Virginia's Sexually Violent Predators Act: 
A Guide for Virginia [Court-appointed] Attorneys

Neal Lewis

"The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."

I. Introduction

On April 2, 2003 the Virginia Legislature passed legislation funding the civil commitment portion of the Sexually Violent Predators Act. This legislation was enacted to protect the public by preventing the release of convicted sexual felons when there is evidence that psychological problems are likely to compel these individuals to commit acts of sexual violence again. Virginia's law allowing for the civil commitment of sexually violent predators is not unique. The Sexually Violent Predators Act is the result of careful analysis and the study of similar laws implemented by other states throughout the nation.

Traditional civil commitment embraces several ideas: first, individuals can suffer from a mental defect resulting in a potential to harm themselves or others; second, these individuals are incapable of controlling their behavior; third, the courts have an interest in protecting the individual and society from these harms; fourth, and finally, civil confinement allows for the

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3 An individual does not have to be a convicted felon to be identified as a sexually violent predator. Rather, individuals who are charged with a sexually violent offense and have been deemed unremorably incompetent may also be identified as such. VA. CODE ANN. § 37.1-70.1 (2004). This article will only address the defense of individuals who have been selected for commitment while awaiting release from incarceration.
4 In 1997, Justice Breyer pointed out in his dissent to Kansas v. Hendricks that there are “17 States with laws that seek to protect the public from mentally abnormal, sexually dangerous individuals through civil commitment or other mandatory treatment programs.” 521 U.S. 346, 388 (1997).
protection of the individual and society while also allowing for rehabilitation. Virginia’s Sexually Violent Predators statute capitalizes on these concepts and applies them to a new class of mentally ill persons: the Sexually Violent Predator (hereinafter SVP). For the public, the law is appealing because it prevents the harm which results from the release of sexually violent predators into the community. For the convicted sexually violent criminal, it raises the possibility of continued and potentially lifelong separation from society.

Although the Sexually Violent Predators Act is two years old, there have been relatively few instances of its application. Jurisdictional requirements have resulted in cases being widely distributed throughout the state. Prisoners who are designated for civil commitment proceedings are entitled to court-appointed counsel. The combination of the law’s infrequent application and jurisdictional mandate results in a dearth of court-appointed attorneys experienced in the SVP civil commitment process. This comment is intended to provide guidance for the court-appointed attorney representing a client during the civil commitment proceedings of a SVP.

Following this introduction, Part I deals with a brief historical perspective on SVP statutes. Part II provides an outline of the preliminary processes involved before an SVP civil commitment.

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7 Virginia’s SVP legislation was passed, in part, due to the public outcry surrounding the impending release of Richard Alvin Ausley. Ausley was convicted of abducting a thirteen-year-old Portsmouth boy, burying him in a box in the woods and repeatedly assaulting him over a span of eight days. The boy, Paul Martin Andrews, was found by local hunters and rescued. Years later, Andrews vigorously lobbied for the funding of Virginia’s Civil Commitment of Sexually Violent Predators Act. Ironically, Ausley was never committed under the statute. Prior to his release from prison, Ausley was convicted for crimes involving another child. In January 2004, Ausley was found dead in his cell. See Attorney General of Virginia, News Releases, Kilgore Applied Law to Civilly Commit Sexually Violent Predators (Jan. 27, 2005) (hereinafter Attorney General of Virginia News Release).
8 See infra Part IV, for a discussion of options for the defendant following commitment.
9 As of January 27, 2005, Virginia has used the Sexually Violent Predators Civil Commitment Act to commit fourteen convicted sexual offenders in ten different counties. See Attorney General of Virginia News Releases, supra note 7.
10 Petitions are required to be filed in the jurisdiction where the offense occurred, not the location of the correctional facility, see Va. Code Ann. § 37.1-70.6(A) (2004); see infra Part III.
11 Courts are required to appoint an attorney for defendants, see Va. Code Ann. § 37.1-70.7(B) (2004); see infra Part II.
12 The Attorney General has a small group of attorneys specifically designated for handling cases involving the civil commitment of sexually violent predators.
commitment proceeding is started. Part III discusses the courtroom phases of trial, both the probable cause hearing and the trial itself. Part IV discusses the options for the judge following trial. This comment concludes with a discussion of some possible approaches for the court-appointed attorney in handling SVP civil commitment cases.

II. History

A. Beginning the Experiment

Washington state introduced the first SVP law in 1990 in response to the public outcry surrounding the assault of a seven-year-old boy by a man with a lengthy history of violence and sexual crimes against children. Civil commitment of these dangerous felons was the answer to the state’s problem. Although civil commitment had long been available, the Washington legislature pointed out the deficiencies in the current law, noting “that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act.” The statute looked to bridge the gap between criminal convictions and civil commitment.

The description of a SVP was central to the statute overcoming the traditional limitations of civil commitment. This definition addressed three basic elements: conviction based on a crime of sexual violence; mental abnormality or personality disorder; and likelihood of continuing acts of sexual violence based on the mental abnormality or personality disorder.

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14 Civil commitment laws in Washington were reformed by the legislature in 1973 to reflect and emphasize short-term treatment of individuals with a serious mental illness. See id. at 545.
16 Taylor, supra note 13, at 545.
17 WASH. REV. CODE § 71.09.020(16) (2004) specifically defines a sexually violent predator as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”
These elements form the backbone of SVP legislation throughout the nation. In 1997, the United States Supreme Court had the opportunity to decide the constitutionality of SVP statutes.\textsuperscript{18} By that time, seventeen states had passed legislation allowing for the commitment of sexually violent predators.\textsuperscript{19}

**B. The Kansas Cases**

In 1994, Kansas passed its version of the Sexually Violent Predators Act.\textsuperscript{20} On August 17, 1994, Leroy Hendricks, an inmate who had an extensive history of child sexual molestation, was the first inmate to be selected for civil commitment.\textsuperscript{21} Hendricks unsuccessfully challenged the constitutionality of the Kansas statute and was adjudicated a sexually violent predator by jury trial.\textsuperscript{22} The Supreme Court of Kansas reversed the decision of the trial court and found the act violated the Due Process Clause of the Fourteenth Amendment.\textsuperscript{23}

On appeal, the United States Supreme Court reversed the Kansas court, finding that the Due Process concerns of the Fourteenth Amendment were not implicated because the act required a finding of dangerousness to one’s self or others as a prerequisite to involuntary commitment.\textsuperscript{24} The Court noted that it had “consistently upheld such involuntary commitment statutes provided the confinement [took] place pursuant to proper procedures and evidentiary standards.”\textsuperscript{25} The Court also held that SVP statutes did not violate the Double Jeopardy Clause because civil adjudications, regardless of the potential for confinement, were not criminal convictions.\textsuperscript{26} Lastly, the Court found the Ex Post Facto Clause was not implicated because the

\textsuperscript{19} Id. at 388.
\textsuperscript{21} In re Hendricks, 259 Kan. 246, 249 (1996).
\textsuperscript{22} Id. at 249.
\textsuperscript{23} Id. at 261.
\textsuperscript{24} Hendricks, 521 U.S. at 356-57.
\textsuperscript{25} Id. at 357 (referring to Foucah v. Louisiana, 504 U.S. 71, 80 (1992) and Addington v. Texas, 441 U.S. 418, 426-27 (1979)).
\textsuperscript{26} Id. at 369-70.
statute did not criminalize conduct previously legal before its enactment or deprive the inmate of any defense available to him at the time of his crimes.\textsuperscript{27}

Five years later, in \textit{Kansas v. Crane}, the Court returned to the question of the constitutionality of the SVP statutes.\textsuperscript{28} Once more, the challenge was based on the Due Process Clause of the Fourteenth Amendment; specifically, regarding the scope of the factual determinations which must be made by the court when determining a defendant to be a SVP.\textsuperscript{29} The Court found that a determination of lack-of-control must be found in addition to the requirements that the defendant suffers from a mental abnormality or personality disorder and that this condition renders him likely to commit future acts of sexual violence.\textsuperscript{30}

Both \textit{Hendricks} and \textit{Crane} upheld the constitutional validity of SVP statutes and provided Virginia with the framework to develop its own SVP legislation.\textsuperscript{31}

\textbf{C. Virginia’s History}

Virginia first enacted legislation regarding sexually violent predators in 1999.\textsuperscript{32} It was not until 2003, when the law was funded, that the state began to pursue civil commitment.\textsuperscript{33} Currently, there is no case law in Virginia providing specific guidelines for the interpretation of the law; however, the Office of the Executive Secretary of the Supreme Court of Virginia has issued a memorandum for Virginia Circuit Court judges to provide a benchmark for judicial standards on the issue.\textsuperscript{34}

\textsuperscript{27} \textit{Id.} at 370-71.
\textsuperscript{28} 534 U.S. 407 (2002).
\textsuperscript{29} \textit{Id.} at 409.
\textsuperscript{30} \textit{Id.} at 413.
\textsuperscript{34} Memorandum from the Office of the Executive Secretary of the Supreme Court of Virginia on Civil Commitment of Sexually Violent Predators to Virginia Circuit Court Judges (April 14, 2004), \textit{available at} http://www.courts.state.va.us/ed/updates/2004_civil_commitment_of SEXUALLY_VIOLENT_PREDATORS.pdf (hereinafter Memorandum).
Although the statute has not been specifically challenged on constitutional grounds in Virginia, according to the current analysis of the United States Supreme Court, Virginia’s Civil Commitment of Sexual Violent Predators Act is a constitutional expression of legislative will. The statute protects the interests of the state by allowing for the civil commitment of persons likely to engage in dangerous behavior. Virginia has incorporated the constitutional lessons learned from challenges to the legislation of other states into the Sexually Violent Predators Act.

Recently, on March 3, 2005, the Supreme Court of Virginia issued three rulings on SVP commitment, each dealing with a different aspect of the Sexually Violent Predators Act. \( \text{McCloud v. Commonwealth} \) is particularly instructive because it provides a brief outline of the SVP civil commitment process from the perspective of the Supreme Court of Virginia.

**III. Preliminary Requirements**

The investigation of the inmate and the determination of SVP status begins long before the defendant is served notice of a civil commitment suit. The Director of the Department of Corrections is charged with maintaining a database of all persons convicted of sexually violent crimes who are in the custody of the Virginia Department of Corrections. This database must contain several items: first, the prisoner’s criminal record; second, the prisoner’s sentences and scheduled date of release from confinement; and third, the location of the offense.

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\( ^{35} \text{See infra Part I(A).} \)


\( ^{37} \text{McCloud, 269 Va. at 252-56.} \)

\( ^{38} \text{Conviction of a sexually violent crime triggers the beginning of the review process. See VA CODE ANN § 37.1-70.4(B) (West. Supp. 2004). This legislation would seem to provide legitimacy for claiming the ‘defense’ of being a Sexually Violent Predator in some instances. Would an adjudication denying SVP status on a criminal defendant in a sexually violent crime act as } \text{res judicata} \text{ on the state for later commitment proceedings?} \)

\( ^{39} \text{VA. CODE ANN. § 37.1-70.4(B) (2004)} \)

\( ^{40} \text{Id. These items are used for several reasons: they provide evidence in the case against the defendant, the record of convictions allows the Attorney General to meet one of the elements of the definition of sexually violent predator, and maintaining the location of the offense ensures that the civil commitment petition is filed in the proper jurisdiction.} \)
the Director is required to review the database for prisoners who will meet the basic requirements for SVP civil commitment within the next ten months.\footnote{Id.\$ 37.1-70.4(C).} The Director of the Department of Corrections is also charged with establishing and maintaining a treatment program for violent sexual offenders.\footnote{Id.\$ 37.1-70.4(A). Justice Breyer's dissent in Hendricks argued for the importance of a treatment program for sexually violent offenders to avoid implicating the Ex Post Facto Clause. “[T]he Act did not provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter. These, and certain other, special features of the Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him.” Kansas v. Hendricks, 521 U.S. 346, 383 (1997).} The program consists of a clinical assessment of the prisoner upon receipt by the Department of Corrections system and the development of an individualized treatment program.\footnote{Id. Presumably, Virginia seeks to avoid the Ex Post Facto violations Breyer warned of, see supra note 39.} Licensed clinical psychiatrists or psychologists experienced in the diagnosis and treatment of mental abnormalities and disorders associated with criminal sexual offenders are required to implement the program.\footnote{Id.\$ 37.1-70.3(A).}

The Director of the Department of Corrections is also responsible for establishing the Commitment Review Committee (CRC).\footnote{Id.} The CRC is established to “screen, evaluate, and make recommendations regarding prisoners in the custody of the Department of Corrections for the purposes of” civil commitment of sexually violent predators.\footnote{Id.\$ 37.1-70.3(B)(i). No additional guidance is provided on requirements of the Department of Corrections representatives.} The CRC works directly under the Department of Corrections.\footnote{Id.}

Membership of the committee is divided among the various interests of the Commonwealth. The Director appoints three members that are required to be full-time employees of the Department of Corrections.\footnote{Id.} The Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services also appoints three members that are...
required to be full-time employees of the department.\textsuperscript{49} The Attorney General appoints the final member of the board.\textsuperscript{50} Terms for CRC membership are staggered at four-year increments.\textsuperscript{51}

To be recommended to the CRC for review, a prisoner must be convicted of a sexually violent offense and have scored a four or higher on the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR) examination.\textsuperscript{52} Monthly, the Director is required to forward the names of these prisoners to the CRC for review.\textsuperscript{53} Within ninety days\textsuperscript{54} of receiving notice from the Director, the CRC has three options: first, it can recommend commitment as a sexually violent predator; second, it may determine commitment is not appropriate because the inmate does not meet the definition of a sexually violent predator; or third, it may make a recommendation of conditional release.\textsuperscript{55} Prior to making the assessment, the CRC is required to conduct a mental health examination of the prisoner, including a personal interview conducted by a licensed psychiatrist or a licensed clinical psychologist who is skilled in the diagnosis and treatment of violent sex offenders.\textsuperscript{56} The examiner must not be a member of the CRC.\textsuperscript{57}

The statute emphasizes that the CRC shall weigh the conditional release option.\textsuperscript{58} A prisoner must meet four elements before being recommended for conditional release: first, the

\textsuperscript{49} See id. § 37.1-70.3(B)(ii). It is further required that at least one shall be a psychiatrist or psychologist licensed in the Commonwealth who is skilled in the diagnosis of mental abnormalities and personality disorders associated with violent sex offenders. Id.
\textsuperscript{50} Id. § 37.1-70.3(B)(iii) (2004).
\textsuperscript{51} See id. § 37.1-70.3. Because of the recent formation of the CRC, the membership of the board has not changed since its creation. This year, one member will be selected by the Director and the Commissioner for vacancies which will result in 2005. There are no provisions for term limitations on members of the CRC. Id.
\textsuperscript{52} Id. § 37.1-70.5(B). The RRASOR examination is an actuarial risk assessment tool that attempts to utilize quantifiable standards for a determination of risk assessment for sexual recidivism. This test is generally considered superior to clinical assessments of risk because subjectivity is abrogated. See Eric S. Janus & Robert A. Prentky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 AM. CRIM. L. REV. 1443, 1453-58 (2003). The statute also allows for the use of “a comparable, scientifically validated instrument.” VA. CODE ANN. § 37.1-70.5(B) (2004).
\textsuperscript{53} The CRC is required to meet monthly, but may meet more frequently. VA. CODE ANN. § 37.1-70.3(C) (2004).
\textsuperscript{54} Id.§ 37.1-70.5(A). The timing inherent in the statute is intended to prevent unnecessary deprivation of liberty for the defendant in the event he does not meet the requirements of an SVP and to ensure swift commitment to a mental facility for the committed without unnecessary overlap with the Department of Corrections.
\textsuperscript{55} Id. § 37.1-70.5(C).
\textsuperscript{56} Id. § 37.1-70.5(B).
\textsuperscript{57} Id.
\textsuperscript{58} Id. § 37.1-70.5(D).
prisoner must not require inpatient hospitalization; second, outpatient supervision must be reasonably available; third, there must be significant reason to believe the prisoner will comply with the conditions of treatment; and fourth, conditional release must not present an undue risk to public safety.59

Within ninety days of receiving information from the Director, the CRC is required to forward its recommendation to the Attorney General.60 Once received, the Attorney General has ninety days to review the prisoner’s record and either file a petition for civil commitment or notify the Director and Commissioner that a petition for commitment will not be filed.61 The Attorney General is required to review the CRC recommendation, the results of the mental health exam, the prisoner’s institutional history and treatment record, the prisoner’s criminal history, and “any other factor relevant to the determination of whether the prisoner should be civilly committed.”62 Ultimately, the responsibility for determining whether to file a petition for civil commitment lies with the Attorney General because the recommendation of the CRC is not binding.63

IV. The Courtroom

The petition for commitment of a sexually violent predator is filed in the circuit court where the prisoner was last convicted of a sexually violent offense.64 There is no centralized jurisdiction for filing these petitions. As a result, inexperienced courts and defense attorneys are limited to the only source of experience available: the Attorney General’s Office. Virginia’s

59 Id. Use of the conjunction “and” makes this a high hurdle to overcome.
60 Id. § 37.1-70.5(A)(ii).
61 Id. § 37.1-70.6(A).
62 Id. § 37.1-70.6(B).
63 Id.
64 Id. § 37.1-70.6(A).
SVP statute requires that the Attorney General’s office provide “a written explanation of the sexually violent predator involuntary commitment process” to the prisoner at the time the petition is delivered to the court and served on the prisoner.65

A. Pre-Trial orders

After receipt of the petition from the Attorney General, the judge is required to determine if the defendant requires a court-appointed attorney.66 Convicted sex offenders are not likely to have the resources to hire their own representation. The pattern of accusation, investigation, conviction, and incarceration is likely to have exhausted the personal economic resources of the prisoner.67 The statute does not look at the ability of the accused to pay. Instead, it requires the judge to “ascertain if the person whose commitment is sought is represented by counsel.”68 If not, an attorney “shall” be appointed for him.69 Though not dispositive on the issue, the Supreme Court of Virginia recently expressed language supporting a presumption of court appointed counsel in *McCloud v. Commonwealth*, stating, “prior to [the probable cause hearing], the circuit court must assure that the prisoner has the opportunity to retain counsel or, if he has not had such opportunity or cannot afford to retain counsel, the court will appoint counsel for him.”70

There are two other requirements for the judge following receipt of the petition for commitment. First, the judge must enter an order requiring the defendant to remain in the custody of the Department of Corrections.71 Second, the judge must schedule a probable cause hearing within sixty days.72 The first of these requirements prevents the prisoner from being...

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65 Id. § 37.1-70.7(A). The petition and written explanation are delivered to the warden of the facility where the prisoner is being held. The warden has the responsibility for delivering the information to the prisoner.
66 Id. § 37.1-70.7(B) (2004).
67 For example, individuals with substantial economic resources may have been exposed to suit under the tort system.
69 See supra note 33.
72 Id. § 37.1-70.7(A)(ii).
released in the event the trial court finds probable cause; it also prevents the release of the prisoner if the civil commitment process is delayed beyond the scheduled release date. The second timing requirement is an attempt to prevent the defendant from being held significantly beyond the scheduled release date in the event the judge determines there is not probable cause to believe the prisoner is a sexually violent predator.

B. The Probable Cause Hearing

Virginia’s SVP statute requires a probable cause hearing, but this procedural hurdle is unlikely to provide significant opportunity for the court-appointed defense attorney to free his client. The requirements for establishing probable cause are minimal. The judge is only required to “(i) verify the person’s identity and (ii) determine whether probable cause exists to believe that the person is a sexually violent predator.”73

Once the identity of the prisoner is confirmed, the court must determine if there is probable cause to believe that the defendant is a “sexually violent predator” according to the definition contained within section 37.1-70.1. The definition of “sexually violent predator” requires only that the defendant have been convicted of a sexually violent offense and that, because of a mental abnormality or personality disorder, the defendant finds it difficult to control his predatory behavior, making him likely to engage in sexually violent acts.74 In turn, a “sexually violent offense” is defined as a felony conviction of former sections 18-54 or 18.1-44, current sections 18.2-61, 18.2-67.1, or 18.2-67.2, or section 18.2-67.3(A)(1), or sexual offenses committed prior to July 1, 1981 where the criminal behavior is set forth in one of the previously listed sections.75

73 Id. § 37.1-70.7(C).
74 Id. § 37.1-70.1.
75 Id.
In *Townes v. Commonwealth*, the Supreme Court of Virginia found that an SVP civil commitment petition could only be brought while the defendant is incarcerated for a sexually violent offense, not while the defendant is being held on unrelated offenses. The Court opined that "although civil in nature, a statutory scheme such as the [Sexually Violent Predators Act] that permits an involuntary commitment process to be initiated by the Commonwealth is subject to the rule of lenity normally applicable to criminal statutes and must therefore be strictly construed." They found that the clear, unambiguous language of the statute required that defendants be incarcerated on sexually violent offenses at the time of consideration for civil commitment.

The requirements of the probable cause hearing limit the scope of the Attorney General’s presentation of evidence to the documentation of the offenses committed by the defendant and brief testimony from the State’s expert psychiatric witnesses. Presumably, the quantum of proof required for the probable cause hearing is analogous to those required for criminal probable cause hearings, an area likely familiar to the court-appointed attorney.

C. Court Appointed Experts

Unquestionably, expert testimony is required to satisfy the definition of an SVP. To meet this definition, the state will be required to present witnesses qualified to make a determination of the defendant’s mental state. A defendant is given the right to have an expert testify on his

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*76 Townes*, 269 Va. at 240-41.

*77 Id.* at 240.

*78 Id* at 241.

*79* Documentation of the defendant’s convictions will automatically meet the first element of the SVP definition. See VA. CODE ANN. § 37.1-70.1 (2004).

*80* Psychiatric expert testimony is required to determine if the defendant is likely to engage in sexually violent behavior because of a mental or personality disorder. *Id.*

*81* See Memorandum, *supra* note 34, at 5. Neither the statute, nor the Memorandum from the Secretary of the Supreme Court of Virginia provides specific guidelines for this determination. The statute itself provides the standard for the trial, but no source outlines the exact burden in the probable cause hearing. The only guidance is the title “probable cause hearing” which certainly implies impending criminal conviction.

*82* By this point in the commitment process, the prisoner has already been examined by an expert for the State. See *infra*, Section II; VA. CODE ANN. § 37.1-70.5(B) (2004).
The court-appointed expert is required to meet the same standards required of experts performing the mental evaluation for the CRC. Furthermore, the defendant’s expert “shall have reasonable access to all relevant medical and psychological records and reports.” To level the playing field, the state will pay for the defendant’s expert witness in an amount up to $5000 of compensation for services. Furthermore, the expert witness is reimbursed $750 plus mileage costs for each day of testimony.

The statute does not identify a specific time frame for the appointment of an expert witness for the defense. However, there is no reason for the court-appointed attorney to wait until after the probable cause hearing to request an expert. Indeed, the state will be required to present an expert to establish the required mental elements for probable cause. There is no reason for the defendant not to present his own expert at this time. Unfortunately, the time frames identified by the statute leave little room for obtaining an expert opinion; as a result, getting an expert to testify at the hearing may require a waiver of the timing requirements of the statute. Furthermore, a vigorous challenge to the probable cause hearing will identify the approaches and issues required to win at trial - an issue which may be worth the cost of waiving the timing requirements.

The expert is not appointed for the benefit of the court, but is specifically retained by the court for the benefit of the defendant. See VA. CODE ANN. § 37.1-70.8(A) (2004) (“Any person who is the subject of petition under this article shall have, prior to trial, the right to employ experts at his own expense to perform examinations and testify on his behalf.”)

VA. CODE ANN. § 37.1-70.8(A) (2004). In Commonwealth v. Allen, the Supreme Court of Virginia upheld the testimony of an expert licensed out-of-state. 269 Va. at 273-74. Prior to 2004, the defendant’s expert was not required to have the same qualifications, but the Legislature has since changed the requirements. See 2004 Va. Acts 764.

VA. CODE ANN. § 37.1-70.8(A) (2004).

Id. § 37.1-70.8(B). However, the Supreme Court of Virginia has promulgated a separate fee recommendation of $2500, which it has determined is appropriate after consultation with the Department of Mental Health. See Memorandum, supra note 34, at 6.

VA. CODE ANN. § 37.1-70.8(B) (2004). Interestingly, both fees are certified to the Supreme Court and made “for payment out of the appropriation to pay criminal charges.” Memorandum, supra note 34, at 6.


If the prisoner refuses to cooperate with the examination by the state, the court is authorized to either admit the evidence of the refusal or bar the prisoner from introducing his own expert testimony. Id. § 37.1-70.2 (2004)
Regardless of the compensation scheme provided for expert witnesses, Virginia’s statute for the Civil Commitment of Sexually Violent Predators does not specify a level of compensation for the court-appointed attorney. The amount of preparation required for these cases, the seriousness of the possible outcome, the lack of experienced counsel, and the difficulties in overcoming the state’s reduced burden of proof should compel the court to permit the maximum allowable by law, currently $1,235. The court always has the discretion to award a smaller amount if reduced compensation seems appropriate considering the level of representation provided.

D. Trial and Standard

Both the defendant and the Attorney General have the right to a trial by jury, which must be held within ninety days of the probable cause hearing. The statute provides that the SVP commitment process should be conducted as a civil proceeding, but there are obvious limitations. The defendant is allowed to view and copy all petitions and reports in the court file. Additional discovery is available with the permission of the court, but “[u]nder no circumstances shall the prisoner or defendant be entitled to receive a copy of the Victim Impact Statement or the presentence investigation report.” The Attorney General is authorized to provide these documents to defendant’s counsel and any expert witness as long as they are reviewed outside the presence of the prisoner.

90 Id. § 19.2-163.
91 Memorandum, supra note 33, at 5.
92 VA. CODE ANN. § 37.1-70.9(B) (2004). Considering the inflammatory nature of the crimes committed by the defendant, it is difficult to imagine the benefit for the defense in requesting a trial by jury.
93 Id. § 37.1-70.9(A) (2004). If all of the time requirements are met, the trial should be completed prior to the defendant’s release date.
94 Id. § 37.1-70.9(A).
95 Id. § 37.1-70.9(B).
96 Id.
97 Id.

Although access to this material is limited, the lingering effects of crimes of sexual violence must be weighed against the right to competent representation. The battleground for determination of a sexually violent predator should lie in the factual assessment of the expert determination of professionals. The legitimate use for a Victim Impact Statement is as a portion of the assessment of an expert witness, not in its evidentiary value. Id.
The Commonwealth has the statutory burden of proving by clear and convincing evidence that the offender is a sexually violent predator.\textsuperscript{98} This standard requires a degree of proof which will produce in the mind of the fact-finder a firm belief as to the allegations sought to be proved.\textsuperscript{99} Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt.

The clear and convincing evidence standard is a civil standard which does not adequately address the implicit issues surrounding the deprivation of liberty associated with a civil commitment proceeding. When compared to the beyond a reasonable doubt standard which controls criminal cases, the clear and convincing evidence standard is a low burden. The difference in standards is unsettling when the reasonable doubt standard of a misdemeanor traffic offense is compared to the lower, clear and convincing evidence standard which could theoretically be the beginning of life-long involuntary commitment. Regardless of this discrepancy, at least thirteen states utilize specific statutory reference to the ‘clear and convincing’ evidence standard for civil commitment.\textsuperscript{100}

In Kilgore v. Hurst, the Attorney General failed to show by clear and convincing evidence that the defendant’s mental abnormality or personality disorder was likely to cause the defendant to commit sexually violent acts.\textsuperscript{101} Instead, the court found the evidence only demonstrated that the defendant was impulsive in his actions and decision making.\textsuperscript{102} As a result, the court held the evidence was insufficient to meet the definition of sexually violent predator.\textsuperscript{103}

\textsuperscript{98} Id. § 37.1-709(C). The standard of proof prior to 2003 was ‘beyond a reasonable doubt.’ Amendments which went into effect April 2, 2003, reduced the standard to ‘clear and convincing evidence.’ This standard is commensurate with other types of civil commitment in Virginia. See generally id. §§ 19.2-176, 19.2-169.6.
\textsuperscript{100} Those states are: Alabama, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Maine, Minnesota, Mississippi, Missouri, Montana, and New Jersey.
\textsuperscript{101} Kilgore v. Hurst, 64 Va. Cir. 376, 380 (Norfolk 2004).
\textsuperscript{102} Id. at 379.
\textsuperscript{103} Id. at 380.
V. Judicial Options

Virginia’s Sexually Violent Predators Act states that “[i]f the court or jury does not find clear and convincing evidence that the person is a sexually violent predator, the court shall, in the case of a prisoner, direct that he be returned to the custody of the Department of Corrections until his scheduled date of release.”

Even if the court finds the defendant to be a sexually violent predator, it must determine if civil commitment is appropriate.

The Attorney General must demonstrate that “there is no less restrictive alternative to institutional confinement and treatment” than to have the defendant committed. A written order, specifying the findings of the court, is required for commitment of the person to the Department of Mental Health, Mental Retardation and Substance Abuse Services. Even if the defendant is determined to be an SVP, the court has the ultimate determination of the appropriate treatment, and this treatment may not rise to the level of civil commitment.

If the court determines that involuntary confinement is not necessary, it will continue the case for at least thirty days and will require the Commissioner of the Department of Mental Health, Mental Retardation, and Substance Abuse to submit a report to the court, the Attorney General, and the defendant’s counsel detailing possible alternatives to civil commitment. The court will then make a determination of the suitability of less restrictive means and make a final order in the case. The requirements of conditional release by judicial authority are consistent

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\(^{104}\) Va. Code Ann. § 37.1-70.9(C) (2004). The defendant is required to be unconditionally released if his scheduled date of release has passed.

\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Id.

\(^{108}\) Id.
with the requirements for conditional release which are required to be investigated by the CRC
during the review process.109

The importance of this statutorily required two-step determination should not be glossed
over in favor of the opinion of the Attorney General. The court must review all of the evidence
presented to verify that there is no less restrictive alternative available.110 It is important to
remember that the Attorney General will not file the petition unless the recommendation is for
civil commitment.111 As a result, if the court does not give serious consideration to the treatment
of the defendant, then the resolve of the Attorney General will substitute for the resolve of the
Court, contrary to the requirements outlined by the Virginia General Assembly.

If the defendant is civilly committed, the committing court is required to conduct a
hearing twelve months after the date of the commitment to determine if the patient still needs to
be hospitalized.112 This hearing places the burden113 on the Attorney General to demonstrate that
the defendant remains a sexually violent predator even after treatment.114 The Commissioner is
required to submit a report to the court detailing the defendant’s condition and recommending
treatment for the sexually violent predator.115 However, if the Commissioner recommends the
release of the defendant, a second evaluation shall be performed by a qualified person not
currently treating the defendant.116

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109 If the defendant needs outpatient treatment to prevent his condition from deteriorating, appropriate treatment is
reasonably available, there is significant reason to believe that the defendant will comply with the required
conditions, and the conditional release will not result in an undue risk to public safety then the judge shall order the
appropriate terms for conditional release. Id. § 37.1-70.13.
110 This investigation involving possible alternatives is led by the CRC. Id. § 37.1-70.3(A).
111 One member of the CRC is required to be appointed by the Attorney General. Id. § 37.1-70.3(B).
112 Id. § 37.1-70.11(A).
113 Once again the standard is clear and convincing evidence. Id. § 37.1-70.11(C) (2004).
114 Id.
115 Id. § 37.1-70.11(B).
116 Id. Interestingly enough, the Commission is competent to demonstrate the continued commitment of the
defendant, but a second opinion is needed to determine the defendant is cured.
The hearing to determine the legitimacy of the commitment of the defendant is conducted annually for five years and biennially after that.\textsuperscript{117} This hearing must take precedence over all matters pending before the court.\textsuperscript{118} Prisoners under conditional release are also subject to review of their status.\textsuperscript{119} The court bases its review on petition of the probation and parole officer, the Department of Mental Health, Mental Retardation and Substance Abuse Services, the Attorney General, the person on conditional release, or on an independent motion of the court.\textsuperscript{120} Petitions by the person on conditional release are limited to once-per-year and the first may not be filed until six months after conditional release begins.\textsuperscript{121}

\textbf{VI. Conclusion}

Virginia’s Sexually Violent Predators Act follows the precedents established by other states. Absent new, creative challenges to SVP legislation, the Act appears to be a constitutional expression of the will of the Virginia legislature regardless of the uncomfortable restrictions on liberty which the Act provides. Challenges to the commitment process for the court-appointed attorney will likely center around expert testimony and the factual determinations of the court.

Cases involving civil commitment of sexually violent predators are few and spread out around the state. As a result, there is little experience available for the court-appointed attorney to draw upon. Judges are likely equally as inexperienced. Awareness of the general issues involved and a strong recommendation by an expert witness are the best hope for the court-appointed attorney to mount a successful defense against a civil commitment petition.

\begin{footnotes}
\item[117] \textit{Id.} § 37.1-70.11(A).
\item[118] \textit{Id.}
\item[119] \textit{Id.} § 37.1-70.15 (2004).
\item[120] \textit{Id.}
\item[121] \textit{Id.}
\end{footnotes}