REPORT OF THE
JOINT COMMISSION ON HEALTH CARE

# Report on: Needs of Individuals Found Not Guilty by Reason of Insanity or Incompetent to Stand Trial

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

## REPORT DOCUMENT NO. 78

COMMONWEALTH OF VIRGINIA
RICHMOND
2007

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# Preface

Senate Joint Resolution 324 introduced by Senator Linda T. Puller during the 2005 General Assembly Session, initially requested that the Joint Legislative Audit and Review Commission study the needs of patients found not guilty by reason of insanity (NGRI) and the impact on the mental health system of individuals found incompetent to stand trial (IST). The resolution was amended to direct the study to the Joint Commission on Health Care (JCHC) through its Behavioral Health Care Subcommittee. This report consists of an executive summary and the presentation made to the Behavioral Health Care (BHC) Subcommittee on September 14, 2006.

The BHC Subcommittee continued its study of NGRI/IST for a second year in 2006. (Study findings and actions taken by JCHC during the first year of the study are detailed in Senate Document 5 – 2006.) In conducting this study, JCHC staff and a study workgroup continued to address the objectives of the NGRI-acquittee system including: protection of public safety by ensuring that acquittees are not released into the community until they are ready for such release; fair treatment in terms of balancing an acquittee's need for treatment with the curtailment of his freedom, and consideration of the best use of inpatient bed capacity within Virginia's psychiatric hospitals.

The following legislative options were approved by the Joint Commission, to be taken during the 2007 General Assembly Session:

- Amend *Code of Virginia*, Title 19.2, Chapter 11 throughout to recognize the role of the CSB/BHA director or director's designee in outpatient restorations (SB 1103).
- Amend *Code of Virginia* §19.2-169.3 where the "director of the treating facility" appears to read the "director of the treating facility or his designee" to reflect current practice with regard to completion of reports (SB 1103).
- Amend *Code of Virginia* §19.2-175 and introduce an accompanying budget amendment to increase the fees provided for evaluations related to sanity and competence issues (SB 965/HB 2368).
- Amend *Code of Virginia* §19.2-182.6.B to make it clear that the court is required to order the DMHMRSAS Commissioner to appoint two evaluators "to assess and report on the acquittee's need for inpatient hospitalization" *only in instances in which the petitioner for release is the acquittee* (SB 1134).
- Amend *Code of Virginia,* Title 19.2, Chapter 11.1 throughout to:
    - Replace the language "the community services board where the acquittee was acquitted" and the language "the community services board serving the locality in which the acquittee will reside" with

"the community services board or the behavioral health authority as designated by the Commissioner"
    - Add "or behavioral health authority" where community services board appears to recognize the existence of such authorities (SB1104/HB2369).

- Introduce a budget amendment to provide funding to DMHMRSAS for outpatient restorations for adults. *(A budget amendment was not introduced since funding was included in the Governor's introduced budget.)*

On behalf of the Joint Commission and staff, I would like to thank the numerous individuals who assisted in this study report, including representatives of community services boards; Department of Mental Health, Mental Retardation and Substance Abuse Services; Indigent Defense Commission; National Alliance for the Mentally Ill, Virginia; Office of the Attorney General; Psychiatric Society of Virginia and Northern Virginia; Supreme Court of Virginia; University of Virginia Institute of Law, Psychiatry and Public Policy; and Virginia Office for Protection and Advocacy.

Kim Snead
Executive Director

March 2007

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# Needs of Patients Found Not Guilty by Reason of Insanity or Incompetent to Stand Trial

## Executive Summary

**Authority for Study**

Senate Joint Resolution 324 introduced by Senator Linda T. Puller during the 2005 General Assembly Session, initially requested that the Joint Legislative Audit and Review Commission study the needs of patients found not guilty by reason of insanity (NGRI) and the impact on the mental health system of individuals found incompetent to stand trial (IST). The resolution was amended to direct the study to the Joint Commission on Health Care (JCHC) through its Behavioral Health Care (BHC) Subcommittee.

**Background**

In Virginia, statutory provisions, allowing for a different disposition if a defendant were found to be mentally ill, date back to the 1800s. The current NGRI program was established in 1991 with the addition of Chapter 11.1 to Title 19.2 of the *Code of Virginia.* Virginia adopted a version of the McNaughten standard in allowing a NGRI defense. As noted in the *Report of the Virginia State Crime Commission SJR 381 Not Guilty by Reason of Insanity*, RD 31 (2004):

> "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."

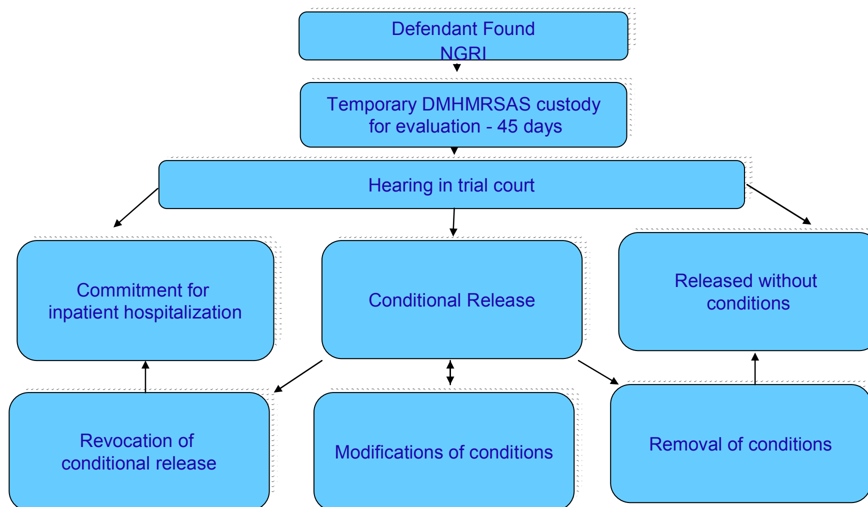
Once a defendant has been acquitted by being found NGRI, *the Code of Virginia* § 19.2-182.2 requires the acquittee to be placed in temporary custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) Commissioner for evaluation. The figure on the next page shows the dispositions that are provided for NGRI acquittees in statute.

An initial review of Virginia's current NGRI system, which was reported to the BHC Subcommittee in 2005, found that the number of NGRI acquittees has increased in recent years. Furthermore, a lack of sufficient community services has meant that some acquittees have remained in State hospitals longer than necessary. The length of stay, as measured by the amount of time spent in the State hospital before the first conditional release (for releases that occurred during fiscal years 2001 through 2005) was reported by DMHMRSAS to be:

| Type of Charge | Average Length of Hospitalization | Median Length of Hospitalization | Number of Acquittees Released |
|---|---|---|---|
| Misdemeanor | 34 months | 12.7 months | 46 |
| Felony | 41 months | 35.7 months | 136 |

**Source:** DMHMRSAS Excel Spreadsheet dated September 12, 2005.

Disposition of Insanity Acquittees Under *Code of Virginia*
Sections 19.2-182.2 through 19.2-182.16




Source: DMHMRSAS.

Note: A new court order is required for each step of the process.

Legislation was introduced to address four areas of concern during the 2006 General Assembly Session. A report was submitted on behalf of JCHC and published as Senate Document 5 (2006). The BHC Subcommittee approved the recommendation to continue the NGRI/IST study for a second year.

### Second Year Study

In conducting the second year of study, several objectives for the NGRI-acquittee system were emphasized including:

- Public safety by ensuring that acquittees are not released into the community until they are ready for such release,
- Fair treatment in terms of balancing an acquittee's need for treatment with the curtailment of his freedom, and

- Consideration of the best use of inpatient bed capacity within Virginia's psychiatric hospitals.

NGRI-related issues were discussed during workgroup meetings and individual contacts with interested parties. In addition, a few issues related to competency to stand trial were discussed. If a defendant is suspected to be incompetent to stand trial (IST) that is, "there is 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…." (*Code of Virginia* §19.2-169.1.A) If the individual is found by the Court to be incompetent to stand trial, the Court will order treatment to restore competency. Both the competency evaluation and the restoration services may be provided on an outpatient basis (while the individual is on bond or in the jail) or on an inpatient basis within a State hospital.

The following agencies assisted with the development of legislative options to propose to the BHC Subcommittee and JCHC:

- Community Services Boards
- Department of Mental Health, Mental Retardation and Substance Abuse Services
- Indigent Defense Commission
- National Alliance for the Mentally Ill Virginia
- Office of the Attorney General
- Psychiatric Society of Virginia and Northern Virginia
- Supreme Court of Virginia
- University of Virginia Institute of Law, Psychiatry and Public Policy
- Virginia Office for Protection and Advocacy

**Legislative Options**

**Option I – *Adopted***
Amend *Code of Virginia*, Title 19.2, Chapter 11 throughout to recognize the role of the CSB/BHA director or director's designee in outpatient restorations.

- Although outpatient restoration is provided for in Title 19.2, Chapter 11 statutory language refers exclusively to "the director of the treating facility" with regard to receipt of reports and to reporting back to the Court.

**Option II - *Adopted***
Amend *Code of Virginia* §19.2-169.3 where the "director of the treating facility" appears to read the "director of the treating facility or his designee" to reflect current practice with regard to completion of reports.

- State hospital representatives reported a number of instances in which the treating facility director had been required to testify in court regarding a report he did not complete.

**Option III - *Adopted***
Amend *Code of Virginia* §19.2-175 and introduce an accompanying budget amendment to increase the fees provided for evaluations related to sanity and competence issues:

- The fees paid to "each psychiatrist, clinical psychologist or other expert appointed by the court to render professional service" for a number of evaluations have not been increased since the early 1980s.
- The fees (except in capital murder cases) are limited to $400.
- Using the increases proposed by Senator Puller last year in SB 639 resulted in an estimated additional cost of $482,100 per year for fiscal years 2007 through 2012.

**Option IV - *Adopted***
Amend *Code of Virginia* §19.2-182.6.B to make it clear that the court is required to order the DMHMRSAS Commissioner to appoint two evaluators "to assess and report on the acquittee's need for inpatient hospitalization" <u>only in instances in which the petitioner for release is the acquittee.</u>

As written, the requirement to appoint evaluators applies <u>even when the DMHMRSAS Commissioner petitions</u> the court to allow the acquittee to be placed on conditional or unconditional release from the hospital. When the Commissioner petitions the court, the petition must include "a report of clinical findings…prepared jointly by the hospital and the appropriate" CSB; thereby eliminating the need for a mandatory second evaluation. CSB staff indicated that residential arrangements often lapse during the time it takes for additional evaluation to be completed. Moreover, the Court would retain the authority to order additional evaluation, and the requirement for the court to hold a hearing of the evidence in order to determine whether to release the acquittee from hospitalization would not change.

**Option V - *Adopted***
Amend *Code of Virginia,* Title 19.2, Chapter 11.1 throughout to:

- Replace the language "the community services board where the acquittee was acquitted" and the language "the community services board serving the locality in which the acquittee will reside" with "the community services board or the behavioral health authority as designated by the Commissioner"

This change would provide needed flexibility to best serve the acquittee.

- Add "or behavioral health authority" where community services board appears to recognize the existence of such authorities, one locality has a behavioral health authority rather than a community services board.

**Option VI - *Adopted***
Introduce a budget amendment to provide funding to DMHMRSAS for outpatient restorations for adults.

DMHMRSAS receives funding for outpatient restoration for juveniles, but no funding is received for adult restorations. The lack of funding results in mentally ill adults remaining in jail longer awaiting either restoration services in the jail or within a State hospital and places a burden on CSBs/BHAs receiving the court orders. While some mentally ill adults will need to be treated within a State hospital in order to be restored to competency, some adults are being restored successfully while in jail or in the community on bond. The number of orders for adult outpatient competency restorations received by CSBs/BHAs has increased significantly in recent years:

- 26 orders in FY 2004
- 41 orders in FY 2005
- 60 orders in FY 2006

**JCHC Staff for this Report**
Kim Snead
Executive Director

# Needs of Patients Found Not Guilty by Reason of Insanity

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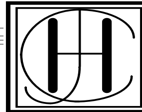
**Behavioral Health Care Subcommittee**
**Joint Commission on Health Care**



**Kim Snead**

**September 14, 2006**
Richmond, Virginia

# Authority for the Study



- Second year of study requested in Senate Joint Resolution 324 – 2005 (Senator Puller) for the Behavioral Health Care Subcommittee to determine the treatment needs of individuals found not guilty by reason of insanity (NGRI) and the impact on the mental health system of individuals found incompetent to stand trial (IST).
- During the 2006 Session, legislation to amend the *Code* to address four areas of concern was introduced by JCHC and enacted by the General Assembly.
- BHC Subcommittee voted to include continuation of the study on its 2006 Workplan.

# Background



- As noted in the *Report of the Virginia State Crime Commission SJR 381 Not Guilty by Reason on Insanity* RD 31 (2004);

  "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. 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."
- A verdict of NGRI does not mean the defendant is not guilty. In fact, the United States Supreme Court in 1983 in *Jones v. United States* ruled that a NGRI verdict "establishes two facts: 1) The defendant committed an act that constitutes a criminal offense, and 2) He committed the act because of mental illness."
- Statutory provisions, allowing for a different disposition if a defendant were found to be insane, date back to the 1800s in Virginia
  - — The current NGRI program was established in 1991 with the addition of Chapter 11.1 to Title 19.2 of the *Code of Virginia.*

# NGRI System in Virginia



- DMHMRSAS reported that as of September 8, 2006 there were:
  - — 226 NGRI acquittees in a State hospital
    - 216 felony acquittees with following charges
      - 31 homicide
      - 23 attempted murder or sex offense
      - 127 other felony against person
      - 31 felony against property
      - 2 substance abuse or weapons offense
      - 2 other felony minor offense
    - 10 misdemeanant acquittees in a State hospital
      - 9 misdemeanor against person or sex offense
      - 1 misdemeanor against property

"The number of NGRI admissions has been increasing which decreases the number of short-term acute beds available given longer lengths of stay than most civilly committed individuals."

Source: *DMHMRSAS Not Guilty by Reason of Insanity (NGRI) Program* Fact Sheet.

## DMHMRSAS Secure Forensic Placement
### from DMHMRSAS presentation to Subcommittees of the Senate Finance Committee on July 19, 2005



- NGRIs are only one of six categories of forensic patients served by DMHMRSAS (FY 2005 admission figures are noted):
  - — Emergency treatment (jail TDOs) – 389
  - — Restoration to competency – 311
  - — Competency evaluation – 118
  - — NGRIs – 53
  - — DOC parolees – 22
  - — Unrestorable incompetent to stand trial – 2
- DMHMRSAS indicates "Forensic patients have been relatively stable (400-450 [patients]) from 2001-2005; discharge rates have prevented severe overcrowding
  - — Forensic patients comprise…30% of all adult psychiatric beds…
  - — Increases in categories with prolonged LOS (e.g. NGRIs, Restorations) may yield long-term increase in forensic cases."

Source: DMHMRSAS presentation to Subcommittees of the Senate Finance Committee on July 19, 2005.

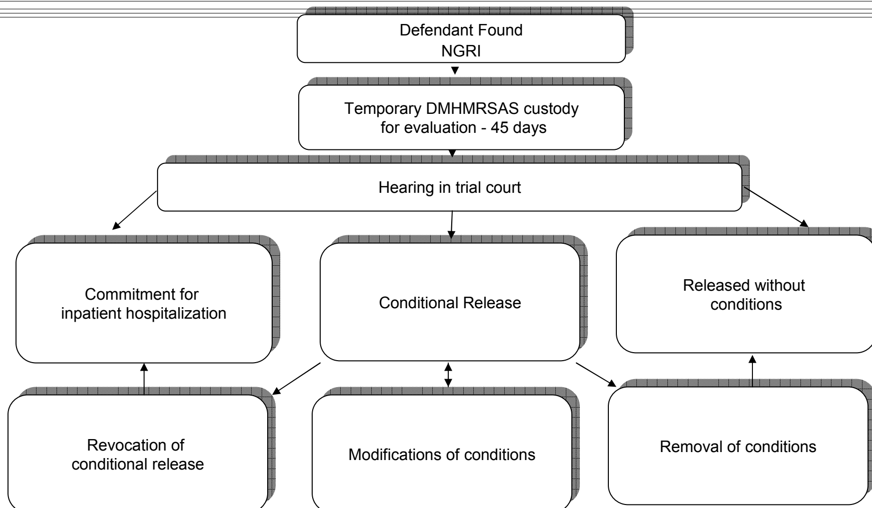
## Appropriate Treatment of Acquittees



- Public safety
  - — Ensuring that acquittees are not released into the community until they are ready for release.
- Fair treatment
  - — Balancing the acquittees' need for treatment with the reality that being hospitalized or on release with conditions is a curtailment of liberty
  - — Balancing the need for inpatient hospitalizations for acquittees with that of civilly committed patients
    - A higher standard of need must be met for civil commitment – dangerous to self or others or unable to care for self – than for commitment as an NGRI acquittee
    - DMHMRSAS inpatient bed capacity has been reduced in recent years making optimal use of available bed space even more important.
- NGRI acquittees come into the mental health system via the criminal justice system. This obviously results in a different legal status than experienced by individuals committed to State hospitals via civil procedures
  - — NGRI acquittees can only be released from the Commissioner's custody by the committing court
  - — Some acquittees remain in State hospitals longer than civil patients with similar treatment needs would typically be held.

## Disposition of Insanity Acquittees Under Code of Virginia Sections 19.2-182.2 through 19.2-182.16






Source: DMHMRSAS.

Note: A new court order is required for each step of the process.



## Study of Virginia's NGRI System



- NGRI-related issues were discussed during meetings of the Forensic Special Populations Work Group as well as in individual contacts with interested parties in 2005 and 2006.
- Ad hoc workgroups were convened by JCHC staff to develop recommendations in 2005 and 2006
  - — Community services boards, DMHMRSAS; Indigent Defense Commission; National Alliance for the Mentally Ill Virginia; Office of the Attorney General; Psychiatric Society of Virginia and Northern Virginia; State Crime Commission; Supreme Court of Virginia; University of Virginia Institute of Law, Psychiatry and Public Policy; and Virginia Office for Protection and Advocacy were represented.

## Study of Virginia's NGRI System



- During meetings held in 2006, a few issues related to competency to stand trial were discussed also. (Statutory provisions related to questions of sanity and competence are included in *Code of Virginia,* Title 19.2, Chapter 11.*)*
- If a defendant is suspected to be incompetent to stand trial (IST) that is,
  "there is 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…." (*Code of VA* §19.2-169.1.A)
- If the individual is found by the Court to be incompetent to stand trial, the Court will order treatment to restore competency.
- Both the competency evaluation and the restoration services may be provided on an outpatient basis (while the individual is on bond or in the jail) or on an inpatient basis within a State hospital.

## Suggested Legislative Options



- Option I: Amend *Code of VA*, Title 19.2, Chapter 11 throughout to recognize the role of the CSB/BHA director or director's designee in outpatient restorations.
  - — Although outpatient restoration is provided for in Title 19.2, Chapter 11 statutory language refers exclusively to "the director of the treating facility" with regard to receipt of reports and to reporting back to the Court.
- Option II: Amend *Code of VA* §19.2-169.3 where the "director of the treating facility" appears to read the "director of the treating facility or his designee" to reflect current practice with regard to completion of reports
  - — State hospital representatives reported a number of instances in which the treating facility director had been required to testify in court regarding a report he did not complete.

## Suggested Legislative Options



- Option III: Amend *Code of VA* §19.2-175 and introduce an accompanying budget amendment to increase the fees provided for evaluations related to sanity and competence issues
  - — The fees paid to "each psychiatrist, clinical psychologist or other expert appointed by the court to render professional service" for a number of evaluations have not been increased since the early 1980s
  - — The fees (except in capital murder cases) are limited to $400
  - — Using the increases proposed by Senator Puller last year in SB 639 resulted in a estimated additional cost of $482,100 per year for fiscal years 2007 through 2012
  - — Amendment to §19.2-175 to limit fee to $750 rather than $400 would be needed.

  CST for juvenile from $300 to $400; CST for adult from $200 to $400; MSO from $300 to $500; MSO/CST from $400 to $750; Presentence evaluation/determination of insanity prior sentence from $300 to $400

## Suggested Legislative Options



- Option IV: Amend *Code of VA* §19.2-182.6.B to make it clear that the court is required to order the DMHMRSAS Commissioner to appoint two evaluators "to assess and report on the acquittee's need for inpatient hospitalization" <u>only in instances in which the petitioner for release is the acquittee</u>
  - — As written, the requirement to appoint evaluators applies <u>even when the DMHMRSAS Commissioner has petitioned</u> the court to allow the acquittee to be placed on conditional or unconditional release from the hospital
    - The Commissioner's petition must include "a report of clinical findings…prepared jointly by the hospital and the appropriate" CSB; thereby eliminating the need for a mandatory second evaluation
      - The Court would retain the authority to order an additional evaluation
    - Residential arrangements often lapse during the time it takes for a second evaluation to be completed.
- The requirement for the court to hold a hearing of the evidence to determine whether to release the acquittee from hospitalization would not change.

## Suggested Legislative Options



- Option V: Amend *Code of VA,* Title 19.2, Chapter 11.1 throughout to:
  - — Replace the language "the community services board where the acquittee was acquitted" and the language "the community services board serving the locality in which the acquittee will reside" with "the community services board or the behavioral health authority as designated by the Commissioner"
    - This change would provide needed flexibility to best serve the acquittee.
  - — Add "or behavioral health authority" where community services board appears to recognize the existence of one such authority
    - One locality has a behavioral health authority rather than a community services board.

## Suggested Legislative Options



- Option VI: Introduce a budget amendment to provide funding to DMHMRSAS for outpatient restorations for adults
  - — DMHMRSAS receives funding for outpatient restoration for juveniles, but no funding is received for adult restorations
  - — The lack of funding results in mentally ill adults remaining in jail longer awaiting restoration services in the jail or in a State hospital and places a burden on CSBs/BHA receiving the court orders
    - While some mentally ill adults will need to be treated within a State hospital in order to be restored to competency, some adults are being restored successfully while in jail or in the community on bond.
  - — The number of orders for adult outpatient competency restorations received by CSBs/BHAs has increased significantly in recent years
    - 26 orders in FY 2004
    - 41 orders in FY 2005
    - 60 orders in FY 2006.

# Public Comments



- Written public comments on the proposed options may be submitted to JCHC by close of business on October 12, 2006. Comments may be submitted via:
  - — E-mail (mwhite@leg.state.va.us)
  - — Facsimile (804/786-5538) or
  - — Mail to Joint Commission on Health Care<br>P.O. Box 1322<br>Richmond, Virginia 23218
- Comments will be summarized and included in the Decision Matrix presentation to the Behavioral Health Care Subcommittee during its November 9th meeting.

# APPENDIX A

**SENATE JOINT RESOLUTION NO. 324**

*Directing the Joint Commission on Health Care, through its Behavioral Health Care Subcommittee, to study the needs of patients found not guilty by reason of insanity and persons found incompetent to stand trial. Report.*

Agreed to by the Senate, February 25, 2005
Agreed to by the House of Delegates, February 24, 2005

WHEREAS, the 2002 General Assembly enacted Senate Bill No. 482 that limited the amount of time that a person found not guilty by reason of insanity (NGRI) of a misdemeanor on or after July 1, 2002, could remain in the custody of the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services for no more than one year; and

WHEREAS, persons judged to be incompetent to stand trial usually lack the ability to understand, communicate, or make rational decisions; and

WHEREAS, persons who would normally spend many years in the custody of the Commissioner began to reenter the local community and be placed under the supervision of local community services boards; and

WHEREAS, persons found not guilty by reason of insanity of a felony and persons found incompetent to stand trial are still subject to an indeterminate sentence; and

WHEREAS, the Commissioner has identified 213 NGRI patients statewide whose cases are under consideration for conditional release; and

WHEREAS, the increasing number of NGRI patients and persons found incompetent to stand trial that are anticipated to reenter the community is likely to have both fiscal, and in a few instances, community safety implications upon localities; and

WHEREAS, the impact on the mental heath state system is that most state hospitals do not have sufficient acute care beds partially due to NGRI patients taking longer to discharge even after their symptoms are in remission; now, therefore, be it

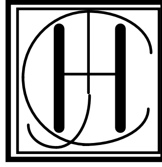
RESOLVED by the Senate, the House of Delegates concurring, That the Joint Commission on Health Care, through its Behavioral Health Care Subcommittee, be directed to study the needs of patients found not guilty by reason of insanity and persons found incompetent to stand trial.

In conducting the study, the Commission shall (i) determine the appropriate treatment of acquittees; (ii) review and revise diagnostic categories that are amenable to treatment and therefore eligible for inclusion as a possible NGRI defense; (iii) examine discharge alternatives that will expedite return to the community as well as free up acute care psychiatric beds; (iv) explore the advisability and feasibility of coordination between the

Department of Mental Health, Mental Retardation and Substance Abuse Services, community services boards, and the criminal justice system when an acquittee violates conditions of release that are not related to a psychiatric illness and therefore not appropriate for rehospitalization, e.g., illegal drug use, refusal to take drug screens, and failure to keep appointments; (v) determine the needs and impact of persons found incompetent to stand trial on the mental health state system; and (vi) consider such other related issues as the Subcommittee deems appropriate to meet the objectives of this study.

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

The Joint Commission on Health Care shall complete its meetings by November 30, 2005, and the Director shall submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the 2006 Regular Session of the General Assembly. The executive summary shall state whether the Commission intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a House or Senate document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.



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