REPORT OF THE
VIRGINIA STATE CRIME COMMISSION

Unrestorable Incompetent Defendants

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA

REPORT DOCUMENT

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I. Authority

The *Code of Virginia*, §30-156, authorized the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters "including apprehension, trial and punishment of criminal offenders."

Using the statutory authority granted to the Crime Commission, the staff conducted a study on language in the *Code of Virginia* concerning unrestorable incompetent defendants.

II. Executive Summary

The *Code of Virginia*, §19.2-169.3, pertains to the disposition of unrestorable incompetent defendants. Subsection C of this section provides:

> *If not dismissed **without prejudice** at an earlier time, charges against an unrestorable incompetent defendant shall be dismissed 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 for such charges, whichever is sooner.*

A review of the legislative history of §19.2-169.3 reveals that the language of Subsection C published in the current *Code of Virginia* is not the same language enacted by the General Assembly in 1982. Furthermore, this section has not been affected by amendments since its enactment. The language passed by the General Assembly, after recommendations concurred with by both the Senate and House, provided:

> *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 for such charges, whichever is sooner.*

The words "without prejudice" were inserted as the result of a recommendation of the Governor and with the concurrence of both the Senate and House. The Governor's recommendation specifically expressed that the words "without prejudice" be inserted on the second line after the word "dismissed." This change was correctly reflected when the act was published in the 1982 Acts of Assembly. However, when the next edition of the *Virginia Code* was published for the year 1983, the words "without prejudice" appeared after the word "dismissed" on the first line. All subsequent editions of the *Virginia Code* have continued this incorrect placement.

This error in publication is not merely technical. The clear meaning of the subsection that existed at the time of its enactment has been severely diminished as a result of the incorrect placement. In fact, it is commonly understood throughout the Commonwealth that Subsection C requires a complete dismissal of charges after no more than five years. However, the language passed by the General Assembly clearly reveals that the purpose of the subsection is merely to take cases off the docket, not to prevent prosecution in the future should the defendant become competent and certainly not to require the defendant's release. Replacing the words "without prejudice" after the word "dismissed" on the second line will restore to the subsection the clear meaning to which the General Assembly intended.

III. Background

The *Code of Virginia* has several statutes regarding the competency to stand trial. First, the *Code*, §19.2-167, provides that due process requires the state must provide an adequate means by which an accused can raise the issue of insanity at the time of the trial and at the commission of the alleged offense.[1] Section 19.2-167 of the *Virginia Code* states, "No person shall, while he is insane or feebleminded, be tried for a criminal offense."[2]

Additionally, §19.2-169.1, provides that State hearing procedures must set in motion whenever it appears in the course of the proceedings that a bona fide doubt as to a defendant's competency exists.[3] This section also provides the issue of competency can be raised at any time after the attorney for the defendant has been retained or appointed and before the end of trial.[4] If the court finds probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed.[5] Since a defendant cannot always be expected to demand a sanity examination for himself, the judge may invoke the procedure.[6] Upon completion of the evaluation, the evaluators shall submit a report concerning the defendant's capacity to understand the proceedings against him, his ability to assist his attorney, and his need for treatment in the event he is found incompetent.[7] After receiving the report, the court shall then determine whether the defendant is competent to stand trial. A hearing is not required unless requested by either the attorney for the Commonwealth or the defendant, or unless the court has reasonable cause to believe the defendant will be hospitalized in a finding of incompetency. If the hearing is held, the party alleging the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the

[1] Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972), appeal dismissed, 471 F.2d 648 (4th Cir. 1973).
[2] Va Code Ann. §19.2-167.
[3] Thomas v. Cunningham, 313 F.2d. 934 (4th Cir. 1963).
[4] Va. Code Ann. 19.2-169.1.
[5] *Id.*
[6] Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).
[7] Va. Code Ann. 19.2-169.1(D).

defendant's lack of competency.[8] A defendant claiming a memory lapse surrounding the alleged offense or under the influence of medication, shall not, by itself, bar a finding of competency if the defendant otherwise understands the charges against him, can assist in his defense, or is able to understand and assist in his defense while medicated.[9]

The *Code* also provides in §19.2-169.2 that upon finding the defendant incompetent, the court shall order treatment to restore his competency on an outpatient basis or, if the defendant requires hospitalization, at a hospital designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services. If at any time after the defendant is ordered to undergo treatment the director of the treatment facility believes the defendant's competency is restored, the director shall send a report to the court. The court shall then make a determination as to the defendant's competency in another hearing pursuant to the procedures of Subsection E of §19.2-169.1.[10]

Subsection A of §19.2-169.3 provides that if, at any time after the defendant is ordered to undergo treatment, the director of the treating facility concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send such a finding to the court.[11] The report of the director should indicate whether the defendant should be released, committed pursuant to §37.1-67.3, or certified pursuant to §37.1-65.1 in the event he is found to be unrestorably incompetent.[12]

The court shall then make a competency determination pursuant to the procedures specified in Subsection E of §19.2-169.1. If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be released, committed pursuant to the involuntary civil commitment procedures of §37.1-67.3, or certified for admission as a mentally retarded person pursuant to §37.1-65.1.[13]

If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order continued treatment up to six months from the date of the

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[8] Va. Code Ann. 19.2-169.1(E).

[9] *Id.*

[10] Va. Code Ann. 19.2-169.2.

[11] Va. Code Ann. 19.2-169.3(A).

[12] Section 37.1-67.3 provides that if, after observing the person and obtaining the necessary positive certification and any other relevant evidence, the judge finds specifically i) 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 ill as to be substantially unable to care for himself and ii) 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 the person placed in a hospital or other facility for a period of treatment not to exceed 180 days. Section 37.1-65.1 pertains to the judicial certification of eligibility for admission of mentally retarded persons and provides for certification of eligibility for admission whenever a person is alleged to be mentally retarded and is not capable of requesting admission to a facility for the training and treatment of the mentally retarded as a voluntary patient pursuant to § 37.1-65. Certification requires that a petition be filed and an examination and hearing take place. If the judge, having observed the person and having obtained to necessary positive certification and other relevant evidence, specifically finds, i) that such person is not capable of requesting his own admission, ii) that the facility has approved the proposed admission pursuant to subsection B of this section, iii) that there is no less restrictive alternative to institutional confinement, consistent with the best interests of the person who is the subject of the proceeding, and iv) that such person is mentally retarded and in need of institutional training or treatment, the judge shall certify that the person is eligible for admission to a facility for the training and treatment of the mentally retarded. Certification is not construed as a judicial commitment but shall empower the parent or guardian or other responsible person to admit such person to a facility for the training and treatment of the mentally retarded and shall empower the facility to accept the person as a patient.

[13] Va. Code Ann. § 19.2-169.3(A).

defendant's initial admission. At the conclusion of six months, if, in the opinion of the director, the defendant remains incompetent, the director shall notify the court and recommend whether the defendant should be released, committed pursuant to §37.1-67.3, or certified pursuant to §37.1-65.1. The court shall hold a hearing pursuant to the procedures of Subsection E of §19.2-169.1. If the court finds the defendant unrestorably incompetent, it shall order either release, commitment pursuant to §37.1-67.3, or certified pursuant to §37.1-65.1. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment for additional six month periods, provided a hearing pursuant to Subsection E of §19.2-169.1 is held at the completion of each six month period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.[14]

As noted above, the incorrect *Code* Subsection C of §19.2-169.3, as printed, provides:

> *If not dismissed **without prejudice** at an earlier time, charges against an unrestorable incompetent defendant shall be dismissed 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 for such charges, whichever is sooner.*

IV. Legislative History

Section 19.2-169.3 did not exist until 1982. Prior to that time, no provision existed in the *Virginia Code* pertaining to the dismissal of charges against a defendant determined to be incompetent. Section 19.2-169.3 was added to the *Code* as part of Senate Bill (SB) 417. SB 417 was an act to amend and reenact §§19.2-175 and 19.2-176, to add §§19.2-168.1 and 19.2-169.1 through 19.2-169.7, and the repeal of §§19.2-169, 19.2-170, 19.2-171, 19.2-172, 19.2-173, 19.2-174 and 19.2-182. The act pertained to the proceedings to determine competency.[15]

Included in the addition of §19.2-169.3 was Subsection C, pertaining to the dismissal of charges against an unrestorable incompetent defendant. After passing the House and Senate, Subsection C provided:

> *If not dismissed at an earlier time, charges against an unrestorable incompetent defendant shall be dismissed on the date upon which is 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 for such charges, whichever is sooner.*

[14] Va. Code Ann. 19.2-169.3(B).
[15] 1982 Va. Acts c. 653. **(See Attachment 1).**

However, on April 12, 1982, Governor Robb returned SB 417 without approval with the request that the following amendment be made: "Page 2 of the enrolled bill, second line of paragraph C of Section 19.2-169.3, after *dismissed* insert *without prejudice*."[16] On April 21, 1982, the Senate concurred with the Governor's recommendation by a vote of 38-0 and the House also amended SB 417 in accordance with the Governor's recommendation.[17] On May 1, 1982, the President of the Senate signed SB 417 as reenrolled.[18] As a result of the Governor's recommendations, in concurrence by the House and Senate, the final version of SB 417 provided:

> *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 for such charges, whichever is sooner.*[19]

This final version was correctly published in the 1982 Acts of Assembly under Chapter 653.[20]

However, when the 1983 *Code* was published by Michie Law Publishers, the Governor's recommendation was misplaced within Subsection C. While the Governor's recommendation, concurred with by the House and Senate, clearly specified that the words "without prejudice" were to be inserted after the word "dismissed" on the second line of Subsection C, the words were erroneously placed after the word "dismissed" on the first line.[21] This error altered the clear meaning of Subsection C and has remained so for 19 years. To this day, the words "without prejudice" incorrectly appear after the word dismissed on the first line of Subsection C.[22]

The only amendments to §19.2-169.3 took effect July 1, 2001. Those amendments to §19.2-169.3 were included as part of the 1999 amendments pertaining to the civil commitment of sexually violent predators and updated §19.2-169.3 to reflect the new legislation that became law on July 1, 2001.[23] The only change to Subsection C resulting from the 1999 amendments replaces the word "unrestorable" with "unrestorably" before the word incompetent. Section 19.2-169.3 has not been subject to any other amendments since its enactment.

Accordingly, it is clear that the current language of Subsection C of §19.2-169.3 should provide:

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[16] Journal of the Senate, Wednesday, April 21, 1982. P. 1314. **(See Attachment 2)**

[17] *Id.* P. 1315 and P.1368.

[18] Journal of the Senate, 1982 p. 1370.

[19] 1982 Va. Acts c. 653. This is the version that was published in the 1982 Acts of Assembly after both the House and Senate concurred with the Governor's recommendations and SB 417 was signed by the President.

[20] *Id.*

[21] Va. Code Ann. § 19.2-169.3 (1983).

[22] Va. Code Ann. § 19.2-169.3 (2000).

[23] The civil commitment of sexually violent predators will be located at §§ 37.1-70.1 through 37.1-70.19.

*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 for such charges, whichever is sooner.*

V. Erroneous Placement

The incorrect wording of this subsection, as it currently exists in publications of the *Code*, is confusing, susceptible to differing interpretations, and not the intent of its drafters. It is not surprising that the language appears to lack clarity. As currently published, it appears to provide that if the charges are dismissed without prejudice prior to the date the sentence would have expired or five years from the date of arrest, the state will be able to prosecute the case at any time in the future should the defendant ever become competent. However, if the charges are not dismissed without prejudice prior to such time, the charges will be dismissed, not merely dismissed without prejudice. The charges will be dismissed and the state will be unable to prosecute the case in the future should the defendant become competent to stand trial. It appears, therefore, that the effect of this subsection is to require that the prosecutors move to have the case dismissed without prejudice prior to the time limitation in order to preserve their ability to try the case in the future. This does not make much sense and has been exacerbated by the fact that statutes must be strictly construed in favor of the defendant.

It should be noted that even if the charges were dismissed, the defendant, if unrestorably incompetent, would remain subject to Subsection A which provides that he be released, committed pursuant to §37.1-67.3, or certified pursuant to §37.1-65.1. The hearings at six month intervals, as required under Subsection B, only apply to a defendant who continues to be incompetent but restorable to competency in the foreseeable future. The unrestorably incompetent defendant will remain under the involuntary civil commitment provisions of §37.1-67.3 or §37.1-65.1. This is despite the fact that the erroneous language of the Subsection C requires that charges against them will be dropped no longer than five years from the date of their arrest.

VI. Restoration of Wording

Replacing the words "without prejudice" to their intended location reveals that Subsection C is actually quite clear and not susceptible to differing interpretations. It states in very simple and clear language that unless the charges against an unrestorable incompetent defendant are dismissed for some other reason at an earlier time, on the date upon which the defendant's 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 arrest, whichever is sooner, the charges must be dismissed without prejudice. It is without question that when the charges are dismissed, they are to be dismissed without

prejudice. There is absolutely no bar to the state's ability to prosecute the defendant for a felony should he become competent at any time in the future. In short, the purpose of Subsection C is nothing more than a means of taking cases involving unrestorable incompetent defendants off the docket. It in no way, shape or form allows a defendant to be forever free from prosecution should they ever become competent.

VI. Conclusion

Although not correctly stated in the Michie publications of the *Code of Virginia*, the law of Virginia should be that charges against an unrestorable incompetent defendant shall be dismissed without prejudice on the date 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 for such charges. Due to this seemingly minor misplacement, the current understanding of the law on this matter is in error.