

DEVELOPMENTS IN MENTAL HEALTH LAW

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Virginia Settles DOJ CRIPA/ADA Investigation; To Close 4 of 5 Training Centers

After almost one year of intense negotiations, the Commonwealth of Virginia and the United States Department of Justice (“DOJ”) resolved the DOJ investigation of Central Virginia Training Center (“CVTC”) under the Civil Rights of Institutionalized Persons Act (“CRIPA”) and the Americans with Disabilities Act (“ADA”) by filing a Settlement Agreement with the United States District Court in Richmond on January 26, 2011. DOJ initiated a CRIPA investigation into the conditions of care at CVTC in August 2008, and in April 2010, expanded the investigation to focus on Virginia’s compliance system-wide with the ADA. In February 2011, DOJ issued a lengthy “findings” letter detailing Virginia’s failure under the ADA to serve individuals with intellectual disabilities residing in state-operated training centers in the most integrated settings appropriate to meet their needs consistent with their choice.

Newly Mandated Services

The centerpiece of the Settlement Agreement is the increase in the number of waiver slots to be made available under the Home and Community Based Waiver programs to 4,170 over a

period of ten years to address the needs of the Agreement's "target population." The target population is defined as all individuals with a developmental disability who 1) reside at any of the training centers, 2) meet the wait list criteria for the Intellectual Disability ("ID") or Developmental Disability ("DD") waivers, or 3) currently reside in a nursing home or intermediate care facility.

There are currently 5932 individuals on Virginia's wait list. In order to address the needs of all individuals with intellectual and developmental disabilities beyond the number of waiver slots available, Virginia has also agreed to develop an individual and family support program to serve individuals not receiving waiver services. "Individual and family support services" are defined as "a comprehensive and coordinated set of strategies that are designed to ensure that families who are assisting family members with [ID or DD] or individuals with ID/LDD who live independently have access to person-centered and family-centered resources, supports, services and other assistance."

In addition, Virginia must also develop a statewide crisis system to support individuals and their families in each health service area. Crisis services will include mobile crisis teams that will provide assessments, support, and treatment to de-escalate a crisis, available 24 hours per day for up to three days with a three-hour response capability by June 30, 2012, and ultimately within one hour in urban areas and two hours in rural areas. Each region will have at least one crisis stabilization program containing no more than six beds with lengths of stay not to exceed 30 days. With the exception of the Pathways Program at Southwestern Virginia Training Center, which must close by July 1, 2015, no crisis stabilization program may be located on the grounds of any training center or inpatient psychiatric hospital.

The Department of Behavioral Health and Developmental Services ("DBHDS") must also hire at least one employment service coordinator to develop a plan the first year to establish Employment First practices that will focus on development of integrated and paid employment services to enable people with intellectual disabilities to participate in meaningful mainstream work activities. In addition, Virginia must also hire a housing service coordinator to develop a plan the first year of the Settlement Agreement to increase access to independent living options. It must also establish an \$ 800,000 fund to provide rental assistance to those in the target population who need it.

Facility Closures

With such a significant enhancement to the community services system, there will be little need to operate expensive and outdated and dilapidated state institutions. Southside Virginia Training Center in Petersburg is therefore projected to close by June 30, 2014; Northern Virginia Training Center in Fairfax by June 30, 2015; Southwestern Virginia Training Center in Hillsville by June 30, 2018; and Central Virginia Training Center near Lynchburg by June 30, 2020. Southeastern Virginia Training Center in Chesapeake, will continue to operate a 75-bed safety net program. Ironically, former Governor Timothy Kaine proposed its closure in 2009. The General Assembly rejected the proposal and funded the building of a 75-bed replacement center. Construction is projected to be complete this Spring.

Only 1,018 individuals currently reside in the five state-operated training centers. The average annual cost to care for an individual with an intellectual disability in a state training center is \$216,000. The average cost to provide comparable care to the same individual in the community is \$138,000. The Department of Planning and Budget estimates the cost of implementing this Settlement Agreement over the next 10 years at \$2 Billion. However, approximately 50% of the cost of services under the Medicaid waivers will be reimbursed by the federal government. Each of the five training centers contain very large, old, dilapidated and asbestos ridden buildings that have become very expensive to maintain, plus they also sit on very large, attractive and valuable parcels of land. In the long term, savings to the Commonwealth should far outweigh the costs to institutionalize individuals with the added benefit that the quality of life and autonomy for Virginians with intellectual and developmental disabilities and their families will be significantly improved.

Virginia will face enormous challenges implementing the Settlement Agreement over the next ten years. It remains to be seen whether legislators in the localities where facilities are located will permit the closures; whether employees who may lose their jobs will embrace the changes that will need to be made to safely discharge the people for whom they have cared for many years; and whether family members fearful that their loved ones will become isolated in the community and subjected to abuse, neglect and a diminished level of care will sue to prevent the closures. Adequate employment opportunities should be developed in the community to provide a livelihood for current state employees who embrace the intensive person-centered planning programs that will soon be provided. DBHDS will need, however, to earn the trust of family members by significantly expanding its licensing and quality insurance infrastructure and capacity in order to ensure adequate monitoring of community programs to prevent abuse, neglect and inadequate levels of care. The Settlement Agreement contains numerous requirements to do this.

Discharge Planning

In order to meet the formidable goal of closing four facilities, DBHDS must change staff culture from one that views individuals with disabilities as people for whom they must provide care to one that embraces the concept that individuals with disabilities can live safely in the community and thrive. To do so, Virginia has agreed to implement a comprehensive discharge planning process by July 1, 2012. All staff must be trained in a person-centered and family-centered discharge planning process, designed to assist the individual in achieving outcomes that promote the individual's growth, well-being, and independence, based on the individual's strengths, needs and preferences. Staff must also be provided with knowledge about resources available in the community. Discharge planning will be based on the presumption that with sufficient supports and services, all individuals can live in an integrated setting, including those with complex behavioral and medical needs. Each training center will have coaches to provide guidance to each individual's Personal Services Team.

DBHDS will also establish a central office Community Integration Manager position at each training center to facilitate communication and planning with individuals, their families, the Personal Support Teams and private providers. Community Resource Consultants will also be hired for each region to provide oversight and guidance to community services boards ("CSBs")

and providers. Each region will also have a Regional Support Team (“RST”) to resolve individually identified barriers to discharge and to review placements to ensure they are the most integrated setting for that individual. Anyone for whom continued placement at a training center, or placement in a nursing home, intermediate care facility (“ICF”), or congregate care setting, defined as any placement with five or more residents, is recommended must be referred to the RST.

All individuals currently residing in a training center must have a discharge plan developed within six months and for all individuals admitted thereafter, within 30 days of admission. Provider choice and involvement in the individual’s transition is mandated. For individuals and/or their authorized representatives who oppose a proposed placement after being informed of the proposed options for placement, their Personal Support Teams must identify and try to resolve the concerns, develop individual strategies to address the concerns and document steps taken to resolve the concerns and provide them with information about community placements. Discharge plans must be updated within 30 days prior to discharge and once a provider is selected, the individual should be discharged within six weeks. Follow-up monitoring of the placement must occur at 30, 60, and 90 day intervals.

Quality and Risk Management Systems

In order to ensure the quality of placements and the safety of each individual, and earn the trust of objecting family members, Virginia must significantly enhance its quality assurance, risk management and licensing infrastructure. All training centers, CSBs and providers of residential and day services will be required to implement risk management programs that must include uniform risk triggers and thresholds, and quality improvement programs, including root cause analyses designed to identify and address significant service issues. Virginia must develop a real-time, web-based incident reporting system requiring any staff of any public or private provider to report any suspected abuse or neglect to DBHDS. All reports must then be investigated with corrective action plans developed under the DBHDS licensing and human rights regulations.

DBHDS must also establish a mortality review team to conduct monthly mortality reviews for all reported unexplained or unexpected deaths. DBHDS must begin collecting and analyzing reliable data concerning 1) safety and freedom from harm, such as abuse, neglect, injuries, seclusion, restraint, deaths, effectiveness of corrective actions and licensing violations; 2) physical, mental and behavioral health and well-being; 3) crisis avoidance; 4) stability of placements and living situations; 4) choice and self-determination; 5) community inclusion; 6) access to services; and 7) provider capacity.

Further, Virginia must establish Regional Quality Councils composed of residential and other providers, CSBs, individuals receiving services and families, individuals experienced in data analysis, and other stakeholders. These Councils will be responsible for assessing relevant data, assessing trends and recommending responsive actions. In addition, Virginia must develop positive and negative outcome measures that each CSB and provider must report to a DBHDS quality improvement committee. DBHDS must also implement Quality Service Reviews to assess the adequacy of all providers’ quality improvement strategies.

By January 2013, case managers must meet with individuals face-to-face at least every 30 days, with at least one visit every two months occurring in the individual's residence, to observe the individual in his or her environment to assess for risks, injuries, needs and other changes in status, and to assess whether the individual's support plan remains appropriate and is being implemented appropriately. DBHDS' licensing staff must also conduct regular, unannounced inspections of community providers and more frequent inspections of providers with conditional or provisional licenses or who serve individuals with intensive medical or behavioral needs, utilize crisis services, serve individuals discharged from training centers within the previous 12 months, or operate congregate settings.

Administrative Provisions

The Settlement Agreement will give Virginia ten years, until June 30, 2021, to comply unless extended upon agreement of Virginia and DOJ, or proof by DOJ that Virginia has failed to substantially comply. The Settlement Agreement could be dismissed sooner if Virginia demonstrates substantial compliance with all of its terms for a full year. The Agreement will be monitored by an independent reviewer, Donald J. Fletcher, former Executive Director of the Association for Community Living that provides supports, resources and programs to individuals with intellectual disabilities and their families residing in western Massachusetts. The independent reviewer must file semi-annual compliance reports with the Court. In carrying out his obligations under the Agreement, the independent reviewer may hire whatever staff he may need and will have unaccompanied and unsupervised access to all programs, facilities, employees, individuals receiving services, their families, and records, including all individual medical and services records, death and serious incident reports, root cause analyses, and quality improvement and risk management data. Virginia will pay all the costs of the independent reviewer and his staff, subject to the test of reasonableness, which will be monitored by the Court.

The DOJ Settlement Agreement containing the detailed requirements and timelines, as well as the Complaint filed in the United States District Court may be accessed on the DOJ website at: http://www.justice.gov/crt/about/spl/documents/va-ada_settlement_1-26-12.pdf. The DOJ "findings" letter, DBHDS Fact Sheet, Settlement Agreement and other information may be accessed on the DBHDS website at: <http://www.dbhds.virginia.gov/Settlement.htm>.

Three Virginia Jurisdictions Establish Specialized Mental Health Dockets

The prevalence of individuals with serious mental illness throughout the country housed in jails is estimated to be 16.9% of the total jail population.¹ In Virginia, the Department of

¹ Council of State Governments Justice Center, 2009. *Mental Health Courts: A Guide to Research-Informed Policy and Practice*. New York: Council of State Governments at: http://www.consensusproject.org/jc_publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/Mental_Health_Court_Research_Guide.pdf.

Behavioral Health and Developmental Services (“DBHDS”) surveyed its jail population in 2005 and similarly determined that 4006 inmates, or 16% of its jail population, suffer from serious mental illness.² Serious mental illness is defined as schizophrenia, schizoaffective disorder, bipolar disorder, and depressive or other mood disorders.

Four reasons have been cited for this phenomenon: 1) lack of basic community resources; 2) lack of jail diversion programs and resources throughout the state; 3) insufficient treatment resources within jails; and 4) a high demand for limited state hospital beds.³ As a result, people with mental illness often repeatedly cycle through courts, jails and prisons that are ill-equipped to address their needs.⁴ Most inmates with serious mental illness also have a co-occurring substance abuse disorder.⁵ One form of jail diversion program that has emerged across the country has been mental health courts or “specialty dockets.” Most of these dockets have been established as a result of “grass roots” efforts designed to address local needs. The primary reasons for establishment of these specialty courts are to improve public safety by reducing the recidivism rates of people with mental illness, reduce jail costs by providing alternatives to incarceration, and to improve the quality of life of people with mental illness by connecting them with treatment and preventing re-involvement with the criminal justice system.⁶

Because most mental health courts are locally-developed, they are often diverse in their design and operation. Nonetheless, most mental health courts share the same characteristics:

1. a specialized docket employing a problem-solving approach to the court process;
2. a judicially supervised, community-based treatment plan with a team of court staff and mental health professionals;
3. regular status hearings at which treatment plans and other conditions are regularly reviewed for appropriateness with rewards and sanctions imposed for adherence or lack thereof; and
4. criteria defining a participant’s completion of the program.⁷

Courts generally use one of three types of approaches to leverage adherence to mental health treatment: 1) pre-adjudication suspension of prosecution of charges; 2) post plea strategies that suspend sentencing; and 3) probation.⁸ Except for the City of Norfolk, Virginia has come late to this area, but is now employing each of these models in three localities. The Norfolk Circuit Court was the first to establish a specialty mental health docket in 2004 after two years of

² Morris, J.J. (2007). Mental Health Treatment Needs of Individuals with Mental Illness in the Virginia Justice System at: <http://www.dbhds.virginia.gov/documents/OMH-CMHLRMorris101206.pdf>.

³ *Id.*

⁴ Council of State Governments Justice Center, 2009. *Mental Health Courts: A Guide to Research-Informed Policy and Practice*. New York: Council of State Governments at 1.

⁵ Council of State Governments Justice Center, 2008. *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*. New York: Council of State Governments at: http://www.consensusproject.org/jc_publications/probation-essential-elements.

⁶ *Id.* at 2.

⁷ Council of State Governments Justice Center, 2008. *Mental Health Courts: Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*. New York: Council of State Governments, at vii.

⁸ Griffin, P.A., H.J. Steadman, and J. Pettila. 2002. The use of criminal charges and sanctions in mental health courts. *Psychiatric Services* 53: 1285-1289.

careful study and planning. To reduce recidivism among individual's charged with misdemeanors and to reduce wait times for competency evaluations, the Norfolk General District Court recently implemented a specialized docket in September 2011. The general district courts in the Cities of Richmond and Petersburg also established a mental health specialty docket in April and March 2011, respectively. As with similar courts throughout the country, these dockets were locally initiated to address perceived local problems, and receive relatively little state-level support.

Norfolk Circuit Court

The Norfolk Circuit Court was the first court in Virginia to establish a mental health specialty docket in February 2004. Prior to its implementation, the community partners, led by Circuit Court Judge Charles E. Poston and Dr. George Pratt, Executive Director for the Norfolk Community Services Board ("CSB"), engaged in extensive study and planning beginning in 2002, including visiting other mental health court sites in San Bernardino County in California and Broward County, Florida. Community partners included the Commonwealth's Attorney, the Public Defender, the Sheriff, the Hampton Roads Regional Jail and the Police Chief. Although the planning group did apply for federal funds, none were received and the program has been funded with totally local funds through reallocation of existing positions and resources. The program has its stated goals:

1. Reduce contact with the criminal justice system of persons with mental illness and/or co-occurring disorders;
2. Ensure that persons with mental illness and co/occurring disorders do not languish in jail because of lack of available treatment;
3. Enhance effective interactions between the criminal justice and mental health systems; and
4. Increase public safety by ensuring that Mental Health Court program participants are engaged in community treatment and follow-up services, thus reducing the potential for reoffending.⁹

The Norfolk Circuit Court program follows a post-plea model. The defendant must first be found guilty either after a plea or a trial. If admitted to the program, the defendant's case is then placed on the mental health docket for sentencing. In order to be referred to the program, 1) the defendant must be a current or former client of the Norfolk CSB or have access to mental health treatment through private funding with willing providers; 2) the defendant must have an Axis I diagnosis with the primary diagnosis being mental illness; 3) mental illness must have been a factor in the arrest; 4) the defendant must not be charged with violent offenses, sex offenses, or driving under the influence (although case by case exceptions may be made at the recommendation of the Mental Health Court Team based upon the nature of the violence charged and its relationship to the defendant's mental illness); and 5) the defendant must have no prior record of violent or sex offenses. Upon referral, the case is referred to the Commonwealth's

⁹ *Take No Prisoners: Mental Health Courts in Virginia & Developments in Reducing Imprisonment & Recidivism*, presented at the Richmond Bar Association Bench-Bar Conference, October 13, 2011.

Attorney for review. No charge is taken under advisement; rather a presentence report is prepared and sentencing is set for a date one year after entry into the program.¹⁰

Upon completion of the program, the defendant is sentenced for the offense charged or the finding of guilt may be vacated and the charges dismissed or the charges reduced to a lesser included offense. An individual with mental illness who has violated his probation may also be placed on the mental health docket. His or her sentence is re-imposed and a stay of execution is ordered conditioned upon completion of the mental health program. The mental health court program is designed as a one-year treatment program with four phases through which each individual must generally pass to complete the program. All participants receive mental health treatment services, including case management and psychiatric services, and other services based upon their individual needs, such as supportive living services, psychosocial day treatment services, substance abuse day treatment services and residential supportive services. All participants receive probation supervision.¹¹

The Social Science Research Center at Old Dominion University conducted an evaluation study, funded by the Virginia Law Foundation, using program data from July 1, 2006 through December 31, 2007.¹² The Study provides empirical evidence that the program is achieving its goals, assisting individuals in achieving stability over an extended period of time without incarceration and without risking public safety, as well as providing economic benefits to the corrections system through significantly reduced operating costs. The study also indicates “that diversion programs for mentally ill offenders may also provide social and economic benefits to individuals and communities by enabling offenders to work to support themselves and eliminating the need for governmental subsidies and incarceration costs.”¹³ More specifically, the study found that the Norfolk Mental Health Court:

1. promoted access to therapeutic and social services for mentally ill offenders who found them helpful, especially the case management services;
2. reduced the number of times that mentally ill offenders came into contact with the criminal justice system;
3. reduced the number of days that mentally ill offenders spent in jail; and
4. promoted effective interactions between the criminal justice and mental health systems.¹⁴

Among the most significant findings of the study was that the recidivism rates for individuals who graduated from the program were considerably lower than baseline rates for both mentally ill and non-mentally ill offenders. Without access to services, offenders with mental illness are repeatedly re-incarcerated. Recidivism rates were 3.5% at 6 months of program participation; 5.0% at 12 months; 12.5% at 18 months; and 30% at 24 months. The number of days those participating in the program remained out of jail while actively

¹⁰ *Id.*

¹¹ *Id.*

¹² The Social Science Research Center, Old Dominion University. Norfolk Mental Health Court Evaluation Study at: <http://www.dbhds.virginia.gov/documents/Adm/080621-Norfolk-MH-CourtFinalReport.pdf>.

¹³ *Id.* at 5.

¹⁴ *Id.* at 29-30.

participating in the program was 11,610. After completing the program, graduates remained out of jail a total of 9,600 days with a total estimated savings of jail costs placed at \$1.63 Million.¹⁵

Program participants also reported that access to case management services, social services and therapeutic services was helpful, enabling them avoid individuals who might get them into trouble. The close supervision provided by case managers and regular meetings with the judge and probation officer promoted compliance with their treatment plans. Program participants were also better able to access treatment services, especially substance abuse treatment, than others attempting to access services on their own. Due to the lack of residential treatment services in the region, some participants were unfortunately incarcerated so that they could receive substance abuse treatment services only offered in jail. Because a large number of participants also had co-occurring substance abuse disorders, services for both mental illness and substance abuse were integrated. In addition, many participants had co-occurring medical problems, including HIV infection, and problems finding appropriate housing and work. Service delivery features, including housing and financial assistance, may therefore have also contributed to participant's success.¹⁶

Participants also indicated that their required long-term compliance with their treatment plan while in the program may have made it easier for them to adhere to their treatment plans after completion of the program by making their behaviors habitual. Participants also indicated that they valued the relationship they had established with the judge and respected his authority. They understood that if they violated the conditions of their probation, they would be sanctioned, but they also reported that they felt they had been treated fairly and appreciated the "second chances" they had been given. The weekly and later monthly meetings with the judge provided a source of support for participants and helped keep them connected to the program.¹⁷ Finally, the collaboration between the justice system and the mental health and social service delivery system was essential in promoting effective outcomes for offenders. Individuals with multiple needs often fall between the cracks. Norfolk effectively reallocated its financial and service resources to establish effective between-systems interactions.¹⁸

Richmond General District Court

Presided over by Judge Robert A. Pustilnik, the Richmond General District Court established a special mental health pre-trial docket in April 2011.¹⁹ The impetus to begin a specialized court docket arose as one of a number of strategies designed to relieve crowding in the Richmond City Jail and to implement alternative sentencing and community corrections strategies as part of the plans for construction of a new city jail. The mental health pre-trial docket has the full support of the mayor, the sheriff, the Commonwealth's Attorney, and the Richmond Behavioral Health Authority, an essential ingredient for the success of any program.

¹⁵ *Id.* at 28.

¹⁶ *Id.* at 28.

¹⁷ *Id.* at 29.

¹⁸ *Id.* at 26.

¹⁹ Because Judge Pustilnik will reach mandatory retirement age, Judge David Eugene Cheek, Sr. will take over the docket with a transitioning of cases to begin in April 2012.

In contrast to the Norfolk Circuit Court program, the Richmond program is strictly a pre-trial docket intended 1) to assist in the case management of alleged offenders with underlying mental illness and 2) to identify defendants who may be suitable for management in the community, rather than detention in the Richmond City Jail. It is not a substitute for the criminal dockets in the general district courts. Any defendant with pending charges who 1) is a resident of the City of Richmond; 2) has an Axis I diagnosis, and possibly a co-occurring substance abuse disorder, and/or 3) appears incompetent or otherwise presents symptoms consistent with mental illness is eligible for placement on the docket and may be assessed for eligibility, regardless of the nature of his or her offense.²⁰

Referrals may be made by general district court judges, the Office of the Commonwealth's Attorney, the Richmond Public Defender's Office or defense counsel, the Richmond Department of Justice Services, the Richmond Behavioral Health Authority or the Richmond Sheriff's Office. Placement of the case on the docket only ensures that the case will be managed with consideration given to the defendant's mental illness and does not guarantee a particular disposition or outcome. Defendants referred for placement on the mental health docket are assessed by a mental health clinician and the Region IV Jail Team who will recommend inpatient services, continued detention in jail, or an outpatient setting if the defendant's illness can be safely managed in an outpatient setting with appropriate resources. Pretrial Investigators with the Department of Justice Services, Division of Adult Programs ("DAP"), may also conduct assessments before the defendant's initial appearance using the Virginia Pretrial Risk Assessment (VPRAI) to identify the likelihood of a defendant's failure to appear in court and his danger to the community pending trial, and the Mental Health Screening Form III, a nonclinical screening tool that identifies a defendant as needing further assessment for mental health issues.²¹

When the Court determines that the defendant is appropriate for management in the community, the Court will consider ordering the defendant supervised by DAP probation officers who have exclusive caseloads of offenders with mental illness or co-occurring disorders. In making this determination, the court considers whether the offender is willing and capable of complying with treatment and medication management, and whether the defendant has a history of supervision demonstrating significant effort to comply with pretrial or probation supervision. The Court will also order compliance with mental health treatment provided by the Richmond Behavioral Health Authority.²²

The Office of the Commonwealth's Attorney has dedicated staff that review and approve cases to be assigned to the pretrial docket. The fact that a defendant is placed on the docket does not bind or obligate the Commonwealth's Attorney to recommend a particular sentence or disposition. If the Commonwealth's Attorney ultimately decides to prosecute a case, the case is transferred back to the original criminal docket for trial. Cases are normally scheduled within 45 days of arraignment so as to expedite treatment interrupted due to incarceration. Follow-up court dates are usually scheduled every 45 days at which time the defendant is expected to appear in

²⁰*Take No Prisoners: Mental Health Courts in Virginia & Developments in Reducing Imprisonment & Recidivism*, presented at the Richmond Bar Association Bench-Bar Conference, October 13, 2011.

²¹ *Id.*

²² *Id.*

person unless excused by the Court. Defendants who are managed in the community and who have no new arrests, who are actively progressing with their treatment plans, who test negative for illegal substances and comply with probation can successfully complete the program, normally within six months of ordered community supervision and treatment. Upon successful completion, the Commonwealth's Attorney may recommend removal from probation, dismissal of relevant charges, and/or a specific sentence of suspended jail time.²³

Petersburg General District Court

The Petersburg General District Court under the leadership of Judge Lucretia A. Carrico implemented its specialized mental health docket in mid-March 2011 primarily to increase effective cooperation between the mental health treatment and criminal justice systems. Home to a large number of individuals with mental illness discharged from Central State Hospital, Petersburg's goal is to provide faster case processing times, improved access to public mental health treatment services, improve individual's well-being, and reduce recidivism. As a result the community should also experience improved public safety.²⁴ A part-time Mental Health Planning Coordinator has been hired through funding from the Cameron Foundation, a local foundation promoting and providing support for programs benefitting residents of the Petersburg area.

Petersburg's docket serves defendants with mental illness who have been charged with misdemeanors, or non-violent felonies that have been reduced to a misdemeanor upon the individual's successful completion of the program. In order to be considered for the program, the defendant's charges may not consist of violent felonies, sexual offenses or misdemeanor crimes involving violence, with exceptions made on a case-by-case basis. Individuals who are incompetent to stand trial may be admitted to the program if they otherwise meet the legal and clinical criteria after being restored to competency.²⁵

Like the Norfolk Circuit Court, the Petersburg docket is a post-plea program. Defendants' participation in the program is purely voluntary with defendants being required to waive their rights to a trial on the merits of their case and to enter into a diversion plea agreement with a community-based treatment emphasis. Defendants accepted into the program are then placed on probation subject to the supervision of Petersburg Community Corrections. The defendant is assigned a case manager and referred to the District 19 Community Services Board for treatment.²⁶

Defendants may be referred to the Mental Health Docket by the police, Commonwealth's Attorney, defense attorneys, family members, medical providers, probation officers, corrections officers or jail psychiatric staff that have screened them for mental health issues. All defendants appear before the court for arraignment and either counsel is appointed or time to hire a private attorney is given to them. If either a police officer or magistrate has filed a Mental Health Docket Notice with the warrant or summons, the Mental Health Docket Coordinator will contact the

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Commonwealth's Attorney to have a criminal history prepared for the defendant. The Commonwealth's Attorney and defense attorney then consider the defendant's current charges and criminal history to determine whether to refer the defendant to the Mental Health Docket for a clinical assessment to determine his or her eligibility. Defendants who are recommended for the program then appear before the Court and are advised about the rights they are giving up and the conditions to which they are agreeing.²⁷

At the beginning of each docket, the Mental Health Team, composed of the judge, the Commonwealth's Attorney, defense attorney, probation officer, District 19 CSB providers and the Mental Health Coordinator, meets to discuss the status of each case and the progress the defendant has made. If the defendant successfully completes the program, he or she may have the charges reduced or dismissed. If the defendant violates the conditions of the program, sanctions may be imposed that may include increased appointments with his or her probation officer and/or treatment providers, loss of privileges allowed by the program, reduction in phases, incarceration, or termination from the program.²⁸

Norfolk General District Court

The Norfolk General District Court also recently established a specialized mental health docket in September 2011, meeting the first and third Wednesday of each month. Because the Chief Justice of the Virginia Supreme Court has directed that no further specialty courts be established without authorization, the docket is simply one specialized docket composed of cases involving mental health issues or cases referred by defense attorneys where competency to stand trial is an issue. It is presided over by one judge, Judge Joseph A. Migliozi. The docket is designed to link defendants in jail with community mental health services upon their release. Unlike the Norfolk Circuit Court docket, which is a post-trial conditional release monitoring program modeled after specialized drug courts, the Norfolk General District Court provides no services and does not follow-up or monitor defendants' compliance with their treatment plans. Most defendants are repeat offenders charged with petty crimes, such as trespassing and disorderly conduct. The goal of the docket is to reduce recidivism by linking individuals to mental health treatment provided by the community services board.

Another goal of the docket is to increase the use of outpatient restoration to competency services to reduce the long waits for admissions to Eastern State ("ESH") and Central State Hospitals ("CSH") for competency evaluations. Currently defendants charged with misdemeanors may wait five to six months for an inpatient competency evaluation at ESH or CSH. Had they been tried for their offense they would have been confined much less time in jail. Even if waits for inpatient admission are significantly reduced, the usual outcome would be the same. Following receipt of restoration services, the defendant would be tried, most likely convicted with a sentence of time served. Unless that defendant is linked to needed and effective services in the community, he or she will most likely re-offend resulting in repetition of the same cycle. If that individual can be linked to services early in the process, the revolving door can be stopped and the individual can lead a more productive life in the community.

²⁷ *Id.*

²⁸ *Id.*

Conclusion

The Norfolk Circuit Court, following the drug court model, has had demonstrated success through the years in diverting individuals from the criminal justice system, reducing recidivism, reducing jail days, and enhancing individuals' adherence to mental health treatment programs and improving their lives. Sufficient time has not elapsed to determine whether the three new general district court dockets will be successful. In order to maintain long-term sustainability, these courts must clearly define their goals and objectives, establish performance measures and collect outcome data. That data must then be collated and analyzed to demonstrate the impact of the court so that court processes are institutionalized and community support is cultivated and expanded. The success of these new specialty dockets will depend on whether the outcome measures now being developed demonstrate that this type of sentencing alternative is effective as one of a number of much-needed diversion tools, enabling individuals with mental illness languishing in jail to pursue a more productive life in the community.

Recently Decided Cases

Fourth Circuit Finds Federal Commitment of Sexually Dangerous Persons Does Not Violate Equal Protection

Reversing the decision of the United States District Court for the Eastern District of North Carolina, the Fourth Circuit Court of Appeals, in a decision written by Judge G. Steven Agee, held on January 9th that the federal scheme found in 18 U.S.C. § 4248 permitting civil commitment of sexually dangerous persons does not violate the Equal Protection Clause of the United States Constitution. *United States v. Timms*, 664 F.3d 436 (4th Cir. 2012). Timms' case was one of the first cases to arise under the Adam Walsh Child Protection and Safety Act of 2006. That section authorizes the civil commitment of individuals in the custody of the Bureau of Prisons who are determined to be a sexually dangerous person, defined as someone "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18. U.S.C. § 4247(a)(5).

The Federal Correctional Institution in Butner, North Carolina is the federal institution to which prisoners in the custody of the Bureau of Prisons are now transferred for assessments as sexually dangerous persons. Most of these cases are therefore being heard before the North Carolina district court and appealed to the Fourth Circuit. Timms was in custody at Butner, completing a 100 month sentence for soliciting and receiving child pornography by mail, when the government filed a certificate to commit him. At the time the certificate was filed, the *Comstock* case, the first challenge to the federal sexually dangerous commitment scheme, was pending before the Fourth Circuit. The hearing on the merits of his case was therefore put on hold. The District Court in *Comstock* had found the statutory scheme unconstitutional on the grounds that Congress lacked authority to enact it, and the Fourth Circuit later upheld that decision. The United States Supreme Court reversed, upholding the authority of Congress to enact the statute under the Necessary and Proper Clause of the Constitution. *United States v. Comstock*, 130 S.Ct. 1949, 176 L.Ed.2d 878 (2010). Upon remand and then re-appeal, the Fourth Circuit determined in *Comstock II* that the statute did not violate the due process clause by requiring a court to find by clear and convincing evidence, rather than beyond a reasonable

doubt, that the individual is a sexually dangerous person. *United States v. Comstock*, 627 F.3d 513 (4th Cir. 2010), *cert. denied*, 131 S.Ct. 3026, 180 L.Ed.2d 865 (June 20, 2011).

When his case finally came forward for hearing before the District Court after the *Comstock I and II* decisions, Timms argued that the statutory scheme violated the Equal Protection Clause of the Constitution. The District Court agreed, relying on *Baxstrom v. Herold*, 383 U.S. 107 (1966) that held that the government cannot provide less protection during civil commitment proceedings for prisoners who are completing their sentences than for non-prisoners. The district court reasoned that the federal government has no authority to commit sexually dangerous persons who are not in prison, and therefore individuals in the custody of the Bureau of Prisons are not being treated similarly with sexual predators in the community.

On appeal, the Fourth Circuit first determined that it had to decide whether to apply a strict scrutiny standard of review, as Timms argued, or the generally applicable rational basis standard. Timms relied on *Foucha v. Louisiana*, 504 U.S. 71 (1992) and *Addington v. Texas*, 441 U.S. 418 (1979) that recognized that civil commitment constitutes a significant deprivation of liberty. However, the 4th Circuit found that these cases were decided on due process grounds, not equal protection, and the Supreme Court, despite being provided an opportunity to do so, never expressly established a heightened standard of review. As a general rule, the Court held that legislation is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest. Following the First Circuit decision in *United States v. Carta*, 592 F.3d 34 (1st Cir. 2010), deciding this very same issue, the Court held that the generally-applicable standard is thus rational basis.

The Fourth Circuit next turned to the Equal Protection issue. Under the Equal Protection Clause, all persons similarly situated must be treated alike. The Court held that Congress had a rational basis for subjecting sexually dangerous persons in BOP custody to civil commitment. The Court found that the scope of the federal government's authority for civil commitment differs so much from a state's authority that there is a rational basis for the distinction Congress drew. Congress rationally limited its scope to sexually dangerous persons within BOP custody based on Congress' limited police power and the federal interest in protecting the public from reasonably foreseeable harm from such persons.

California Supreme Court Rules Court Has Discretion Whether to Permit Competent Defendant to Represent Self

Following the United States Supreme Court decision in *Indiana v. Edwards*, 554 U.S. 64 (2008), the California Supreme Court has ruled that trial courts may deny the right to represent themselves to defendants who fall into a "gray area" between those who are competent to stand trial and those who are competent to conduct their own trial. *People v. Johnson*, 2012 Cal. LEXIS 600 (January 30, 2012). In so ruling, the Court found that California law has never afforded defendants the right to represent themselves, but only *permits* self-representation in noncapital cases in the judge's discretion. In capital cases, the law specifically requires defendants to be represented by counsel at all stages of the proceedings. The legislative history states that *pro se* litigants cause unnecessary delays at trial and generally disrupt the proceedings.

The history further provides that the burden on the justice system is not outweighed by any benefits to defendants who generally gain nothing by representing themselves.

Prior to *Edwards*, and because California courts are required to follow federal constitutional law, they afforded criminal defendants the right to represent themselves in spite of the state law based upon the United States Supreme Court decision in *Faretta v. California*, 422 U.S. 806 (1975), holding that defendants have a Sixth Amendment Constitutional right to self-representation. California courts further presumed that a defendant's right to self-representation was absolute based upon *Godinez v. Moran*, 509 U.S. 389 (1993). That case held that a defendant found competent to stand trial was allowed to waive counsel and plead guilty, rejecting the argument that federal law required a higher standard of competence for waiving counsel or pleading guilty than to stand trial. In 2008, the United States Supreme Court held in *Edwards* that a trial court could insist that a defendant proceed with counsel even though the court had found him competent to stand trial.

In this case, Johnson was charged with two separate assaults, one an early-morning brutal sexual assault on a bar tender and later the same day, hitting the patron of a sandwich shop with a metal chair rendering him unconscious. A single judge presided over all the proceedings. The defendant was originally represented by counsel but early on requested to represent himself, which request was granted. During pre-trial proceedings, the defendant conducted himself in an unusual manner and the nature and content of letters he filed with the court and others cast doubt on his competence. The judge thereupon appointed counsel to represent the defendant in competency proceedings and ultimately appointed three mental health experts to evaluate him. The defendant refused to be interviewed by any of the experts who then testified that they were unable to state with certainty whether he was competent or not. His behavior in court and jail, and his bizarre filings led one expert to proffer a diagnosis of delusional disorder with conspiracy paranoia and to strongly suspect incompetency. Based upon all of the evidence, the jury found the defendant competent to stand trial. The trial judge, however, found the defendant incompetent to represent himself and appointed counsel for him.

The California Supreme Court held that competency to stand trial was a matter to be decided by a jury, but competency to represent oneself was a decision within the sound discretion of the trial judge. The Court stated that although courts should be cautious about making competency decisions without the benefit of expert evidence, the judge's own observations of the defendant's behavior supported a common sense finding of incompetence. Here the court was able to observe the defendant's behavior in representing himself over several months; the defendant had already refused mental health evaluations on competency to stand trial; and the judge placed on the record examples of his disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illness. The Court found the trial court had the discretion to determine the defendant lacked the competency to represent himself and the judge had not abused his discretion in this case.

Although urged to do so by the parties and *amicus curiae*, the California Supreme Court, like the United States Supreme Court in *Edwards*, declined to set out a standard for determining competency to represent oneself, but decided that trial courts should simply determine whether

the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel. The decision in this case is similar to the Washington Supreme Court decision in *In Re Rhome*, 260 P.3d 874 (Wash. 2011) and reported in the last issue of *Developments in Mental Health Law*.

Maine Finds Right to Competency in Post-Conviction Proceedings

The Maine Supreme Judicial Court ruled on November 17, 2011 that a convicted defendant has the statutory right to be competent during post-conviction proceedings. *Haraden v. State*, 32 A.3d 448 (Maine 2011). Although a defendant has no constitutional right of access to post-conviction proceedings to overturn his or her conviction, Maine has statutorily created a process whereby inmates may challenge their convictions, including setting time limits within which relief may be sought, the number of petitions that may be filed, the nature and scope of claims that may be pursued, and the type of relief that may be granted. 15 M.R.S § 2130 (2010). As part of the post-conviction process, inmates are specifically given a statutory right to counsel. The Court therefore found that implied within that right to counsel is the right to the effective assistance of counsel. It then reasoned that counsel cannot effectively assist his client if his client cannot meaningfully communicate with him.

In this case, the inmate was convicted of murder by a jury and sentenced to 52 years in prison. After his trial, conviction and appeal, the inmate raised factual allegations that he was denied the effective assistance of counsel. On the inmate's motion, the court ordered a mental evaluation by the State Forensic Service. The evaluation indicated that although the inmate was not psychotic, he was unable to assist his attorney in the post-conviction process. Based upon the evaluation, the trial court found him incompetent to proceed. The court then proceeded to decide the matter upon the legal issues presented, but continued those claims based upon factual contentions until such time as the inmate became competent. During that time period, the inmate was ordered to remain in the Department of Corrections and not be transferred to the Department of Health and Human Services for restoration to competency.

In upholding the right found by the trial court, the Supreme Court was faced with a dilemma of how to proceed when an inmate may have a legitimate claim for release but cannot pursue it due to his incompetency. It therefore had to fashion a process to handle the prisoner's claims. The Court determined that when an inmate's competency is in question, the court must order an evaluation by the State Forensic Service. Because a defendant was presumed to be competent during trial, the burden rests on the inmate to prove his incompetency by a preponderance of the evidence. If he does so, the court must still proceed to adjudicate the inmate's claims and defense counsel must represent the inmate to the best of his or her ability. Under Maine post-conviction law, an inmate must 1) file a post-conviction claim within one year and 2) may only seek post-conviction review once, raising all claims he may have in that petition or else they are considered waived. If the inmate is found to be incompetent, however, the Court then provided that an inmate may file an affidavit at a later date alleging that he had previously been found incompetent and has regained his competence as a result of the passage of time, medical intervention or some other substantial change. If the court then determines the inmate has regained competency, it must review the petition to determine whether, if the newly asserted evidence or grounds were true, the outcome of a post-conviction judgment would be different,

and which, if any, of the defendant's claims may be pursued despite the intervening delay. The Supreme Court agreed with the trial court that the inmate must remain in the custody of the Department of Corrections during the period of incompetency and not be transferred to the Department of Health and Human Services for restoration services. Presumably, the inmate could not then be ordered treated over his objection to restore him to competency.

Upcoming ILPPP Training Programs Winter-Spring 2012

Link to more detailed information:

<http://ilppp.virginia.edu/OREM/TrainingAndSymposia>

Conducting Mental Health Evaluations for Capital Sentencing Proceedings

This program, March 29-30 2012, prepares experienced forensic mental health professionals to meet the demands of capital sentencing cases, in which the accused faces the possibility of the death penalty. The program is a full day March 29 and one-half day March 30. Registration Schedule: \$80 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$190 - all Others. (Agencies and organizations may consider negotiating a group discount: please advise els2e@virginia.edu.)

Advanced Seminar: Evaluating Legal Sanity: Beyond the Basics

On April 30, 2012 Ira Packer, PhD, ABPP, of the University of Massachusetts School of Medicine, will present advanced training on evaluating legal sanity. Registration Schedule: \$50 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$135 - all Others. (Agencies and organizations may consider negotiating a group discount: please advise els2e@virginia.edu.)

Advanced Seminar: Motivational Interviewing

On May 14, 2012 David Prescott, LICSW, will present an introductory workshop on Motivational Interviewing, particularly with forensic and correctional populations. Registration Schedule: \$50 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$135 - all Others. (Agencies and organizations may consider negotiating a group discount: please advise els2e@virginia.edu.)

Juvenile Forensic Evaluation: Principles and Practice

This five-day program, to be held April 23-27, 2012, provides basic legal, clinical, and evidence-based training in the principles and practices of forensic evaluation, appropriate for juvenile and adult forensic evaluators. Registration Schedule: \$150 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$750 - all Others.

Evaluation Update: Applying Forensic Skills to Juveniles

This program, to be held April 23-25, 2012, is for experienced adult forensic evaluators (who have already successfully completed the five-day “Basic Forensic Evaluation” program for ADULTS) and wish to evaluate juveniles. Registration Schedule: \$80 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$190 - all Others. (Agencies and organizations may consider negotiating a group discount: please advise els2e@virginia.edu.)

Advanced Case Presentation: Juvenile Adjudicative Competence

In this one-day advanced program on May 23, 2012 will view and discuss an evaluation for juvenile adjudicative competence in order to fulfill the training requirements approved by the DBHDS Commissioner for individuals authorized to conduct juvenile competence evaluations. Registration Schedule: \$50 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$135 - all Others. (Agencies and organizations may consider negotiating a group discount: please advise els2e@virginia.edu.)

Assessing Individuals Charged with Sexual Crimes

This two-day program, to be held February 28-29, 2012, focuses on the assessment and evaluation of sexual offenders, including 19.2-300 pre-sentencing evaluations and 37.2-904 assessment of Sexually Violent Predators (SVPs). Registration Schedule: \$80 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$190 - all Others. (Agencies and organizations may consider negotiating a group discount: please advise els2e@virginia.edu.)

Risk Assessment of Sexually Violent Predators: Dynamic Risk Factors in Sexual Offender and Sexually Violent Predator Risk Assessment

To be held March 1, 2012, this Advanced Seminar regarding issues of Sexual Offender and Sexually Violent Predators will welcome Jennifer Schneider, PhD, presenting on Dynamic Risk Factors in Sexual Offender and Sexually Violent Predator Risk Assessment. Registration Schedule: \$50 - employees of VA DBHDS & its Community Services Boards, and employees of the Office of Attorney General. \$135 - all Others. (Agencies and organizations may consider negotiating a group discount: please advise els2e@virginia.edu.)

Registration information: <http://ilppp.virginia.edu/OREM/Registrant/SignIn>

Continuing Education information: <http://ilppp.virginia.edu/OREM/ContinuingEducation>

Program, Registration & Continuing Education questions may be directed to
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