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Without Limitation: 'Groundhog Day' for Incompetent Defendants

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> [D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.[1]

INTRODUCTION

On April 19, 2000, eight-year-old Kevin Shifflett was murdered while playing in the driveway of his great-grandmother's house in Alexandria, Virginia.[2] The killer was not captured at the scene, so the police conducted a massive manhunt, using federal indictments to bring suspects before a grand jury.[3] Witnesses told the police that the attack on Kevin was unprovoked and that the killer, described only as a black person, screamed racial epithets as he slashed Kevin's throat.[4] The police immediately suspected that the killer suffered from serious mental illness; many of the suspects were actively mentally ill or had an extensive history of mental illness.[5]

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* This subtitle stems from the film, *Groundhog Day* (Columbia/TriStar Home Entertainment 1993), in which the lead character, Phil Connors, lives the same day over and over again with no logical hope of escaping from his predicament.

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1. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

2. Josh White, *Mourners Recall "an All-American Boy,"* WASH. POST, Apr. 23, 2000, at C3.

3. *See* Tom Jackman, *Shifflett Suspect Explodes in Court*, WASH. POST, Sept. 20, 2000, at B1.

4. *See* David Horowitz, *The Politics of Hate*, SALON, Oct. 30, 2000, http://archive.salon.com/news/col/horo/2000/10/30/race/index.html.

5. *See* J. Amy Dillard, personal notes (May 2000) (on file with author). During the manhunt, I served as the Deputy Public Defender for the City of Alexandria, and in that capacity, I fielded numerous phone calls from suspects and their counsel, wherein I learned about the mental health of the suspects. I currently represent Gregory Murphy, and thus, have personal knowledge of the investigation beyond that which was reported in the press.

Several months later, the police arrested Gregory Murphy, and on October 4, 2000, the Commonwealth's Attorney indicted him for the capital murder of Kevin Shifflett.[6] On October 30, 2000, during a pre-trial hearing in open court, Murphy punched one of his court-appointed attorneys, knocking him unconscious. The trial judge promptly referred Murphy to the Virginia Department of Mental Health for a competency evaluation.[7] During the initial thirty-day assessment, the doctors found Murphy incompetent to stand trial and reported this finding to the court. In accordance with Virginia Code § 19.2-169.1, the hospital held Murphy in a locked facility, forcibly administered psychotropic medication pursuant to a contested court order, and reassessed him for competency every six months. In each successive competency assessment, the hospital determined that Murphy was incompetent to stand trial, and at each biannual review, the trial court agreed.

When the court entered its initial finding that Murphy was not competent to stand trial, Virginia Code § 19.2-169.3 prescribed a five-year limit on holding an incompetent pre-trial defendant.[8] Pursuant to the statute, the trial court should have dismissed the capital murder charge against Murphy in November 2005, five years after its initial finding that he was incompetent to stand trial. Murphy, who remains incompetent to stand trial today, would have been civilly committed after the dismissal.[9]

But in January 2003, the Commonwealth's Attorney in Alexandria, Virginia, asked local lawmakers to propose legislation to the Virginia General Assembly that would eliminate the five-year limitation for detaining incompetent defendants charged with capital murder. The amendment would address a single pending criminal case, *Common-*

6. *See* Patricia Davis, *Suspect in Shifflett Slaying Charged in Va.*, WASH. POST, Oct. 5, 2000, at A1.

7. *See* Patricia Davis, *Suspect to Make First Court Appearance Since Attack on Lawyer*, WASH. POST, Nov. 9, 2000, at B2.

8. *See* VA. CODE ANN. § 19.2-169.3(C) (2000) (amended 2003) ("If not dismissed without prejudice at an earlier time, charges against an unrestorably 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.").

9. *See* VA. CODE ANN. § 19.2-169.3(A) (2000) (amended 2003) ("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 (i) released, (ii) committed pursuant to § 37.1-67.3, (iii) reviewed for commitment pursuant to § 37.1-70.6, or (iv) certified pursuant to § 37.1-65.1. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.").

wealth v. Murphy.[10] Because the defendant had already been held for half of the statutory maximum and had exhibited no progress towards competency, the prosecutor was worried that the clock on Murphy's detention was running out.[11]

The prosecutor had two concerns. First, he did not want Murphy to dodge prosecution for capital murder, especially for the murder of a child, where the community's attention was extremely intense. Second, he did not want Murphy, against whom he had compiled compelling evidence, to be released into the community ever again. He feared that if Murphy became a hospitalized patient pursuant to civil commitment, he would not necessarily remain in a locked facility. Moreover, Murphy's opportunity for release from civil commitment would be in the hands of doctors who use standards for release that are not designed to protect the community from alleged murderers.[12]

The Virginia General Assembly, apparently with little debate, amended § 19.2-169.3 and eliminated the five-year tolling provision for any defendant charged with capital murder.[13] In doing so, the legislature enacted a statute that unconstitutionally allows for the indefinite detention of all incompetent defendants charged with capital murder in Virginia.[14] The use of the phrase "without limitation" in a criminal statute should have caused concern for the lawmakers, since unlimited pre-trial detention and due process rarely go hand in hand.[15] The constitutional flaws of this statute could be cured with the proposed amendment in Appendix B. Because the 2003 amend-

10. No. CF000517, 2001 WL 34037915 (Va. Cir. Ct. Apr. 5, 2001).

11. *See* VA. CODE ANN. § 19.2-169.3(C) (2000) (amended 2003).

12. *See* VA. CODE ANN. § 37.2-824 (2005) (detailing how often the hospital must review a patient's progress for release); *see also id.* § 37.2-837 (setting forth the criteria for a patient's release from involuntary civil commitment).

13. *See* VA. CODE ANN. § 19.2-169.3(C) (2004 & Supp. 2006) ("Unless an incompetent defendant is charged with capital murder or the charges against an incompetent criminal defendant have been previously dismissed, charges against an unrestorably 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."); app. A.

14. *See* Jackson v. Indiana, 406 U.S. 715 (1972); *infra* Part III.A.

15. *See* Dillard, *supra* note 5 (Aug. 2005). When asked about indefinite detention, the prosecutor said that he was not sure if it was constitutional and that, in twenty years or so, he would probably move to dismiss the charge. *See* VA. CODE ANN. § 19.2-169.3(E) (2004 & Supp. 2006) ("In any case when an incompetent defendant is charged with capital murder, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the capital murder case may order that the defendant receive continued treatment under subsection A of § 19.2-169.2 for additional six-month periods without limitation, provided that (i) a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others.").

ment to § 19.2-169.3 and the proposed amendment at Appendix B would likely be seen as procedural in nature, they could be applied to Murphy without an ex post facto violation.[16]

When the Virginia General Assembly amended § 19.2-169.3 to detain incompetent capital murder defendants, many cynics saw this as overly aggressive prosecution by the state that currently holds the "honor" of being runner-up in execution rates.[17] But an examination of all fifty state codes demonstrates that twenty other states also have unconstitutional detention statutes that violate the due process rights of incompetent defendants.[18] The proposed amendment to § 19.2-169.3 protects the unrestorably incompetent defendant charged with capital murder without placing an undue burden on his right to due process, and protects the community by requiring judicial oversight and authorization for the capital defendant's release.

This Article offers a brief overview of the standards for determining competency to stand trial. After examining the seminal case of *Jackson v. Indiana*,[19] which held that the indefinite pre-trial detention of incompetent defendants violates due process, this Article argues that § 19.2-169.3, like statutes in twenty other states, violates a defendant's right to substantive due process, including the right to be free from forcible medication. This Article proposes legislation that will make the process constitutional, while addressing the concerns about the release of dangerous individuals held by the prosecutors and the community.[20]

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16. *See* Collins v. Youngblood, 497 U.S. 37 (1990). The constitutional prohibition against laws applied ex post facto applies to those that make innocent acts criminal, alter the nature of the offense, or increase the punishment. Beazell v. Ohio, 269 U.S. 167, 170 (1925). A constitutionally prohibited ex post facto amendment is one "which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage." Kring v. Missouri, 107 U.S. 221, 228 (1883) (emphasis omitted) (quoting United States v. Hall, 26 F. Cas. 84, 86 (C.C.D. Pa. 1809) (No. 15,285)).

17. *See, e.g.*, M. Marshall, *Death Penalty Politics Skews Outcomes Toward Execution, Smith Says*, VA. L. NEWS & EVENTS, Nov. 17, 2005, http://www.law.virginia.edu/home2002/html/news/2005_fall/deathpenalty.htm. Professor Stephen Smith offered these statistics:

> Virginia has the lowest number of reversals in capital cases and the highest execution rate of any state in the country. We're number one in the death penalty, per capita. The funding squeeze probably has something to do with that. Virginia is dead last—50 out of 50—in terms of funding indigent defense.

Id. (internal quotation marks omitted).

18. *See* Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1 (1993) (providing a comprehensive and detailed analysis of how states have applied or failed to apply the principles of *Jackson*).

19. 406 U.S. 715.

20. For my proposed amendments to Virginia Code § 19.2-169.3, see app. B.

II. STANDARDS USED TO DETERMINE COMPETENCY TO STAND TRIAL

The notion that a criminal defendant must be competent before standing trial dates as far back as medieval English law. Men were tortured if they refused to enter a plea in a criminal case, but those with physical or mental defects were spared.[21] No conventional theory of punishment could be justified if the defendant was not competent to understand the charges against him, the nature of the proceedings, or the reasons for his prosecution. William Blackstone declared that any man who became "mad" after committing a crime should not be arraigned if he was unable to make the proper pleadings in his defense.[22]

There is very little common law addressing competency to stand trial. Most common law arises from appellate court opinions, but competency decisions are rarely reviewed by these courts. The reasons are two-fold. First, only the defendant has the right to appeal a competency decision.[23] While the defendant's lawyers "will often have the best-informed view of the defendant's ability to participate in his defense,"[24] they resort to this argument only in unusual cases. Where a defendant is charged with a minor offense, even a minor felony, defense counsel will carefully consider whether it is in the defendant's best interest to be found incompetent to stand trial or to limp through the proceedings without raising the issue. In many cases, defendants with serious mental illness may spend more time confined, in a pre-trial posture, while the hospital tries to restore them to competency or, even worse, be held indefinitely under a civil commitment after being found unrestorable. Only in the most serious cases, where the defendant is facing significant jail time or execution, would a defense attorney actively pursue a finding of incompetency on a defendant's behalf.[25] Second, in the vast majority of cases where a defendant is incompetent, there will be little debate over whether the defendant is actually incompetent to stand trial. Both the prosecutor and the defendant will simply agree to dismiss the criminal charges in favor of civil commitment.

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21. Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 201 (2004).

22. WILLIAM BLACKSTONE, 4 COMMENTARIES *24.

23. *See* VA. CODE ANN. § 19.2-398(A) (2004 & Supp. 2006) (noting that, in felony cases, the Commonwealth may appeal only dismissals and motions to suppress based on constitutional violations).

24. Medina v. California, 505 U.S. 437, 450 (1992).

25. These difficult ethical questions could be the topic of another article but are not the central focus here.

In 1960, the Supreme Court set out an explicit test for determining a defendant's competency to stand trial in *Dusky v. United States*.[26] The Court held that the trial court must ascertain whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[27] The Court rejected the notion that merely being "oriented to time and place and [having] some recollection of events" was sufficient to qualify a defendant as competent to stand trial.[28] In *Drope v. Missouri*,[29] the Court suggested that the defendant should also have the present ability to assist counsel in preparing a defense.[30]

The method of conducting a competency evaluation by a qualified forensic assessor varies from state to state,[31] but the Court requires an assessment in every case where the evidence raises sufficient doubt as to a defendant's competency.[32] The Court has not specifically defined "sufficient doubt." Instead it has created a flexible set of factors for the trial court to consider, including a defendant's irrational behavior and demeanor in court, prior medical opinions of a defendant's competency, and concerns raised by defense counsel.[33] If even one of these factors is satisfied, a competency evaluation may be required.[34]

The guidelines for determining whether a defendant is competent to stand trial vary widely among the states. Most states use the "rational understanding" test set out in *Dusky*,[35] though eight states still endorse the arcane "rational manner" test first introduced in 1847.[36] Under the "rational manner" test, the trial court simply may observe the defendant's conduct to determine competency to stand trial.[37] The more modern "rational understanding" test, however, requires an

26. 362 U.S. 402 (1960) (per curiam).

27. *Id.* at 402 (internal quotation marks omitted); *accord* Godinez v. Moran, 509 U.S. 389 (1993) (explaining that the *Dusky* standard applies to competency to stand trial, competency to waive the right to counsel, and competency to enter a guilty plea).

28. *Dusky*, 362 U.S. at 402 (internal quotation marks omitted).

29. 420 U.S. 162 (1975).

30. *Id.* at 171.

31. *See, e.g.*, VA. CODE ANN. § 19.2-169.1 (2004 & Supp. 2006) (explaining which professionals are qualified to conduct a court-ordered competency evaluation).

32. *See* Pate v. Robinson, 383 U.S. 375, 385 (1966).

33. *See Drope*, 420 U.S. at 179–80; *Pate*, 383 U.S. at 385–86.

34. *See Drope*, 420 U.S. at 179–80.

35. Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam).

36. *See* Morris et al., *supra* note 21, at 204–05 & n.56 (noting that the eight states are California, Illinois, Louisiana, Maine, Michigan, North Carolina, South Dakota, and Wyoming).

37. That eight states still have this test in place is a testament to how slowly legislatures react and conform to decisions of the Supreme Court, since the Court has required a medical evaluation for well over thirty years.

assessment of a defendant's rational understanding of the proceedings, his factual understanding of the case, and his present ability to consult with lawyers with a reasonable degree of rational understanding, often defined as the present ability to assist counsel.[38] The recent wave of medical literature on the subject of assessing competency suggests that many doctors may be using a "rational thinking" test that factors intellectual capacity into the competency determination.[39] As recently as November 2005, Professor Grant Morris suggested that "rational manner" and "rational understanding" might not be linked to "rational thinking" at all.[40] In fact, the newest group of incompetent defendants may be those who lack the ability for abstract reasoning and decisionmaking and who will likely never acquire it.[41] Medical experts currently criticize "competency training" for defendants because the training leads only to superficial knowledge—nothing close to the skills needed to assist in preparing a defense.

An unknown number of criminal defendants are deemed incompetent to stand trial each year under some form of competency test. But as expertise among forensic evaluators deepens, and the medical community establishes criteria for competency beyond that required by the letter of the law, more defendants with the superficial knowledge required by *Dusky* may be found incompetent.[42] Thus, more and more mentally ill defendants will suffer indefinite pre-trial detention under unconstitutional statutes that allow for detention without limitation.[43]

III. ANALYSIS

A. Indefinite Detention of Incompetent Pre-trial Defendants Violates the Fourteenth Amendment Guarantee of Due Process

Like all citizens, defendants charged with capital murder are entitled to due process of law before being deprived of their liberty.[44] In cases where a defendant is detained before trial because he is incompetent, the defendant is entitled to a meaningful review of his competency and of his continued detention. In *Jackson*, the Supreme Court

38. *See, e.g.*, *Drope*, 420 U.S. at 171–72; *Dusky*, 362 U.S. at 402.

39. *See, e.g.*, Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 LAW & HUM. BEHAV. 141 (1997).

40. Grant H. Morris, Professor at the University of Pittsburgh Law School, Distinguished Nordenberg Lecture in Law and Psychiatry: Is Competency to Stand Trial Assessed Competently? (Nov. 10, 2005).

41. *See, e.g.*, Hoge et al., *supra* note 39.

42. Morris, *supra* note 40.

43. Morris & Meloy, *supra* note 18.

44. U.S. CONST. amend XIV.

addressed the unconstitutionality of indefinite pre-trial detention.[45] The current version of § 19.2-169.3 violates the principles of *Jackson*, which require that "the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant."[46]

In *Jackson*, the trial court found the defendant, a deaf mute with the mental capacity of a preschool child, incompetent to stand trial for two counts of robbery.[47] Pursuant to the Indiana competency statute, the trial court ordered Jackson committed to the Indiana Department of Mental Health until the Department could certify him as sane.[48] The two doctors appointed by the trial court to examine Jackson agreed that his communication skills were almost nonexistent and that it was extremely unlikely that he could ever learn to read, write, or use sign language because of his profound mental deficiency.[49] The doctors concluded that his "prognosis appear[ed] rather dim" and that, even if Jackson were not a deaf mute, he would still be incompetent to stand trial.[50] Despite this testimony, the trial court ordered that Jackson be detained until he attained competency to stand trial.[51]

Because of his condition and the dim prognosis, the trial court effectively rendered a decision to detain Jackson indefinitely without a trial. The trial judge did not use Indiana's procedure for civilly committing the "feeble-minded," which would have afforded Jackson more protection.[52] With the continued pre-trial detention, Jackson did not have a right to counsel (though he did have counsel) nor a right to periodic reviews. Because of the prognosis that he would never be restored to competency, he had no hope for release at any time in the future.[53] On appeal, the Court held that this type of pre-trial detention constituted indefinite commitment of a criminal defendant solely because of his incompetence to stand trial and thus vio-

45. 406 U.S. 715 (1972).

46. *Id.* at 738.

47. *Id.* at 717, 720.

48. *Id.* at 718–19. Sanity and competency are not interchangeable legal terms, though courts often use them interchangeably. Competency to stand trial is a pre-trial determination based on the *Dusky* factors. *See supra* notes 26–28 and accompanying text. Insanity is an affirmative defense, raised by the defendant, who alleges that he suffered from a mental defect at the time of the offense and could not distinguish between right and wrong. The trial court in *Jackson* undoubtedly meant competency rather than sanity.

49. *Jackson*, 406 U.S. at 718–19.

50. *Id.* at 719 (internal quotation marks omitted).

51. *Id.*

52. *Id.* at 721 (citing an Indiana statute that offered the subject of the commitment the right to an examination by two psychiatrists, representation by counsel, and the opportunity for release after commitment based on the recommendation of the superintendent of the institution).

53. *Id.* at 720–21.

lated Jackson's constitutional right to due process.[54] The Court noted that "due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed."[55] Jackson was a chronically incompetent defendant, and whatever the cause of this incompetency, the Court held that, if the likelihood of restoration is nonexistent, the trial court could not constitutionally detain him.

B. Violations of the Due Process Rights of Incompetent Defendants in Virginia and Beyond

The vast majority of defendants who are referred to the hospital for a competency evaluation will be found competent to stand trial or be restored to competency within a year.[56] Prior to the 2003 amendments to Virginia Code § 19.2-169.3, all incompetent criminal defendants charged with felonies were treated equally. If the hospital determined that any defendant was not competent to stand trial, it advised the court of its findings and followed the court's order to continue treatment to restore the defendant to competency.[57] The trial court had the authority to order forcible medication for the sole purpose of restoring the defendant to competency, so long as it found a reasonable likelihood of restoration, no less intrusive alternative, and that the medication was otherwise medically appropriate.[58]

The legislature has implemented a time limit for the court to wait for competency and has effectively declared all unrestored incompetent defendants unrestorable after five years.[59] Under § 19.2-169.3(C), for defendants charged with any crime except capital murder, the charge shall be dismissed and the defendant civilly committed after five years of being found incompetent.[60] Civil commitment requires the court to find that the defendant presents an imminent dan-

54. *Id.* at 731. There was virtually no chance that Jackson would be released because he had no chance of improving. The Court explained that, to accomplish the indefinite detention of Jackson, the trial court needed to follow the proceedings in place for indefinite civil commitment. *Jackson*, 406 U.S. at 738. By treating Jackson differently from other citizens who had been civilly committed, simply because he was charged with a crime, Indiana violated Jackson's right to equal protection of the laws. *Id.* at 737–39.

55. *Id.* at 738.

56. Interview with Dr. Lillian Tidler, Forensic Med. Dir., Cent. State Hosp., in Petersburg, Va. (Sept. 2004).

57. *See* VA. CODE ANN. § 19.2-169.3(A) (2000) (amended 2003).

58. *See* Riggins v. Nevada, 504 U.S. 127 (1992); Washington v. Harper, 494 U.S. 210 (1990).

59. Some might say that after five years of biannual findings of incompetence, no defendant has the required promise of restoration.

60. *See* VA. CODE ANN. § 19.2-169.3(C) (2004 & Supp. 2006) (stating that the maximum period of pre-trial detention for defendants charged with misdemeanors is the maximum sentence, which in Virginia would be no longer than twelve months).

ger to himself or others before the court detains the defendant for treatment.[61]

Since the 2003 amendment to § 19.2-169.3, a defendant charged with capital murder who is deemed incompetent to stand trial for more than five years, or who is deemed unrestorably incompetent, might never have the opportunity to have the charges against him dismissed and be civilly committed. Instead, the court will continue to review the defendant for competency, and the hospital will continue to try to restore the defendant to competency, even if it determines that restoration is impossible.[62] Every six months, the court will review the hospital's competency evaluation, and as long as it concludes that the defendant is not competent to stand trial, the court will detain the defendant and return him to the hospital for further treatment.[63]

The standard for determining whether the defendant is dangerous is not explicit in the statute. However, subsection E states that a defendant may indefinitely receive treatment for six-month periods provided that four conditions are met: "(i) a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others."[64] Absent instructions to the contrary, one must presume that the finding of the defendant's dangerousness is made according to the hearing required by subsection E of § 19.2-169.1, which states that "the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency."[65]

The *Jackson* Court also noted that, in *Greenwood v. United States*, the Court had upheld a federal statute granting the government authority to civilly commit a defendant found likely unrestorably incompetent for an indefinite period of time.[66] In so ruling, the Court endorsed the statute, which required the trial court to make an explicit finding during any commitment proceeding that the defendant was "dangerous to the safety of the officers, property, or other inter-

61. *See* VA. CODE ANN. § 37.2-814 to -815 (2005) (providing in relevant part that "the person (i) does or does not present an imminent danger to himself or others as a result of mental illness or is or is not so seriously mentally ill as to be substantially unable to care for himself and (ii) requires or does not require involuntary inpatient treatment").

62. *See* VA. CODE ANN. § 19.2-169.3(C), (E) (2004 & Supp. 2006).

63. *See id.*

64. *Id.* § 19.2-169.3(E).

65. *Id.* § 19.2-169.1(E).

66. Jackson v. Indiana, 406 U.S. 716, 726 (1972) (citing Greenwood v. United States, 350 U.S. 366, 375 (1956)).

ests of the United States."[67] Central to the Court's holding in *Greenwood*, however, was the provision that the defendant was entitled to be released once a trial court determined that he was no longer dangerous, even if his competence to stand trial had not been achieved.[68] In contrast, although Virginia Code § 19.2-169.3 requires a finding of dangerousness, however low the standard for making that determination, it makes no provision for a defendant's release should he no longer present a danger to himself or others.

By unconstitutional legislative fiat, the unrestorably incompetent capital defendant will be permanently detained without standing trial or being found guilty.[69] Moreover, because of the pre-trial posture of the biannual reviews, the court need only find by a preponderance of the evidence that the defendant is incompetent, that treatment is medically appropriate, and that the defendant presents a danger to himself or others.[70] To detain any citizen under civil commitment, a court must determine whether "the person (i) does or does not present an imminent danger to himself or others as a result of mental illness or is or is not so seriously mentally ill as to be substantially unable to care for himself and (ii) requires or does not require involuntary inpatient treatment."[71] The clear goal of § 19.2-169.3(C) is the indefinite detention of incompetent defendants charged with capital murder without the prospect of release in the community and without restoration to competency, both of which are impossible for the unrestorably incompetent capital defendant.[72]

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67. *Id.* (citing *Greenwood*, 350 U.S. at 375).

68. *Id.* at 732 (citing *Greenwood*, 350 U.S. at 374).

69. In addition to Virginia, three states—Maryland, Rhode Island, and South Carolina—specify different procedures for defendants charged with capital crimes.

70. VA. CODE ANN. § 19.2-169.3(C), (E) (2004 & Supp. 2006); *see also id.* § 19.2-169.1.

71. VA. CODE ANN. § 37.2-815 (2005).

72. *See* Barker v. Wingo, 407 U.S. 514 (1972) (explaining the Sixth Amendment speedy trial right of criminal defendants). Any defendant held indefinitely under the burden of a criminal charge may have a viable motion to dismiss for a violation of the right to a speedy trial if he is ever restored to competency. With an eye towards the defendant's right to a speedy trial, § 19.2-169.3(C) dictates that charges against all unrestorably incompetent defendants, except those charged with capital murder, shall be dismissed within five years of the date of arrest. The speedy trial issue has not come before the Court in the *Jackson* context, but the principles articulated in *Barker* apply to indefinite detention while a criminal charge is pending and there is no expectation of a trial. The Court has not established a bright-line test to determine at what point a defendant would suffer a speedy trial violation. *Barker*, 407 U.S. at 527; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."). Instead, the Court set out four factors for examination: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant has actually asserted his right, and (4) whether the delay served to prejudice the defendant. *Barker*, 407 U.S. at 530. In *Klopfer v. North Carolina*, the Court held that the right to a speedy trial, "one of the most basic rights preserved by the Constitution," is covered by the Fourteenth Amendment and thus is binding on

Additionally, § 19.2-169.3 violates the incompetent capital defendant's right to remain free from forcible medication. As the Court declared in *Washington v. Harper*, "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."[73] The Court has acknowledged that inmates have the right to remain free from the serious, debilitating effects of psychotropic medication, unless there is a determination that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[74] Without a determination of medical appropriateness and an overriding justification, forcing antipsychotic medication on an inmate is impermissible; the trial court must always consider less intrusive alternatives.[75] Finally, the trial court should determine whether the forcible medication will "significantly further" the state's interest in prosecution, as required by *Sell v. United States*.[76] Section 19.2-169.3 ignores the fact that the state could not possibly meet the requirement of significantly furthering its interests in prosecuting an incompetent capital defendant who has been deemed unrestorable.[77] The state may have a significant interest in bringing the incompetent capital defendant to trial, but reading *Sell* and *Jackson* together, the trial court must make an explicit finding that the forcible medication will significantly further the state's prosecution and that the defendant's detention will bear a "reasonable relation to the purpose for which the individual is committed."[78] The

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the states. 386 U.S. 213, 226 (1967). The speedy trial right is one of the provisions of the Magna Carta that endured in the early days of the American legal system. Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101 (2004) (providing a useful historical summary). George Mason incorporated the right to a speedy trial in drafting the Virginia Declaration of Rights in 1776. *Id.* at 103 & n.14. The Commonwealth of Virginia has opted to set a bright-line test for speedy trial determinations, though there is an exception to the rules if "the failure to try the accused [within the proscribed time limits] was caused . . . [b]y . . . [the accused's] confinement in a hospital for care and observation." VA. CODE ANN. § 19.2-243 (2004).

73. 494 U.S. 210, 229 (1990).

74. *Id.* at 227.

75. Riggins v. Nevada, 504 U.S. 127, 135 (1992).

76. 539 U.S. 166, 181 (2003). The Court decided *Sell* after the Virginia legislature amended Virginia Code § 19.2-169.3, but the Virginia Attorney General has declined to present my proposed legislation, which complies with the holding in *Sell*.

77. *See* VA. CODE ANN. § 19.2-169.3(E) (2004 & Supp. 2006) (explaining that the court must determine only if the defendant is a danger to self or others and that continued treatment is medically appropriate, and ignoring the requirement of significantly furthering the state's interest in prosecution).

78. Jackson v. Indiana, 406 U.S. 715, 738 (1972); *accord Sell*, 539 U.S. at 181 (holding that the court must weigh the side effects against the community's need to prosecute); Dina E. Klepner, Note, Sell v. United States*: Is the Supreme Court Giving a Dose of Bad Medicine?: The Constitutionality of the Right to Forcibly Medicate Mentally Ill Defendants for Purposes of Trial Compe-*

unrestorably incompetent capital defendant is detained for public safety reasons, not for restoration and prosecution; thus, both the detention and the forcible medication violate due process guarantees.

States handle the procedures concerning incompetent defendants in different ways. All states call for a hearing on incompetence once the issue is raised, and all have examinations to determine whether a defendant is competent, incompetent but likely to regain competence in the foreseeable future, or unrestorably incompetent. After that initial determination, state laws differ considerably.[79] Virginia, the District of Columbia, and nineteen other states do not comply with the requirements of *Jackson*.[80] In those states, Murphy and similarly situated defendants will remain confined indefinitely, based solely on the

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tence, 32 PEPP. L. REV. 727 (2005) (offering a detailed description of how courts should handle the forcible medication issue for defendants charged with nonviolent crimes).

79. *See* Morris & Meloy, *supra* note 18 (providing a comprehensive and extremely detailed look at how the states have complied with or ignored the principles of *Jackson*).

80. The District of Columbia and twenty states do not comply with the principles of *Jackson*. In eleven states, a court can order treatment indefinitely for a defendant in the hopes of restoring competency. This includes states where there is no time limit for determining whether there is a substantial likelihood that the defendant will ever regain competency and states where the law provides only that a determination must be made in a reasonable time but does not define a reasonable time. *See, e.g.*, DEL. CODE ANN. tit. 11, § 404 (2001); FLA. R. CRIM. P. 3.212, 3.213; MINN. R. CRIM. P. 20.01; MISS. UNIF. R. CIR. & COUNTY CT. PRAC. 9.06; MO. ANN. STAT. § 552.020 (West 2002); MONT. CODE ANN. § 46-14-221 (2005); NEB. REV. STAT. ANN. § 29-1823 (LexisNexis 2003); NEV. REV. STAT. § 178.425 (2006); TENN. CODE ANN. § 33-7-301 (2001); VA. CODE ANN. § 19.2-169.3 (2004 & Supp. 2006); WYO. STAT. ANN. § 7-11-303 (2005).

In nine other states and the District of Columbia, the defendant's fate is tied to the maximum time for which he could be sentenced for the most severe crime of which he is accused or the statute of limitations for bringing charges on that crime. For a defendant facing a life sentence or the death penalty, there is no limit on how long he can be held. The court may order treatment toward regaining competency for the maximum sentence allowable, or after commitment the charges against the defendant may not be dismissed until he has been confined for the maximum sentence allowable. *See, e.g.*, COLO. REV. STAT. ANN. §§ 16-8-112, -114.5 (West 2006); CONN. GEN. STAT. ANN. § 54-56d (2001 & Supp. 2006); D.C. CODE ANN. §§ 24-531.06–.08 (LexisNexis 2001); MASS. GEN. LAWS ch. 123, §§ 15–17 (2003); N.M. STAT. §§ 31-9-1.3–.5 (2000); N.Y. CRIM. PROC. LAW §§ 730.50, .70 (McKinney 1995); N.D. CENT. CODE § 12.1-04-08 (1997); 50 PA. STAT. ANN. §§ 7402–7403 (West 2001); S.D. CODIFIED LAWS §§ 23A-10A-4, 14–15 (1998); W. VA. CODE ANN. § 27-6A-2 (LexisNexis 2004).

On the other hand, thirty states comply with the principles of *Jackson* to varying degrees. In seven states, within a definite time period, the court determines whether a defendant is unrestorably incompetent, then either initiates civil commitment proceedings or releases the defendant and dismisses the charges. *See, e.g.*, ALASKA STAT. § 12.47.110 (2006); 725 ILL. COMP. STAT. ANN. 5/104-23 (West 2006); IOWA CODE ANN. § 812.9 (West Supp. 2006); ME. REV. STAT. ANN. tit. 15, § 101-B (2003 & Supp. 2006); N.H. REV. STAT. ANN. § 135:17-a (LexisNexis 2006 & Supp. 2006); OR. REV. STAT. § 161.370 (2005); WASH. REV. CODE ANN. §§ 10.77.025, .090, .092 (West 2002 & Supp. 2007).

In four states, within a definite time period, the court determines whether a defendant is unrestorably incompetent, then either initiates civil commitment proceedings or releases the defendant upon a designation of unrestorable, but does not dismiss the charges until a later date. *See, e.g.*, MD. CODE ANN., CRIM. PROC. §§ 3-106 to -108 (LexisNexis 2001 & Supp. 2006); MICH.

criminal charges against them; this is an inadequate basis for indefinite detention, and it violates the guarantee of due process.

IV. A CONSTITUTIONAL SOLUTION

The legislation proposed in Appendix B offers a detailed solution to the constitutional problem created by § 19.2-169.3. States have long had the authority to seek indefinite civil commitment for their citizens.[81] Moreover, the Virginia General Assembly has crafted alternative methods of release for defendants found not guilty by reason of insanity and for citizens civilly committed as sexually violent predators.[82] In each of these proceedings, the sentencing court retains the ultimate decision over the release of the patient, thus protecting against release by an unwitting doctor who is unaware of the nature of the alleged offense that initiated the commitment.[83] Having a judicial gatekeeper to release defendants from indefinite civil commitment is somewhat novel, as only eight states currently follow that protocol.[84]

The proposed amendment to § 19.2-169.3 and the adoption of proposed § 19.2-169.3.1[85] create a mechanism for detaining the un-

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COMP. LAWS ANN. §§ 330.2020–.2044 (West 1999); OHIO REV. CODE ANN. §§ 2945.38–.39 (LexisNexis 2006); R.I. GEN. LAWS § 40.1-5.3-3 (1997).

In five states, within a definite time period, the court determines whether a defendant is unrestorably incompetent, then either initiates civil commitment proceedings or releases the defendant, but leaves the charges on the books, which the court may dismiss at its discretion. *See, e.g.*, CAL. PENAL CODE §§ 1370, 1370.01 (West 2000 & Supp. 2007); IDAHO CODE ANN. § 18-212 (2004); N.J. STAT. ANN. § 2C:4-6 (West 2005); N.C. GEN. STAT. §§ 15A-1002 to -1003, -1008 (2005); S.C. CODE ANN. §§ 44-23-430 to -460 (2002 & Supp. 2006).

In twelve states, within a definite time period, the court determines whether a defendant is unrestorably incompetent, then either initiates civil commitment proceedings or releases the defendant, but leave the charges on the books and either there is no explicit provision regarding dismissal or the charges are dismissed only if the defendant is released. *See, e.g.*, ALA. R. CRIM. P. 11.6; GA. CODE ANN. § 17-7-130 (2004); HAW. REV. STAT. § 704-406 (LexisNexis 2003 & Supp. 2006); IND. CODE ANN. § 35-36-3-3 (LexisNexis 1998 & Supp. 2006); KAN. CRIM. CODE ANN. § 22-3303 (West 1995 & Supp. 2006); KY. REV. STAT. ANN. § 504.110 (LexisNexis 1999 & Supp. 2006); LA. CODE CRIM. PROC. ANN. art. 648 (2003 & Supp. 2007); OKLA. STAT. ANN. tit. 22, §§ 1175.5–.6 (West 2003 & Supp. 2007); TEX. CODE CRIM. PROC. ANN. arts. 46B.071, .079, .084, .107 (Vernon 2006); UTAH CODE ANN. § 77-15-6 (2003); VT. STAT. ANN. tit. 13, § 4817 (1998); WIS. STAT. ANN. § 971.14 (West 2007).

Finally, in two states, within a definite time period, the court determines whether a defendant is unrestorably incompetent, and the law provides that a court *may* commit or release a defendant but does not make clear what happens if the court chooses not to do either. *See, e.g.*, ARIZ. R. CRIM. P. 11.5; ARK. CODE ANN. § 5-2-310 (West 2006).

81. *See Jackson*, 406 U.S. at 736.

82. VA. CODE ANN. § 37.2-905 (2005).

83. *See* Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding the constitutionality of a scheme that gives the trial court the power to release the defendant).

84. Eight states require the committing court to approve a defendant's release from commitment: Georgia, Illinois, Ohio, Rhode Island, Texas, Vermont, Wisconsin, and West Virginia.

85. *See* app. B.

restorably incompetent defendant who is charged with capital murder; they could be applied to any defendant deemed dangerous enough to require additional burdens to being released from civil commitment.[86] Further, the proposed amendments clarify the protocol for forcibly medicating a defendant to restore him to competency.[87] The Commonwealth may forcibly medicate a defendant when important governmental interests are at stake, but only if the "administration of the drugs is substantially likely to render the defendant competent to stand trial."[88]

Statutes are usually amended when a court declares the statute unconstitutional. The method of challenge through litigation works for those who stand only to gain by the challenge. The situation of the incompetent capital defendant is markedly different, since the ultimate risk in any capital case is trial, a sentence of death, and execution. The court cannot constitutionally force an incompetent defendant to face any of those risks. But the capital defendant has a right to be free from indefinite detention that bears no relation to the purpose for which he is detained. In order to challenge that statute, the incompetent capital defendant must risk the possibility that the court will use his constitutional challenge as a means for finding him competent, after which it could force him to stand trial and sentence him to death.

While the goal of detaining unrestorably incompetent capital defendants has some merit because the community will be safer as a result of the detention, this interest does not outweigh the incompetent capital defendant's right to due process. Moreover, the two competing interests need not be at odds, as the proposed amendment to § 19.2-169.3 demonstrates. The defendant can be held and treated like other chronically mentally ill citizens without the sword of a capital case hanging over his head. Furthermore, the community can feel safer knowing that the defendant is receiving appropriate treatment and that a judge, who will know the nature of the original criminal charge and the progress the defendant has made in treatment, will act

86. Upon reviewing my proposed amendments, the late Professor Roger Groot, of Washington and Lee University Law School, remarked that "lots of defendants are bat-shit crazy and a whole lot scarier than many who are charged with capital murder." In particular, he referred to those charged with arson as a means to murder under Virginia Code § 18.2-32.

87. *See* app. B.

88. Sell v. United States, 539 U.S. 166, 181 (2003); *accord* Riggins v. Nevada, 504 U.S. 127, 133–34 (1992) (holding that only an essential or overriding state interest might overcome an individual's liberty "interest in avoiding involuntary administration of antipsychotic drugs"); Washington v. Harper, 494 U.S. 210, 221 (1990) (holding that an individual has "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs").

as the ultimate gatekeeper over the defendant's release into the community.

The legislature should aspire to meet constitutional muster in every piece of legislation it enacts. With §19.2-169.3, the legislature may, however, need to examine its haste in passing unconstitutional legislation, admit its error, and undertake to perform its job more deliberately. Finally, the legislature should undertake this task before a defendant successfully challenges the statute and becomes eligible for release without proper safeguards to ensure a safe community.

APPENDIX A: CURRENT VIRGINIA CODE SECTION 19.2-169.3

A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § 19.2-169.2, the director of the treating facility concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the director's opinion, the defendant should be released, committed pursuant to § 37.1-67.3, committed pursuant to § 37.1-70.9, or certified pursuant to § 37.1-65.1 in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according 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 (i) released, (ii) committed pursuant to § 37.1-67.3, (iii) reviewed for commitment pursuant to § 37.1-70.6, or (iv) certified pursuant to § 37.1-65.1. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A of § 19.2-169.2 if the defendant remains incompetent in the opinion of the director, the director shall so notify the court and make recommendations concerning disposition of the defendant as described above. The court shall hold a hearing according to the procedures specified in subsection E of § 19.2-169.1 and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described above. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § 19.2-169.2 for additional six-month periods, provided a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. Unless an incompetent defendant is charged with capital murder or the charges against an incompetent criminal defendant have been previously dismissed, charges against an unrestorably 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.

D. If the court orders an unrestorably incompetent defendant to be reviewed for commitment pursuant to § 37.1-70.6, it shall order the Attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services to provide the Attorney General with any information relevant to the review, including, but not limited to: (i) a copy of the warrant or indictment, (ii) a copy of the defendant's criminal record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to § 19.2-169.1, and (v) a copy of the report prepared by the director of the defendant's treating facility pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for secure confinement and treatment until the Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice that the Attorney General has declined to file a petition for the commitment of an unrestorably incompetent defendant as a sexually violent predator after conducting a review pursuant to § 37.1-70.6, the court shall order that the defendant be released, committed pursuant to § 37.1-67.3, or certified pursuant to § 37.1-65.1.

E. In any case when an incompetent defendant is charged with capital murder, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the capital murder case may order that the defendant receive continued treatment under subsection A of § 19.2-169.2 for additional six-month periods without limitation, provided that (i) a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others.

F. The Attorney for the Commonwealth may bring charges that have been dismissed against the defendant when he is restored to competency.

APPENDIX B: PROPOSED CHANGE TO VIRGINIA CODE SECTION 19.2-169.3

Section 1. Exception for Capital Murder Defendants

Section 19.2-169.3(E) is amended by striking the entire section and inserting the following:

E. In any case when an incompetent defendant is charged with capital murder, notwithstanding any other provision of this section, upon a report by the director of the treating facility that he is unrestorably incompetent, the court wherein he was charged shall order a review pursuant to § 19.2-169.3.1(C).

Insert the following new section: Section 19.2-169.3.1

Section 2. Procedures for Unrestorable Capital Murder Defendants

A. DEFINITIONS: The following words and phrases when used in this article shall have the following meanings, unless the context clearly indicates otherwise:

"Commissioner" means the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services.

"Defendant" means any person charged with a capital murder offense pursuant to §§ 18.2-31, 18.2-18, or 18.2-40 who is deemed an unrestorably incompetent defendant pursuant to § 19.2-169.3 and is referred for commitment review pursuant to subsection C of this section.

"Director" means the Director of the Department of Corrections.

"Hospitalization" means appropriate treatment, as determined by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services pursuant to § 19.2-169.3.2, for persons civilly committed in accordance with this act.

B. RIGHTS OF DEFENDANTS: In hearings held pursuant to this article, defendants shall have the following rights:

1. To receive adequate notice of the proceeding.
2. To be represented by counsel.
3. To remain silent or to testify.
4. To be present during the hearing.
5. To present evidence and to cross-examine witnesses.
6. To view and copy all petitions and reports in the court file.

In no event shall a defendant be permitted, as a part of any proceedings under this article, to raise challenges to the validity of his prior criminal sentences or institutional convictions.

C. REVIEW OF UNRESTORABLY INCOMPETENT DEFENDANTS CHARGED WITH CAPITAL MURDER; PETITION FOR COMMITMENT; PROCEDURE FOR COMMITMENT HEARING:

1. In any case where a defendant charged with capital murder is found unrestorably incompetent, the court wherein he was charged, pursuant to § 19.2-169.3(E), shall issue an order referring the defendant for review to the Attorney General. The Attorney General shall have 90 days to conduct a review of such defendant and (i) file a petition for the civil commitment of such defendant or (ii) notify the Commissioner that he will not file a petition for commitment, in which case the defendant shall be released. Petitions for commitment shall be filed in the circuit court wherein the defendant was deemed unrestorably incompetent and referred for commitment review pursuant to § 19.2-169.3.

2. In determining whether to file a petition to civilly commit a defendant under this article, the Attorney General shall review (i) the defendant's warrant or indictment, (ii) the competency reports completed pursuant to § 19.2-169.1, (iii) the report and recommendations prepared by the director of the defendant's treating facility pursuant to § 19.2-169.3, (iv) the defendant's criminal offense history, (v) information about the alleged crime, and (vi) any other factor relevant to the determination of whether the defendant should be civilly committed.

3. Notwithstanding § 19.2-299.1 or any other provision of law, the Attorney General is authorized to possess, copy and use pre-sentence reports, post-sentence reports and victim impact statements for all lawful purposes.

4. Any person who is the subject of a petition for civil commitment under this article shall have, prior to a hearing, the right to employ experts, at his own expense, to perform examinations and testify on his behalf. However, if a person has not employed an expert and requests expert assistance, the judge shall appoint such experts as he deems necessary to perform examinations and participate in the hearing on the person's behalf. Any expert appointed to assist the person on matters relating to the person's mental health, including examination, evaluation, diagnosis, and treatment, shall be a licensed psychiatrist or licensed clinical psychologist. Any expert employed or appointed pursuant to this section shall have reasonable access to all relevant medical and psychological records and reports pertaining to the person he has been employed or appointed to represent.

5. Each psychiatrist, psychologist, or other expert appointed by the court to render professional service pursuant to this article who is not regularly employed by the Commonwealth of Virginia, except by the University of Virginia School of Medicine and the Virginia Commonwealth University School of Medicine, shall receive a reasonable fee for such service. The fee shall be determined in each instance by the court that appointed the expert, in accordance with guidelines established by the Supreme Court after consultation with the Department of Mental Health, Mental Retardation and Substance Abuse Services. The fee shall not exceed $5,000; however, if any such expert is required to appear as a witness in any hearing held pursuant to this article, he shall receive mileage and a fee of $750 for each day during which he is required to serve. An itemized account of expenses, duly sworn to, must be presented to the court, and when allowed shall be certified to the Supreme Court for payment out of the state treasury, and be charged against the appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized shall also be made by order of the court, duly certified to the Supreme Court for payment out of the appropriation to pay criminal charges.

D. COMMITMENT HEARING; PROCEDURES:

1. If the Attorney General files a petition for civil commitment, the court wherein the defendant was charged shall hold a hearing to determine if the defendant presents an undue risk to public safety.

2. The burden of proof at the hearing shall be upon the Commonwealth to prove to the court by clear and convincing evidence that the committed person presents an undue risk to public safety.

3. If the court finds, based upon the report of the director of the treating facility and other evidence provided at the hearing, that the committed person's condition does not present an undue risk to public safety, the court shall (i) release the committed person from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in subsection H, provided the court has approved a discharge plan prepared by the Department of Mental Health, Mental Retardation and Substance Abuse Services or (ii) place the committed person on conditional release if he meets the criteria for conditional release, and the court has approved a conditional release plan prepared by the Department of Mental Health, Mental Retardation and Substance Abuse Services. However, if the court finds that the committed person presents an undue risk to public safety, it shall order that the charges against him be dropped and that

he remain in the custody of the Commissioner for secure inpatient hospitalization and treatment.

E. PLACEMENT OF COMMITTED PERSONS:

1. Any person committed pursuant to this article shall be placed in the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person will not present an undue risk to public safety. The Department of Mental Health, Mental Retardation and Substance Abuse Services shall provide such control, care, and treatment at a facility operated by it, or may contract with private or public entities, within or without the Commonwealth, and with other states to provide comparable control, care, and treatment. At all times, persons committed for control, care, and treatment by the Department of Mental Health, Mental Retardation and Substance Abuse Services pursuant to this article shall be kept in a secure facility.

The Commissioner may make treatment and management decisions regarding committed persons in his custody without obtaining prior approval of or review by the committing court, but the treatment decisions must comply with § 19.2-169.3.2.

F. REVIEW OF CONTINUATION OF CONFINEMENT HEARING; PROCEDURE AND REPORTS; DISPOSITION:

1. The committing court shall conduct a hearing 12 months after the date of commitment to assess each committed person's need for continued inpatient hospitalization. A hearing for assessment shall be conducted at yearly intervals for five years and at biennial intervals thereafter. The court shall schedule the matter for hearing as soon as possible after it becomes due, giving the matter priority over all pending matters before the court.

2. Prior to the hearing, the Commissioner shall provide to the court a report reevaluating the committed person's condition and recommending treatment, to be prepared by a licensed psychiatrist or a licensed clinical psychologist. If the Commissioner's report recommends release or the committed person requests release, the committed person's condition and need for inpatient hospitalization shall be evaluated by a second person with such credentials who is not currently treating the committed person. Any professional person who conducts a second evaluation of a committed person shall submit a report of his findings to the court and the Commissioner. A copy of any report submitted pursuant to this subsection shall be sent to the

Attorney General and to the Commonwealth's Attorney wherein the defendant was charged.

3. The burden of proof at the hearing shall be upon the Commonwealth to prove to the court by clear and convincing evidence that the committed person remains an undue risk to public safety.

4. If the court finds, based upon the report and other evidence provided at the hearing, that the committed person's condition has so changed that he is no longer an undue risk to public safety, the court shall (i) release the committed person from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in subsection H, provided the court has approved a discharge plan prepared by the Department of Mental Health, Mental Retardation and Substance Abuse Services or (ii) place the committed person on conditional release if he meets the criteria for conditional release, and the court has approved a conditional release plan prepared by the Department of Mental Health, Mental Retardation and Substance Abuse Services. However, if the court finds that the committed person remains an undue risk to public safety, it shall order that he remain in the custody of the Commissioner for secure inpatient hospitalization and treatment.

G. PETITION FOR RELEASE; HEARING; PROCEDURES:

1. The Commissioner may petition the committing court for conditional or unconditional release of the committed person at any time he believes the committed person's condition has so changed that he is no longer an undue risk to public safety in need of treatment and secure confinement. The petition shall be accompanied by a report of clinical findings supporting the petition and by a conditional release or discharge plan, as applicable, prepared by the Department of Mental Health, Mental Retardation and Substance Abuse Services. The committed person may petition the committing court for release only once in each year. The party petitioning for release shall transmit a copy of the petition to the Attorney General, to the Commonwealth's Attorney wherein the defendant was charged, and to the Commissioner.

2. Upon the submission of a petition pursuant to this section, the committing court shall conduct the proceedings according to the procedures set forth in subsection F.

H. CONDITIONAL RELEASE; CRITERIA; CONDITIONS; REPORTS:

At any time the court considers the committed person's need for inpatient hospitalization pursuant to this article, it shall place the committed person on conditional release if it finds that (i) based on consideration of the factors which the court must consider in its com-

mitment 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; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the committed person, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety. The court shall subject a conditionally released committed person to such orders and conditions it deems will best meet the committed person's need for treatment and supervision and best serve the interests of justice and society.

The Department of Mental Health, Mental Retardation and Substance Abuse Services shall implement the court's conditional release orders and shall submit written reports to the court on the committed person's progress and adjustment in the community no less frequently than every six months. The Department of Mental Health, Mental Retardation and Substance Abuse Services shall send a copy of each written report submitted to the court and copies of all correspondence with the court pursuant to this section to the Attorney General, to the Commonwealth's Attorney wherein the defendant was charged, and to the Commissioner.

I. EMERGENCY CUSTODY OF CONDITIONALLY RELEASED PERSON; REVOCATION OF CONDITIONAL RELEASE:

A judicial officer may issue an emergency custody order, upon the sworn petition of any responsible person, or upon his own motion, based upon probable cause to believe that a person on conditional release within his judicial district has violated the conditions of his release and is no longer a proper subject for conditional release. The emergency custody order shall require a law-enforcement officer to take the person into custody immediately and transport him to a convenient location specified in the order where a person designated by the Department of Mental Health, Mental Retardation and Substance Abuse Services shall, as soon as practicable, evaluate him for the purpose of determining the nature and degree of violation of the conditions of his release. A copy of the petition shall be sent to the Attorney General, to the Commonwealth's Attorney wherein the defendant was charged, and to the Commissioner.

The person on conditional release shall remain in custody until a hearing is held in the circuit court on the motion or petition to determine if he should be returned to the custody of the Commissioner. Such hearing shall be given priority on the court's docket. If upon hearing

the evidence, the court finds that the person on conditional release has violated the conditions of his release and that the violation of conditions was sufficient to render him no longer suitable for conditional release, the court shall revoke his conditional release and order him returned to the custody of the Commissioner for inpatient treatment. The person may petition the original committing court for re-release pursuant to the conditions set forth in subsection E no sooner than six months from his return to custody. The party petitioning for re-release shall transmit a copy of the petition to the Attorney General, to the Commonwealth's Attorney wherein the defendant was charged, and to the Commissioner.

J. MODIFICATION OR REMOVAL OF CONDITIONS; NOTICE; OBJECTIONS; REVIEW:

1. The committing court may modify conditions of release or remove conditions placed on release pursuant to subsection H, upon petition of the Department of Mental Health, Mental Retardation and Substance Abuse Services, the supervising parole or probation officer, the Attorney General, the Commonwealth's Attorney wherein the defendant was charged, or the person on conditional release, or upon its own motion based on reports of the Department of Mental Health, Mental Retardation and Substance Abuse Services or the supervising parole or probation officer. However, the person on conditional release may petition only annually commencing six months after the conditional release order is issued. Upon petition, the court shall require the Department, or, if the person is on parole or probation, the person's parole or probation officer, to provide a report on the person's progress while on conditional release. The party petitioning for release shall transmit a copy of the petition to the Attorney General, to the Commonwealth's Attorney wherein the defendant was charged, and to the Commissioner.

2. As it deems appropriate based on the Department's report and any other evidence provided to it, the court may issue a proposed order for modification or removal of conditions. The court shall provide notice of the order, and their right to object to it within 21 days of its issuance, to the person, the Department or parole or probation officer, the Commonwealth's Attorney wherein the defendant was charged, and the Attorney General. The proposed order shall become final if no objection is filed within 21 days of its issuance. If an objection is so filed, the court shall conduct a hearing at which the person on conditional release, the Attorney General, and the Department or the parole or probation officer, have an opportunity to present evidence challenging the proposed order. At the conclusion of the hear-

ing, the court shall issue an order specifying conditions of release or removing existing conditions of release.

K. REPRESENTATION OF COMMONWEALTH AND PERSON SUBJECT TO COMMITMENT; NATURE OF PROCEEDINGS:

The Attorney General shall represent the Commonwealth in all proceedings held pursuant to this article. The Attorney General shall receive prior written notice of all proceedings held under this article in which he is to represent the Commonwealth.

The court shall appoint counsel for the person subject to commitment or conditional release unless such person waives his right to counsel. The court shall consider appointment of the person who represented the person in previous proceedings.

All proceedings held under this article shall be civil proceedings.

L. AUTHORITY OF COMMISSIONER; DELEGATION TO BOARD; LIABILITY:

For the purposes of carrying out the duties of this article, the Commissioner may appoint an advisory board composed of persons with demonstrated expertise in such matters. The Department of Mental Health, Mental Retardation and Substance Abuse Services shall assist the board in its administrative and technical duties. The membership of the board shall include (i) a citizen appointed by the Commissioner, (ii) a psychiatrist or psychologist licensed to practice in the Commonwealth and who is a full-time employee of the Department of Corrections, to be appointed by its director, (iii) a member of the Department of State Police, and (iv) such other members as deemed appropriate by the Commissioner. Members of the board shall exercise their powers and duties without compensation, except that members of the board who are not state employees shall be reimbursed by the Department for their approved travel expenses to the meetings of this board at the approved state rate. Members of the board shall be immune from personal liability while acting within the scope of their duties except for intentional misconduct.

M. ESCAPE OF PERSONS PLACED OR COMMITTED; PENALTY:

Any person committed to the custody of the Commissioner pursuant to this article who escapes from such custody shall be guilty of a Class 6 felony.

N. PERSONS ON CONDITIONAL RELEASE LEAVING COMMONWEALTH; PENALTY:

Any person placed on conditional release pursuant to this article who leaves the Commonwealth without permission from the court which conditionally released the person shall be guilty of a Class 6 felony.

Insert the following new section: Section 19.2-169.3.2

Section 3. Treatment of unrestorable defendants

The hospital may treat a defendant who is committed pursuant to § 19.2-169.3.1 with any medical treatment necessary to protect his own safety or the safety of others, provided that such treatment is medically appropriate and takes into account less intrusive alternatives. The hospital may not authorize medical treatment solely intended to restore a patient to competency.