger to themselves and to others, than it would be difficult to argue that a problem exists. However, if there are individuals in custody who are not a danger to society and who would be better off if released from custody, then it would appear that the current statutory provisions fail to achieve the ends of justice and should be amended to become more effective.

Once committed after acquittal by reason of insanity, decisions affecting the liberties and eventual release of the individual are made by the Forensic Review Panel (FRP). Patients who desire the opportunity to walk around the grounds, for example, must convince the FRP that they are deserving of the opportunity. The FRP also makes recommendations to judges as to whether a patient should be released.

---

definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement."

[117] Id. at 368.

[118] Id. at 369.

[119] Seling v. Young, Supreme Court of the United States, No. 99-1185, October Term 2000, (January 17, 2001).

The panel was created in 1992 when the state overhauled its legal framework for insanity acquittees. The new system created the review panel and established detailed procedures for commitment and release of insanity acquittees. The law provides that mental health officials must decide that forensic patients do not pose a substantial threat of bodily harm to others or to themselves in the foreseeable future before they may be released. The review panel also has to consider whether a patient can be controlled and treated adequately outside a hospital.

The panel is comprised of twelve members who meet weekly and who must approve any increase in privileges or petition for release unanimously. In making such determinations, the panel encounters the same balancing analysis as that which is the subject of this study. The panel must balance the civil rights of the individual with concerns of public safety and the risk the individual might pose to others or himself.

The panel implements a policy requiring the patients to complete every step of a bureaucratic process designed to reduce the risk of releasing them from state hospitals. The panel tests these risks by giving patients more privileges in increments and observing how they respond. For example, a patient may be given permission to walk around the grounds and then permission to walk into town with an escort. This process may eventually lead to release. Release, the final step, must be approved by the court that ordered commitment. The fact that only a handful of the patients released from Virginia hospitals after going through this graduated release process run into any trouble with the law may serve as evidence that this process works. Or, it may simply serve as evidence that only the patients containing the least possible amount of risk are released while the others remain confined.

Comparison to Other States

Crime Commission staff analyzed the commitment and disposition provisions pertaining to persons found not guilty by reason of insanity of twenty-five states were analyzed. States analyzed include: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Maine, Maryland, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming. The analysis revealed that Alaska, Arizona, Connecticut, New Jersey, South Carolina, Texas, and West Virginia limit the time in custody to the maximum length of imprisonment for the crime charged. Continued commitment must be pursuant to civil commitment standards. Arizona, Arkansas, Montana, Texas, and Vermont distinguish between violent and non-violent offenses. Florida distinguishes between felonies and misdemeanors. Idaho and Montana do not have a plea of not guilty by reason insanity.

Table 2 COMPARABLE STATE STATUTES	
State	***Statutory Provision***
Alabama[120]	• When the Department of Mental Health and Mental Retardation is of the opinion that the acquittee is no longer mentally ill, or that the defendant no longer poses a real and present threat of substantial harm to himself or others, the department shall give notice to the court of that opinion. If an order for release is not stipulated by all involved parties (prosecutor, defense, etc.) the court shall hold a hearing within 30 days. If a hearing is not held within 60 days, the defendant shall be released. At the hearing, if the court determines that the acquittee is no longer mentally ill or no longer poses a real and present threat of substantial harm to himself or to others by being at large, the court shall order release. • There are no statutory provisions for required judicial hearings or hearings upon a petition by the acquittee. A hearing results only from an opinion by the department.
Alaska[121]	• Acquittee held in custody for period of time not to exceed the maximum term of imprisonment for the crime charged or until the mental illness is cured or corrected as determined at a hearing. • Continued commitment following the expiration of the maximum term of imprisonment for the crime charged is governed by the standards pertaining to civil commitment. To continue commitment at civil commitment proceedings, the court must find by clear and convincing evidence that the respondent is mentally ill and, as a result, is likely to cause harm or is gravely disabled. • Acquittee may file petition to have commitment reviewed by the court annually, beginning one year after commitment. The burden is on the acquittee to prove by clear and convincing evidence that he is not presently suffering from any mental illness causing him to be dangerous to the public.
Arizona[122]	• Standards differ based on whether or not the criminal act caused death or serious physical injury of or the threat of death or serious physical injury to another. • If the crime did not cause the death or serious physical injury of or the threat of death or serious physical injury to another, the acquittee shall be released or civilly committed based on whether the court finds the acquittee still suffers from a mental disease or defect, may present a threat of danger to self or others, is gravely disabled, or has a propensity to re-offend. • If the crime did cause the death or serious physical injury of or the threat of death or serious physical injury to another, the court shall place the acquittee under the jurisdiction of the psychiatric security review board which will have jurisdiction over the acquittee for the length of time they would have been sentenced to prison. The acquittee is not entitled to a hearing until 120 days after commitment. Additional hearings may not be sought earlier than 20 months after a prior hearing but the person shall not be held in confinement for more than two years without a hearing. At each such hearing, the acquiuttee has the burden of proving that he no longer suffers from a mental disease or defect and is not dangerous and the person's entire criminal history will be considered. • The procedures for civil commitment govern the continued commitment after the expiration of the jurisdiction of the board.

[120] Ala. Code §§ 15-16-60 through 15-16-67; "The Criminal Psychopath Release Restriction Act."
[121] Alaska Stat. §§ 12.47.090, 46.30.730, 47.30.735, 47.30.740, and 47.30.745.

Arkansas[123]	• Standards differ based on whether the acquittee was charged with an offense involving bodily injury to another or serious damage to the property of another, or involving a substantial risk of such injury or damage. One acquitted of such an offense has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious risk to property of another due to a present mental disease or defect. • For any other offense, the person has the burden of proof by a preponderance of the evidence. • Acquittee may move for a hearing not more than once every 180 days and the Director of the Department of Human Services may file an application for discharge at any time. These hearings will apply the same standards applied in the initial commitment hearings.
Connecticut[124]	• If mentally ill and a danger to himself or others, the court shall order commitment and the court shall fix a term of commitment, not to exceed the maximum sentence that could have been imposed if the acquittee had been convicted. Acquittee shall be immediately discharged at the expiration of the maximum term. • However, if reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or is mentally retarded to the extent that his discharge at the expiration of his maximum term would constitute a danger to himself or others, the state's attorney, at least 135 days prior to expiration, may petition for an order of continued commitment. • Petition will result in a hearing at which the acquittee has the burden of proving by a preponderance of the evidence that he is not mentally ill and a danger to himself or others. • In addition, the board may recommend discharge and the acquittee may apply for discharge not more than once every 6 months and no sooner than 6 months after the initial hearing.
Delaware[125]	• Acquittee kept in the state hospital in a secured building until the Superior Court is satisfied public safety will not be endangered by release. • Only required post-commitment judicial hearing is after one year of confinement. Thereafter, the court shall reconsider the patient's detention only upon petition by the patient or when advised by the hospital that the public safety will not be endangered by the patient's release. • Burden is not provided by statute. • Appears to allow for continued confinement based only upon a showing of dangerousness, regardless of mental illness. If so, this is constitutionally problematic.
Florida[126]	• Statute applies only to felonies, apparently leaving misdemeanors to civil commitment if the prosecution chooses to pursue it. • Codified intent: "It is the intent of the Legislature that evaluation and services to defendants who are mentally ill, retarded, or autistic be provided in community settings, in residential facilities, or in civil, non-forensic facilities, whenever this is a feasible alternative to treatment or training in a state forensic facility." • Statute applies to defendants determined to need treatment for mental illness, acquitted of a felony offense by reason of insanity, determined by the Department of Children and Family Services to be dangerous to himself or others or present a clear and present potential to escape. • Such a defendant may be committed if mentally ill and, because of the illness, is

[122] Ariz. Rev. Stat. §§ 13-502-1 and 13-3994-1.
[123] Ark. Code Ann. § 5-2-315.
[124] Conn. Gen. Stat. §§ 17a-580 though 17a-597.
[125] Del. Code Ann. § 403.
[126] Flor. Stat. ch. 916.105, 106, 107, 13, 15, 16 and 17.

	manifestly dangerous to himself or others. • No later than 6 months after admission, prior to the end of extended commitment, or any time the administrator determines the defendant no longer meets the criteria for commitment, the administrator shall file a report with the court. The defendant and the state have the right to a hearing. • Committing court retains jurisdiction and no defendant may be released except by court order. • Committing court may order conditional release based on an approved plan for providing outpatient care and treatment. • At any time, and without notice, the person or his representative may petition for a writ of habeas corpus to question the cause and legality of such detention and request that the committing court issue a writ for release.
Georgia[127]	• Acquittee must show he is not mentally ill or does not present a substantial risk of imminent harm to himself or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or others persons, or is so unable to care for his own health and safety as to create an imminently life-endangering crisis. • Applications for release must be at least 12 months after the hearing of a prior application. The Department of Human Resources has an independent right to request a release hearing once every 12 months.
Idaho[128]	• Idaho does not have a plea of not guilty by reason of insanity (abolished in 1982). • Today, the defendant is either found guilty or not guilty. If found guilty, there is a statutory provision that allows for the commitment of mentally ill convicts, but they are returned to prison once restored to sanity. If found not guilty, an application may be filed for involuntary commitment.
Kentucky[129]	• Automatic involuntary commitment proceedings upon acquittal. No person shall be involuntarily hospitalized unless mentally ill and presents a danger or threat of danger to self, family, or others as a result of the mental illness, can reasonably benefit from treatment, and for whom hospitalization is the least restrictive alternative mode of treatment presently available. The person shall be discharged as an involuntary patient when he no longer meets the criteria for involuntary hospitalization. • At any time, and without notice, the acquittee, or a relative, friend, guardian, representative, or attorney on their behalf, may petition for a writ of habeas corpus to question the cause and legality of such detention and request that the Circuit Court issue a writ for release.
Maine[130]	• Annual report by head of institution where person is placed, stating whether the person may be released or discharged without likelihood that he will cause injury to that himself or others due to mental disease or defect, must be filed with court. If it is made to appear by the report that any person may be ready for release or discharge, the court shall set a date for and hold a hearing on the issue. If the court finds that the person may be released or discharged without likelihood that he will cause injury to himself or others due to mental disease or mental defect, the court shall order conditional release or discharge. • Order of release includes condition that acquittee must be returned to the institution immediately upon order of the Commissioner whenever the person fails to comply with conditions of release. The acquittee remains in the custody of the Commissioner and is subject to annual review by the court. • If, at any time, the staff psychiatrist thinks the acquittee may be released or discharged without likelihood that he will cause injury to himself or others due to

[127] Ga. Code Ann. § 17-7-131.
[128] Idaho Code § 66-337 and § 66-1304.
[129] Ky. Rev. Stat. Ann. §§ 504.030, 202A.026, 202A.171, and 202A.151.
[130] Me. Rev. Stat. Ann. tit. 15, §§ 103 and 104-A.

	mental disease or mental defect, a report must be filed with the court and a hearing held. • An acquittee, or their spouse or next of kin may petition for a hearing. If release or discharge is not ordered, a petition may not be filed again for 6 months. Any person released, or their spouse or next of kin may at any time after 6 months from the release petition for discharge. If discharge is not ordered, a new petition for discharge may not be filed for 6 more months.
Maryland[131]	• No required judicial hearings. • Beginning 1 year after the initial release hearing, and not more than once a year thereafter, acquittee may apply for release and has the burden of proving he would not be a danger, as a result of mental disorder or mental retardation, to self or to the person or property of others. • Department may apply for release to the court at any time it considers the acquittee to be eligible for release.
Montana[132]	• Montana does not have a plea of not guilty by reason of insanity but mental illness can eliminate an essential element of the offense. • Standards differ between violent and non-violent offenses. • If offense involved a substantial risk of bodily injury or death, actual bodily injury, or substantial property damage, the court may find that the defendant suffers from a mental disease or defect that renders the defendant a danger to the defendant or others. If the court finds that the defendant presents a danger to self or others, he may be committed to the custody of the department of public health and human services. • If the offense did not involve a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage, the court shall release the defendant. • Once committed, must have hearing w/I 180 days to determine whether acquittee should be discharged, released, or further committed. The burden is on the state to prove by clear and convincing evidence that the acquittee may not be safely released pursuant to the above standard. • If the director believes the acquittee may be discharged or released without danger to self or others, he shall apply for discharge or release. • Director or acquittee may apply for discharge or release as part of an annual treatment review. If the court is satisfied by the annual report that the acquittee no longer suffers from a mental disease or defect that causes him to present a substantial risk of serious bodily injury or death to himself or others, a substantial risk of an imminent threat of physical injury to the person or others, or a substantial risk of substantial property damage, the court shall order discharge. If the court is not so satisfied, it shall order a hearing to determine whether he can be released pursuant to this standard. The burden is on the state to prove by clear and convincing evidence that the person should not be released. • An application by the acquittee need not be considered until 6 months of confinement and, if the determination of the court is adverse to the application, the person may not be permitted to file a further application until 1 year has elapsed from the date of any prior hearing for release or discharge.
Nebraska[133]	• Upon acquittal, if the court finds probable cause to believe the person is dangerous to himself or others by reason of mental illness or defect or will be so dangerous in the foreseeable future, as demonstrated by omissions, threats, or overt acts, it shall order an evaluation not to exceed 90 days in length. • At a hearing held within 90 days, if the court does not find that that there is clear and convincing evidence of such dangerousness, the court shall order

[131] Md. Code Ann. §§ 12-112 through 12-120.
[132] Mont. Code Ann. §§ 46-14-301 through 46-14-313.
[133] Neb. Rev. Stat. §§ 29-2203, 29-3701, 29-3702, and 29-3703.

	unconditional release. If the court does find clear and convincing evidence of such dangerousness, the court shall order an appropriate treatment program specifying conditions of liberty and monitoring consistent with the treatment needs of the person and the safety of the public. The court shall place the person in the in the least restrictive available treatment program consistent with the treatment needs of the patient and the safety of the public. • The court shall annually and may, upon its own motion or upon the motion of the person or the prosecuting attorney, review the records of such person and conduct an evidentiary hearing on the status of the person pursuant to the same standards as above.
New Jersey[134]	• Limits length of custody pursuant to the standard of preponderance of the evidence to the maximum, "ordinary" prison term for the crime(s) charged. At the expiration of that time, it switches to civil commitment and the clear and convincing standard.
North Carolina[135]	• Acquittee is provided hearings at 50 days after automatic commitment, 90 days thereafter, then 180 days thereafter, and at annual intervals thereafter. • Hearings can also result from the recommendation of the physician. • At each hearing, the acquittee has the burden of proving that he is no longer mentally ill or a danger to others.
North Dakota[136]	• Order for commitment contains a date for review that must be within one year of the date of the order. • After commitment, both the director and the individual may each apply for conditional release or discharge. • At hearings, the acquittee has the burden of proving by a preponderance of the evidence that he is not mentally ill or defective or that there is not a substantial risk, as a result of the mental illness or defect, that he will commit a criminal act. • If the application is denied, the court must set a new date for periodic review for within a year after the date of the order. A final order can be appealed to the Supreme Court.
Oklahoma[137]	• If the court finds the acquittee is mentally ill and dangerous to the public peace or safety, it shall order commitment to the Department of Health and Substance Abuse Services to be subject to discharge procedures set forth in the Mental Health and Substance Abuse Law. • The superintendent of the hospital must give notice to the court and the state attorney of a proposed discharge. The state attorney may then move for a hearing to ascertain if the person is mentally ill or dangerous to the public peace or safety. • Pursuant to the Mental Health and Substance Abuse Law, a review of the status must be conducted once every three months. • The acquittee may, at any time, file a written request that the treatment order be reviewed by the committing court or by a court in the county where the person is located. The hearing shall be to determine if the person can be treated on a less restrictive basis. At the conclusion of the hearing, the court may confirm the order of treatment, modify the order of treatment, discharge the respondent, or enter any appropriate order.
South Carolina[138]	• If committed and at a later date it is determined by officials at the state hospital that the defendant is no longer in need of hospitalization, the judge shall be notified and a hearing held. If the court finds that the defendant is in need of continued hospitalization, it shall order his continued confinement. If not, it may order release upon such terms and conditions as the judge deems appropriate for

[134] N.J. Stat. Ann. § 2C:4-8.
[135] N.C. Gen. Stat. § 15A-1321 and § 122C-268.1.
[136] N.D. Cent. Code §§ 12.1-04.1-21 through 12.1-04.1-26.
[137] Okla. Stat. § 22-1161 and § 43A-5-420.

	the safety of the community and the well being of the defendant. • In no case shall a defendant found not guilty by reason of insanity be confined or remain under supervision longer than the maximum sentence for the crime with which he was charged without full civil commitment proceedings being held.
Tennessee[139]	• Acquittee can be judicially committed to involuntary treatment and care only if 1) the person has a mental illness or serious emotional disturbance, 2) the person poses a substantial likelihood of serious harm (defined as having threatened or attempted suicide, homicide, or other violent behavior, or placed others in reasonable fear of serious physical harm, and there is a substantial likelihood that such harm will occur unless the person is placed under involuntary treatment) because of mental illness, and all less drastic alternatives are unsuitable to needs. • Must be examined at least every 6 months and can request examinations not more than once every 6 months. • A person involuntarily committed pursuant to the requirements above and who is found by clear, unequivocal, and convincing evidence that he does not have a mental illness or serious emotional disturbance or that he does have a mental illness or serious emotional disturbance but does not pose a likelihood of serious harm may be discharged or conditionally released.
Texas[140]	• Standards differ based upon whether the offense constituted an act, attempt, or threat of serious bodily injury. • If the defendant did not commit an act, attempt, or threat of serious bodily injury to another person and if the court determines that the person is mentally ill or mentally retarded, the court may transfer the defendant for civil commitment proceedings, give the defendant into the care of a responsible person on satisfactory security being given of his proper care and protection, or order discharge. • If the defendant did commit an act, attempt, or threat of serious bodily injury to another person the trial court shall retain jurisdiction and order the commitment to a maximum-security unit for examination. • At the hearing, if the acquittee meets the criteria for involuntary commitment, he will be committed for a period not exceeding 90 days. If not meeting the criteria for involuntary commitment, the acquittee shall be released. • A person committed may only be discharged by the committing court but in no event may a person acquitted by reason of insanity be committed to a mental hospital for a cumulative period of time that exceeds the maximum term provided by law for the crime tried. Upon expiration of that maximum term, the acquitted person may be further confined in such a facility only pursuant to civil commitment proceedings.
Vermont[141]	• If the court finds that the acquittee is suffering from mental illness and, as a result of that illness, his capacity to exercise self-control, judgment or discretion in the conduct of his affairs and social relations is so lessened that he poses a danger of harm to himself or others, he shall be committed A danger of harm to others may be shown by establishing that he has inflicted or attempted to inflict bodily harm on another or by his threats or actions, he has placed others in reasonable fear of physical harm. • The order of commitment will have the same force and effect as an order pursuant to the involuntary civil commitment provisions and persons so committed have the same status and rights, including rights for discharge, as those civilly committed. • However, in any case involving personal injury or threat of personal injury, the

[138] S.C. Code Ann. §§ 17-24-10 through 17-24-80.
[139] Tenn. Code Ann. §§ 33-6-602, 33-6-705, 33-6-706, and 33-6-708.
[140] Tex. Code Ann. § 46.
[141] Vt. Stat. Ann. tit. 13, §§ 4801 through 4823 and tit. 18, §§ 7611 through 7629.

	committing court may issue an order requiring a court hearing before discharge. • Civil commitment provisions apply, meaning the state has burden of proof by clear and convincing evidence and the court shall not order hospitalization without a thorough consideration of available alternatives.
Virginia[142]	• Commissioner can apply for release to the committing court at any time. • Required judicial hearing every year for the first 5 years and biennially thereafter. • The acquittee can apply for release once in any year in which a judicial hearing is not required.
West Virginia[143]	• Acquittee remains under the jurisdiction of the court for a length of time equal to the maximum sentence of the crime charged. • If, upon the expiration of the court's jurisdiction, the acquittee remains mentally ill and is a danger to self or others, a civil commitment application can be filed. The acquittee may be released prior to the expiration of the court's jurisdiction if he is no longer mentally ill and a danger to self or others.
Wyoming[144]	• After 90 days of commitment, if of the opinion that the acquittee is no longer affected by mental illness or deficiency, or that he no longer presents a substantial risk of danger to himself or others, the head of the facility shall apply to the committing court for discharge. If the state opposes the recommendation, the state has the burden of proof by a preponderance of the evidence to show that the person continues to be affected by mental illness or deficiency and continues to present a substantial risk of danger to himself or others and should remain in custody. • After 90 days of commitment, the acquittee may apply to the court for an order of discharge upon the same grounds but the burden is on the applicant to prove his fitness for discharge by a preponderance of the evidence. An application by the person for an order of discharge filed within 6 months of the date of a previous hearing will be subject to summary disposition by the court.

V. Findings and Recommendations

Justice compels, and public safety concerns allow, Virginia to apply different standards for individuals acquitted of misdemeanors by reason of insanity than those acquitted of felonies.

Crime Commission staff concludes that appropriate statutory language should limit the length of time that misdemeanants may remain confined, pursuant to the provisions pertaining to the disposition of insanity acquittees, to no more than one year. Upon the expiration of one year, the misdemeanant should remain confined only pursuant to civil commitment standards.

Although the statutory provisions pertaining to the disposition of insanity acquittees are constitutional and provide frequent opportunities for release hearings, they establish restrictive requirements and allow for confinement of an indefinite duration. The standards applied by the statutes may constitute sound practice when dealing with mentally ill individuals with propensities for violence. However, the provisions often produce harsh results for persons charged with only a misdemeanor. Despite the fact that

[142] Va. Code Ann. § 19.2-
[143] W. Va. Code § 27-6A-3, and § 27-6A-4.
[144] Wyo. Stat. Ann. § 7-11-306.

the incarceration of indefinite length is currently imposed upon all offenders acquitted by reason of insanity, misdemeanants and felons alike, the less serious nature of misdemeanor offenses render misdemeanants generally less dangerous to public safety.

Differences in the nature of misdemeanors and felonies justify amending the statutory provisions to allow for different standards to be applied for acquittees charged with misdemeanors and those charged with felonies. Furthermore, case law establishing that states are not required to limit length of incarceration to the maximum term of imprisonment for the crime charged should not be interpreted to mean that states may not codify such a comparison.

Accordingly, Crime Commission staff concludes that appropriate statutory language should limit the length of time that misdemeanants may remain confined, pursuant to the provisions pertaining to the disposition of insanity acquittees, to no more than one year. Upon the expiration of one year, the misdemeanant should remain confined only pursuant to civil commitment standards. The statutory provisions should remain otherwise unchanged and will not effect those charged with feonies.

Fears pertaining to persons acquitted of misdemeanors but having an extensive felony record or those who are equally as dangerous as felons should be quelled by the fact that a one year limitation on the length of confinement does not mean that the misdemeanant will be released. It only means that after one year of confinement, any continued confinement will be pursuant to the less stringent, civil commitment provisions. Under the civil commitment provisions the misdemeanant will remain in confinement if the judge finds:

> 1). That the person presents an imminent danger to himself or others as a result of mental illness or has proven to be so seriously mentally ill as to be substantially unable to care for himself, and
> 2). That alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment.

If the judge so finds, the misdemeanant will remain in confinement for periods of 180 days. Continued confinement for additional periods will be subject to the same standard.

In fact, it may be a greater threat to public safety to maintain the current provisions as they are, subjecting those acquitted of misdemeanors to the same incarceration of indefinite length as their felonious counterparts. It is now common knowledge in the criminal defense community that an attorney faced with a mentally ill client charged with a misdemeanor should advise them to plead guilty rather than not guilty by reason of insanity. Indeed, criminal defense attorneys state that to advise a misdemeanant to legitimately plead the defense of not guilty by reason of insanity rises to the level of malpractice. The consequence of the current statutory scheme, therefore, is to effectively eliminate the insanity defense for misdemeanants. This unintended impact defeats the apparent purpose of the disposition provisions pertaining to persons found not guilty by reason of insanity, the purpose of which is to provide treatment to those who need it so that they will not be a danger to society.

The effective elimination of the insanity defense for misdemeanants has two dangerous consequences. First, a misdemeanant who truly needs inpatient hospitalization and treatment will, instead, serve a brief prison sentence and then be let out on the street again without receiving needed treatment and care. Secondly, a misdemeanant who poses a serious danger to society will, likewise, serve only a brief prison sentence before being set loose to harm others. If such a misdemeanant had been urged to plead not guilty by reason of insanity, they would have been examined and their dangerous propensities discovered. Then, whether pursuant to either the disposition provisions for acquittees or the civil commitment provisions, they would have remained confined. By maintaining a statutory scheme that encourages misdemeanants to plead guilty rather than not guilty by reason of insanity, the people of Virginia have lost their opportunity to provide necessary treatment to those who need it and to keep persons who are truly mentally ill and dangerous off the street.

Recommendations

A. Limit the Length of Confinement

Legislation directed at creating a remedy for this situation should be carefully crafted so as not to increase the risk that a mentally ill person having a tendency to cause danger to others will be released. Amending language must take into account and balance the liberty interest of the committed person and the government's responsibility to protect society from danger. The result of this balance should allow for the least possible restrictive alternatives that can be had without an increased threat to public safety. However, due to the fact that the current statutory provisions are constitutional, the legislature need not feel compelled to create a remedy that may cause an even slight increased risk to society. Therefore, although the legislature should "balance" the interests of the committed person and of society, it can afford the luxury of erring on the side of caution. Any doubts should be resolved in favor of society and against the committed person. Taking public safety concerns into consideration, a less restrictive standard can be applied to misdemeanants acquitted by reason of insanity.

B. To Whom the Remedy Should Apply

There are three possible categories of persons who should arguably be afforded the benefit of such amending legislation. The three potential categories, arranged from the broadest to the narrowest, are as follows:

1. All Non-Violent Offenses

Due to the fact that public safety is a central justification for continued confinement, it can certainly be argued that legislation should take all non-violent offenders into consideration, felonies and misdemeanors alike. However, this prospect faces the daunting question of what is, and is not, a violent felony. In addition, many felonies that are arguably non-violent, are nevertheless linked to violence or could result

in violence.[145] Accordingly, it is recommended that amending legislation not apply to all non-violent offenses, misdemeanors and felonies alike.

2. Limited to Only Non-Violent Misdemeanors

Limiting the amending legislation to non-violent misdemeanors encounters obstacles similar to those encountered when extending the remedy to all non-violent offenses. The difficulties in defining exactly which offenses are violent and which are not amounts to a daunting obstacle. Clearly, simple assault and battery can be defined as violent misdemeanors but excluding simple assault and battery would result in the exclusion of persons who this legislation is directed to help. One of the subjects of this study was charged with spitting on a police officer. Spitting on someone amounts to a battery. In addition, other misdemeanors would not be easy to decipher. For example, some could reasonably argue that breaking a window is violent.

3. Remedy Should Apply to Misdemeanors

Accordingly, the proposed legislation should be directed at all misdemeanors, whether involving violence or not. Although some misdemeanors involve violence, misdemeanors are classified as such because they do not tend to pose as much of a threat to public safety as do most felonies.

[145] Examples of such felonies could include distribution of drugs and grand larceny. For example, while stealing a car may not involve violence, it certainly could be said to pose a threat to public safety. What if the owner of the car hears his car being stolen and tries to prevent the theft?