UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7039

JONATHAN PENDLETON,

Plaintiff - Appellant,

v.

JASON S. MIYARES, Attorney General of Virginia; LOUISE DIMATTEO; COMMISSIONERS OF VIRGINIA DEPARMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES; ARLINGTON COUNTY COMMUNITY SERVICES BOARD; ARLINGTON COUNTY DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF CENTRAL STATE HOSPITAL; SUPERINTENDENT OF NORTHERN VIRGINIA MENTAL HEALTH INSTITUTE; COURTNEY NOBLES, NGRI Coordinator for DHS; GRACE GUERRERO, psychologist employed by DHS; KELLY NIEMAN, NGRI Coordinator for DHS from 2017 to 2019; ANGELICA TORRES-MANTILLA, NGRI Coordinator for DHS from 2020 onward; MARK DOERING, case management supervisor for DHS; THOMAS WALLACE, compliance officer for DHS; JAN LONGMAN, compliance officer for DHS; RICHARD WRIGHT, forensic psychiatrist on the Virginia DBHDS Forensic Review Panel; ANITA FREIDMAN, Director of Arlington DHS; NELSON SMITH, Commissioner of Virginia Department of Behavioral and Developmental Services (DBHDS); JENNIFER ANGLIN; MICHAEL WESTFALL, Virginia State Inspector General; OSIG JANE DOE #1; KLI KENZIE, Executive Secretary for the Virginia Office of Human Rights under DBHDS; ANN PASCOE; SARAH DAVIS, Forensics Operations Manager in the DBHDS Office of Forensic Services; CHRISTINE SCHEIN, Deputy Director for Forensic Services under DBHDS; OSIG JANE DOE #2; PAUL FERGUSON, Clerk of the Circuit Court of Arlington County,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:23-cv-00446-LMB-IDD)

Appendix A

Submitted: December 20, 2023 Decided: February 21, 2024

Before KING and WYNN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Jonathan Pendleton, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jonathan Pendleton appeals the district court's order dismissing Pendleton's civil claims against Defendants after a review pursuant to 28 U.S.C. § 1915. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order. *Pendleton v. Miyares*, No. 1:23-cv-00446-LMB-IDD (E.D. Va. filed Oct. 3, 2023 & entered Oct. 4, 2023). We deny Pendleton's motion for a certificate of appealability, without prejudice,* and deny his motions for summary reversal, reassignment, and release. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

* The clerk's office construed Pendleton's motion for a certificate of appealability as a notice of appeal of the district court's order dismissing Pendleton's 28 U.S.C. § 2254 petition in *Pendleton v. DiMatteo*, No. 3:23-cv-00734-RCY-MRC (E.D. Va., PACER Nos. 4-5), and forwarded the motion to the appropriate district court for docketing as a misrouted notice of appeal.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JONATHAN PENDLETON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:23-cv-446 (LMB/IDD)
	)	
JASON MIYARES, et al.,	)	
	)	
Defendants.	)	

ORDER[1]

On April 5, 2023, plaintiff Jonathan Pendleton ("Pendleton" or "plaintiff"), proceeding pro se, filed a 14-count Verified Complaint ("Complaint") against 26 individual defendants and groups of defendants, including Arlington Circuit Court Judge Louise DiMatteo, the Virginia Department of Behavioral Health and Development Services, the Arlington County Community Services Board, the Arlington County Department of Human Services, two inpatient psychiatric facilities in Virginia, the Attorney General of Virginia, the State Inspector General, the Clerk of the Circuit Court of Arlington County, and various employees of the aforementioned agencies

[1] On September 25, 2023, plaintiff filed an Emergency Petition for Writ of Mandamus in the United States Court of Appeals for the Fourth Circuit in which he asks the court of appeals to order that he be "released immediately" from being "effectively recommitted to the custody of the Commissioner of DBHDS." [Dkt. No. 12-1] at 20, 22. In addition, Pendleton asks the Fourth Circuit to consider "reassigning or removing [his] case to another division or district" and suggests that the undersigned judge be required to "disclose any associations with the Defendants/Respondents, any *ex parte* communication . . . with Virginia officials regarding the matter, and whether she should recuse herself for any other reason." Id. at 23-24. Plaintiff's filing of a petition for writ of mandamus does not deprive this Court of jurisdiction over this civil action. See, Nascimento v. Dummer, 508 F.3d 905 (7th Cir. 2007) ("Petitions for writ of mandamus do not destroy the district court's jurisdiction in the underlying case."); Federal Insurance Company v. United States, 882 F.3d 348, 362 (2d Cir. 2018).

Appendix B

and offices. Plaintiff has also filed an Application to Proceed in District Court Without Paying Fees or Costs, [Dkt. No. 2], a Motion for Appointment of Counsel, [Dkt. No. 3], an E-Noticing Registration Request [Dkt. No. 4], a Motion for Leave to Proceed Pseudonymously,[2] [Dkt. No. 5], and a Motion for Service of Summons by U.S. Marshals, [Dkt. No. 7]. On July 7, 2023, he filed a Petition for Writ of Habeas Corpus and Motion for Preliminary Hearing. [Dkt. No. 9]. Because he filed the Petition under the same civil action number, it has been treated as an exhibit to his Complaint, and not as a stand-alone habeas petition.

When a pro se litigant seeks to proceed in forma pauperis, a court must screen the complaint and dismiss the action if it is legally or factually frivolous or fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B). A court has the authority not only to "dismiss a claim based on an indisputably meritless legal theory," but also "to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Neitzke v. Williams, 490 U.S. 319, 327 (1989). A pro se complaint is "'to be liberally construed,' and . . . 'however inartfully pleaded, [it] must be held to less stringent standards than formal pleadings drafted by lawyers,'" King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016) (quoting Erickson v. Pardus, 551 U.S. 89, 94 (2007)). Nevertheless, a pro se complaint "still must contain 'enough facts to state a claim for relief that is plausible on its face.'" Thomas v. The Salvation Army S. Territory, 841 F.3d 632, 637 (4th Cir. 2016) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

According to his Complaint, in March 2014, Pendleton entered a lecture hall at George Mason University and attacked an economics professor with pepper spray in an attempt to "effectuate a citizen's arrest" because plaintiff believed the professor had "gain[ed] unauthorized

[2] Plaintiff legally changed his name in 2020, [Dkt. No. 1] ¶ 74, and has filed this civil action using his former name. [Dkt. No. 5].

access to [his] computer . . . [in] furtherance of stalking or harassment." [Dkt. No. 1] ¶ 31. Pendleton was charged with malicious wounding by means of a caustic substance, abduction, assault, and battery in Arlington Circuit Court, [Dkt. No. 1-1] at 1, and on December 15, 2014, he was found not guilty by reason of insanity ("NGRI"). [Dkt. No. 1] ¶ 34. In accordance with Va. Code 19.2-182.2, the presiding judge, Judge DiMatteo, ordered Pendleton into the temporary custody of the Commissioner of Behavioral Health and Developmental Services for evaluation of whether release or commitment was appropriate. Id. ¶ 35. After a commitment hearing in May 2015, Pendleton was committed to Central State Hospital for inpatient treatment and was later transferred to the Northern Virginia Mental Health Institute. Id. ¶¶ 43-48. In January 2017, Judge DiMatteo granted Pendleton conditional release, and he was placed on outpatient treatment and monitoring by the Arlington County Community Services Board and the Arlington County Department of Human Services. Id. ¶¶ 49-50.

Between March 2019 and August 2020, Pendleton, with the assistance of counsel, filed several petitions for unconditional release, which Judge DiMatteo denied. Id. ¶¶ 53-101. In response to a report filed by his NGRI Coordinator that Pendleton had violated conditions of his release, Judge DiMatteo scheduled a show cause hearing for October 2020. Upon learning that the hearing had been scheduled, Pendleton "fled Arlington" and did not appear for the October 2020 show cause hearing. Id. ¶ 104. As a result, a warrant was issued for his arrest. Id. Because Pendleton left Virginia while he was on conditional release and did not have permission from the court, he could be charged with a felony. In accordance with Va. Code Ann. § 19.2-182.15, "[a]ny person placed on conditional release pursuant to § 19.2-182.7 who leaves the Commonwealth without permission from the court which conditionally released the person shall be guilty of a Class 6 felony."

In May 2021, at a hearing that Pendleton did not attend, Judge DiMatteo revoked his conditional release. Id. ¶ 105. Under Va. Code 19.2-182.8, the court may revoke an acquittee's conditional release and order him returned to the custody of the Commissioner of Behavioral Health and Developmental Services.

After leaving Virginia, Pendleton lived in Seattle, Washington, and Austin, Texas. Id. ¶¶ 106, 114. In August 2022, Pendleton was arrested in Austin, Texas on the October 2020 warrant and was held in custody for 10 days, but apparently was not returned to Virginia. Id. ¶ 115. The arrest warrant remains active, [Dkt. No. 9] at 4, and Pendleton is identified as a fugitive in the Arlington County Circuit Court records.

On August 23, 2022, Pendleton filed a Petition for Writ of Habeas Corpus in Arlington Circuit Court in which he identified his place of detention as "Warrant for arrest and return to the custody of the Commissioner." [Dkt. No. 1-1] at 1. In his petition to the circuit court, Pendleton raised several claims, including that he has been denied equal protection and due process in his commitment and release proceedings; the October 2020 arrest warrant violated the Double Jeopardy Clause; he received ineffective assistance of counsel throughout his commitment and release proceedings; and he has been subjected to cruel and unusual punishment. [Dkt. No. 1-1]. The petition sought an order "declaring [his] continued and prolonged detention unlawful and ordering [his] immediate release." Id. at 2. On March 13, 2023, Pendleton filed a "similar" Petition for Writ of Habeas Corpus with the Virginia Supreme Court, seeking to have the October 2020 warrant quashed, among other forms of relief. [Dkt. No. 1] ¶ 123; [Dkt. No. 1-2]. According to his Petition for Writ of Mandamus, the Virginia Supreme Court dismissed his habeas petition for failure to provide proof of service. [Dkt. No. 12-1] at 7; [Dkt. No. 10-1] at 3.

The Complaint before this Court includes fourteen counts challenging the legality of the events that resulted in the warrant for his arrest and the revocation of Pendleton's conditional

release, which "ostensibly recommit[ed] him to be returned to the custody of the Commissioner of DBHDS, [defendant] Nelson Smith." [Dkt. No. 1] ¶ 127. In other words, the substance of plaintiff's pleading reads as an attack on an ongoing state criminal proceeding—the arrest warrant for leaving the state while on conditional release—and the revocation of plaintiff's conditional release, which is a civil proceeding. See Va. Code Ann. § 19.2-182.8 (West) (revocation of conditional release "is a civil proceeding").

The Complaint must be dismissed because it constitutes an attack on ongoing state criminal and civil proceedings, for which neither his § 1983 complaint nor his petition for writ of habeas corpus are appropriate.[3] Rather, Pendleton—who is a fugitive from justice—should return to Virginia and seek relief directly from the Circuit Court of Arlington County where his arrest warrant and conditional release proceedings are pending. Moreover, this civil action must be dismissed because of the "fundamental policy" that federal courts should abstain from interfering in ongoing state criminal proceedings. Younger v. Harris, 401 U.S. 37, 46 (1971). Specifically, "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Id. at 43-44. In Middlesex City Ethics Committee v. Garden State Bar Association, the Supreme Court further clarified that a federal court should refrain from exercising jurisdiction if (1) there is an ongoing state judicial proceeding that began

[3] As a matter of law, several of the named defendants have immunity from this lawsuit. For example, Judge Louise DiMatteo has absolute judicial immunity because her decisions to revoke Pendleton's conditional release and issue an arrest warrant fall squarely within her capacity and jurisdiction as a presiding judge in the Arlington Circuit Court. See Mireles v. Waco, 502 U.S. 9, 11 (1991) (explaining that judicial immunity can only be overcome if a judge takes actions outside her judicial capacity or takes actions in the absence of all jurisdiction). The Clerk of the Circuit Court of Arlington County and his staff are similarly protected because absolute immunity "applies to all acts of auxiliary court personnel that are basic and integral part[s] of the judicial function." Jackson v. Houck, 181 F. App'x 372, 373 (4th Cir. 2006).

before any substantial progress in the federal proceeding; (2) the proceeding implicates important state interests; and (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges. 457 U.S. 423, 432 (1982); see Robison v. Thomas, 855 F.3d 278, 285 (4th Cir. 2007).

All of the factors articulated in Middlesex are present in this case. Pendleton's pleading attacks both the revocation of his conditional release and the related arrest warrant issued by the Arlington Circuit Court, which are part of ongoing state court proceedings that began long before this civil action. Plaintiff's Complaint and the habeas petition he filed in this civil action also undoubtedly implicate the Commonwealth of Virginia's "substantial[] and vital" interest in "prevent[ing] violations of its criminal laws and maintain[ing] the efficient operation of its criminal justice system." See McSheffrey v. Wilder, 2022 WL 2806720, at *3 (E.D. Va. July 18, 2022).

Although the Younger abstention doctrine does not always bar federal courts from hearing challenges to ongoing state prosecutions if there is a showing of bad faith or harassment by state officials responsible for the prosecution, the state law to be applied in the criminal proceeding is violative of express constitutional provisions, or there exist other extraordinary circumstances in which irreparable injury can be shown, Pendleton has failed to meet any of these exceptions. Younger, 401 U.S. at 53-54. Pendleton cannot demonstrate any bad faith or harassment for the revocation of his conditional release or issuance of the arrest warrant because, by his own admission, he "fled Arlington" without permission while he was on conditional release instead of appearing at his October 2020 show cause hearing and his May 2021 conditional release violation hearing. [Dkt. No. 1] ¶ 104. He similarly does not meaningfully challenge any state law as violative of the Constitution, and his allegations do not meet the high standard of showing irreparable harm through "proven harassment or prosecutions undertaken by

state officials in bad faith without hope of obtaining a valid conviction." Perez v. Ledesma, 401 U.S. 82, 85 (1971). Because the basic requirements for Younger abstention are present in this case, and because plaintiff has failed to show that any exceptions to Younger abstention should apply, this Court will not interfere with the state court proceedings. Accordingly, it is hereby

ORDERED that this civil action be and is DISMISSED; and it is further

ORDERED that all pending motions are DENIED AS MOOT.

To appeal this decision, plaintiff must file a written notice of appeal with the Clerk of the Court within thirty (30) days of the date of entry of this Order. A notice of appeal is a short statement indicating a desire to appeal, including the date of the order plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court of appeals. Failure to file a timely notice of appeal waives plaintiff's right to appeal this decision.

The Clerk is directed to forward copies of this Order to plaintiff, Jonathan Eric Pendleton, pro se, and to close this civil action.

Entered this 3rd day of October, 2023.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

FILED: March 19, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7039
(1:23-cv-00446-LMB-IDD)

JONATHAN PENDLETON

Plaintiff - Appellant

v.

JASON S. MIYARES, Attorney General of Virginia; LOUISE DIMATTEO; COMMISSIONERS OF VIRGINIA DEPARMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES; ARLINGTON COUNTY COMMUNITY SERVICES BOARD; ARLINGTON COUNTY DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF CENTRAL STATE HOSPITAL; SUPERINTENDENT OF NORTHERN VIRGINIA MENTAL HEALTH INSTITUTE; COURTNEY NOBLES, NGRI Coordinator for DHS; GRACE GUERRERO, psychologist employed by DHS; KELLY NIEMAN, NGRI Coordinator for DHS from 2017 to 2019; ANGELICA TORRES-MANTILLA, NGRI Coordinator for DHS from 2020 onward; MARK DOERING, case management supervisor for DHS; THOMAS WALLACE, compliance officer for DHS; JAN LONGMAN, compliance officer for DHS; RICHARD WRIGHT, forensic psychiatrist on the Virginia DBHDS Forensic Review Panel; ANITA FREIDMAN, Director of Arlington DHS; NELSON SMITH, Commissioner of Virginia Department of Behavioral and Developmental Services (DBHDS); JENNIFER ANGLIN; MICHAEL WESTFALL, Virginia State Inspector General; OSIG JANE DOE #1; KLI KENZIE, Executive Secretary for the Virginia Office of Human Rights under DBHDS; ANN PASCOE; SARAH DAVIS, Forensics Operations Manager in the DBHDS Office of Forensic Services; CHRISTINE SCHEIN, Deputy Director for Forensic Services under DBHDS; OSIG JANE DOE #2; PAUL FERGUSON, Clerk of the Circuit Court of Arlington County

Defendants - Appellees

Appendix C

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

FILED: February 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7293
(3:23-cv-00734-RCY-MRC)

JONATHAN PENDLETON

Petitioner - Appellant

v.

LOUISE MARIE DIMATTEO, Arlington Circuit Court Judge; PAUL FERGUSON, Arlington Circuit Court Clerk; NELSON SMITH, Commissioner, Virginia Department of Behavioral Health and Developmental Services

Respondents - Appellees

ORDER

Upon consideration of submissions relative to appellant's motions for release, for sealing the case, to proceed under pseudonym, and for attorney's fees, the court denies the motions.

Entered at the direction of Senior Judge Traxler with the concurrence of Judge King and Judge Wynn.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JONATHAN PENDLETON,

Petitioner,

v. Civil Action No. **3:23CV734 (RCY)**

LOUISE DiMATTEO, *et al.*,

Respondents.

MEMORANDUM OPINION

Jonathan Pendleton, currently a Texas resident, brings this *pro se* petition pursuant to 28 U.S.C. § 2254 ("§ 2254 Petition," ECF No. 1). Pendleton is not incarcerated but appears to be challenging his prior criminal proceedings where he was acquitted but placed in mental health civil commitment, and challenging an outstanding bench warrant for his failure to appear in the Circuit Court for the County of Arlington ("Circuit Court"). As background, the Alexandria Division of this Court explained as follows:

> According to his Complaint, in March 2014, Pendleton entered a lecture hall at George Mason University and attacked an economics professor with pepper spray in an attempt to "effectuate a citizen's arrest" because plaintiff believed the professor had "gain[ed] unauthorized access to [his] computer . . . [in] furtherance of stalking or harassment." [Dkt. No. 1] ¶ 31. Pendleton was charged with malicious wounding by means of a caustic substance, abduction, assault, and battery in Arlington Circuit Court, [Dkt. No. 1-1] at 1, and on December 15, 2014, he was found not guilty by reason of insanity ("NGRI"). [Dkt. No. 1] ¶ 34. In accordance with Va. Code 19.2-182.2, the presiding judge, Judge DiMatteo, ordered Pendleton into the temporary custody of the Commissioner of Behavioral Health and Developmental Services for evaluation of whether release or commitment was appropriate. *Id.* ¶ 35. After a commitment hearing in May 2015, Pendleton was committed to Central State Hospital for inpatient treatment and was later transferred to the Northern Virginia Mental Health Institute. *Id.* ¶¶ 43–48. In January 2017, Judge DiMatteo granted Pendleton conditional release, and he was placed on outpatient treatment and monitoring by the Arlington County Community Services Board and the Arlington County Department of Human Services. *Id.* ¶¶ 49–50.

Appendix E

Between March 2019 and August 2020, Pendleton, with the assistance of counsel, filed several petitions for unconditional release, which Judge DiMatteo denied. *Id.* ¶¶ 53-101. In response to a report filed by his NGRI Coordinator that Pendleton had violated conditions of his release, Judge DiMatteo scheduled a show cause hearing for October 2020. Upon learning that the hearing had been scheduled, Pendleton "fled Arlington" and did not appear for the October 2020 show cause hearing. *Id.* ¶ 104. As a result, a warrant was issued for his arrest. *Id.* Because Pendleton left Virginia while he was on conditional release and did not have permission from the court, he could be charged with a felony. In accordance with Va. Code Ann. § 19.2-182.15, "[a]ny person placed on conditional release pursuant to § 19.2-182.7 who leaves the Commonwealth without permission from the court which conditionally released the person shall be guilty of a Class 6 felony."

In May 2021, at a hearing that Pendleton did not attend, Judge DiMatteo revoked his conditional release. *Id.* ¶ 105. Under Va. Code 19.2-182.8, the court may revoke an acquittee's conditional release and order him returned to the custody of the Commissioner of Behavioral Health and Developmental Services.

After leaving Virginia, Pendleton lived in Seattle, Washington, and Austin, Texas. *Id.* ¶¶ 106, 114. In August 2022, Pendleton was arrested in Austin, Texas on the October 2020 warrant and was held in custody for 10 days, but apparently was not returned to Virginia. *Id.* ¶ 115. The arrest warrant remains active, [Dkt. No. 9] at 4, and Pendleton is identified as a fugitive in the Arlington County Circuit Court records.

On August 23, 2022, Pendleton filed a Petition for Writ of Habeas Corpus in Arlington Circuit Court in which he identified his place of detention as "Warrant for arrest and return to the custody of the Commissioner." [Dkt. No. 1-1] at 1. In his petition to the circuit court, Pendleton raised several claims, including that he has been denied equal protection and due process in his commitment and release proceedings; the October 2020 arrest warrant violated the Double Jeopardy Clause; he received ineffective assistance of counsel throughout his commitment and release proceedings; and he has been subjected to cruel and unusual punishment. [Dkt. No. 1-1]. The petition sought an order "declaring [his] continued and prolonged detention unlawful and ordering [his] immediate release." *Id.* at 2. On March 13, 2023, Pendleton filed a "similar" Petition for Writ of Habeas Corpus with the Virginia Supreme Court, seeking to have the October 2020 warrant quashed, among other forms of relief. [Dkt. No. 1] ¶ 123; [Dkt. No. 1-2]. According to his Petition for Writ of Mandamus, the Virginia Supreme Court dismissed his habeas petition for failure to provide proof of service. [Dkt. No. 12-1] at 7; [Dkt. No. 10-1] at 3.

The Complaint must be dismissed because it constitutes an attack on ongoing state criminal and civil proceedings, for which neither his § 1983 nor his petition for writ of habeas corpus are appropriate. Rather, Pendleton—who is a fugitive from justice—should return to Virginia and seek relief directly from the Circuit Court of Arlington County where his arrest warrant and conditional release proceedings are pending. Moreover, this action must be dismissed because of the

> "fundamental policy" that federal courts should abstain from interfering in ongoing state criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 46 (1971).

Pendleton v. Miyares, No 1:23-cv-446 (LMB/IDD), 2023 WL 7109681, at *1–2 (Oct. 3, 2023) (alterations and omissions in original) (footnotes omitted).

In his § 2254 Petition, Pendleton "continue[s] to seek relief from his unlawful and prolonged detention under Virginia's facially unconstitutional NGRI statutes." (ECF No. 1, at 1.) However, Pendleton is not currently detained, but has a bench warrant issued for his arrest. Although individuals who are serving terms of parole, probation, or conditional release generally meet the "in custody" requirement for habeas corpus, it is doubtful that Pendleton—who was on conditional release from a mental health hospital and, subsequently, fled and remains a fugitive—satisfies that requirement.[1] Nevertheless, the Court need not decide that here, because even if Pendleton satisfied the "in custody" requirement, he has not exhausted his state court remedies.

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[1] Under 28 U.S.C. § 2254(a), a federal district court has jurisdiction over claims "of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution and laws or treaties of the United States." A litigant can meet the "in custody" requirement, when incarcerated pursuant to a criminal conviction, or when civilly committed or found in civil contempt pursuant to a state court order. *Duncan v. Walker*, 533 U.S. 167, 176 (2001) (citations omitted). Moreover, custody is not limited to "actual physical custody," but a person remains "in custody" if subject to significant restraints on his or her liberty, so long as the restraints are a direct consequence of the challenged state order. *Jones v. Cunningham*, 371 U.S, 236, 239–40 (1963); *see Piasecki v. Court of Common Pleas, Bucks Co., Pa.*, 917 F.3d 161, 163 (2019) (finding sex offender registry requirements upon release "were sufficiently restrictive to constitute custody and that they were imposed pursuant to a state court judgment"). Here, Pendleton was acquitted of any criminal charges because he was found not guilty by reason of insanity but was civilly committed to a mental health facility. Pendleton was subsequently released from his civil commitment, but presumably was subject to various conditions of release sufficient to amount to a restraint on his liberty. *See Piasekci*, 917 F.3d at 163. *But see Maleng v. Cook*, 490 U.S. 488, 492 (1989) (recognizing that a petitioner being subject to "collateral consequences" of a prior conviction, such as a sentencing enhancement in a subsequent offense, does not render him in custody); *Wilson v. Flaherty*, 689 F.3d 332, 337 (4th Cir. 2012) (holding that sex offender registration requirements resulting from a prior conviction do not render a petitioner "in custody" for purposes of that conviction, once he has fully served his sentence of imprisonment and any period of supervision, parole, or probation). At that juncture, Pendleton likely was "in custody" for the purposes of habeas corpus. However, once Pendleton learned that a show cause hearing had been scheduled because he violated his terms of conditional release, Pendleton fled, and he

"As a general rule, in the absence of 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent,' *Bowen v. Johnston*, 306 U.S. 19, 27 (1939), courts 'require[] exhaustion of alternative remedies before a prisoner can seek federal habeas relief.'" *Timms v. Johns*, 627 F.3d 525, 530–31 (4th Cir. 2010) (alteration in original) (parallel citation omitted) (quoting *Boumediene v. Bush*, 553 U.S. 723, 793 (2008)). In this regard, "[i]n the case of those detained by states, principles of federalism and comity generally require the exhaustion of available state court remedies before [the federal courts] conduct habeas review of the detention." *Id.* at 531 n. 5 (citing *Boumediene*, 553 U.S. at 793). Thus, "district courts 'should withhold relief in [a] collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted.'" *Id.* at 531 (alteration in original) (quoting *Stack v. Boyle*, 342 U.S. 1, 6–7 (1951)); *see Sweeney v. Woodall*, 344 U.S. 86, 90 (1952) (explaining that "[c]onsiderations fundamental to our federal system require that the [fugitive] prisoner test the claimed unconstitutionality of his treatment by [the state] in the courts of that State").

Conversely, "federal courts should abstain from the exercise of [habeas] jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner." *Dickerson*, 816 F.2d at 224 (citations omitted); *Durkin v. Davis*, 538 F.2d 1037, 1041 (4th Cir. 1976) (internal quotation marks omitted) ("Until the State has been accorded a fair opportunity by any available procedure to consider the issue and afford a remedy if relief is warranted, federal courts in habeas proceedings by state [inmates] should stay their hand."). Here, the issues raised by Pendleton, may be resolved either by (1) a trial on the merits in the Circuit Court, or (2) subsequent direct and collateral appeals. *See Newkirk*

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remains at large. Thus, it cannot be said that Pendleton is currently subject to any conditions of his release that would amount to a restraint on his liberty; and thus, is doubtfully "in custody" for the purposes of habeas corpus.

v. Lerner, No. 3:13CV570-HEH, 2013 WL 4811219, at *1 (E.D. Va. Sept. 9, 2013) (citing *Gould v. Newport News*, No. 2:08cv465, 2008 WL 7182638, at *5 (E.D. Va. Nov. 5, 2008) (summarily dismissing habeas petition because the petitioner's grounds for habeas relief "could be defenses in his upcoming criminal prosecution")). As the Alexandria court noted, "Pendleton—who is a fugitive from justice—should return to Virginia and seek relief directly from the Circuit Court of Arlington County where his arrest warrant and conditional release proceedings are pending." *Pendleton*, 2023 WL 7109681, at *2. Pendleton fails to demonstrate that any exceptional circumstances warrant the consideration of his habeas petition at this time.

Accordingly, Pendleton's § 2254 Petition (ECF No. 1) and the action will be DISMISSED without prejudice because Pendleton has failed to exhaust available state remedies or demonstrate that exceptional circumstances warrant consideration of his petition at this juncture. Pendleton's Motion for Pro Se E-Noticing (ECF No. 3) will be DENIED. A certificate of appealability will be DENIED.

An appropriate Final Order will accompany this Memorandum Opinion.

/s/ RCY
Roderick C. Young
United States District Judge

Date: November 30, 2023
Richmond, Virginia

No. 23-7293

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN PENDLETON,

Petitioner-Appellant,

v.

LOUISE MARIE DIMATTEO, Arlington Circuit Court Judge; PAUL FERGUSON, Arlington Circuit Court Clerk; NELSON SMITH, Commissioner, Virginia Department of Behavioral Health and Developmental Services,

Respondents-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

RESPONDENT NELSON SMITH'S RESPONSE TO PETITIONER'S MOTION FOR RELEASE

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Counsel for Nelson Smith

January 8, 2024

Appendix F

INTRODUCTION

After violating the conditions of his conditional release, Petitioner Jonathan Pendleton fled Virginia. He now seeks release from custody pending appeal of the district court's decision denying his habeas corpus petition. But he is not in custody—he is a fugitive and thus is not entitled to habeas corpus relief. And, in any event, his federal habeas petition is meritless: he brings challenges that were never raised in the Virginia state courts from which he fled. He thus cannot show the requisite "extraordinary circumstances" that would allow his release pending appeal, and his motion should be denied.

FACTUAL BACKGROUND

In March 2014, Pendleton attacked an economics professor at George Mason University with pepper spray. Memorandum Opinion (Op.), Case No. 3:23-cv-734, ECF No. 4 (E.D. Va. Nov. 30, 2023), at 1. Pendleton was charged with malicious wounding by means of a caustic substance, abduction, assault, and battery in Arlington Circuit Court. *Ibid.* In December 2014, he was found not guilty by reason of insanity (NGRI). *Ibid.* Va. Code § 19.2-182.2 requires that all defendants found NGRI be temporarily committed to the custody of the Commissioner of Behavioral Health and Developmental Services—Respondent Nelson

Smith—for evaluation of whether release or commitment is appropriate. Judge DiMatteo committed Pendleton to Respondent Smith's custody for evaluation. Op. 1. After a commitment hearing in May 2015, Pendleton was committed to Central State Hospital for inpatient treatment and was later transferred to the Northern Virginia Mental Health Institute. *Ibid.*

In January 2017, Judge DiMatteo granted Pendleton conditional release, and he was placed on outpatient treatment and monitoring. *Ibid.* Pendleton then violated the conditions of his release, and Judge DiMatteo scheduled a show cause hearing for October 2020. *Id.* at 2. Upon learning that the hearing had been scheduled, Pendleton—according to his own allegations—"fled Arlington" and did not appear for the show cause hearing. *Ibid.* As a result, a warrant was issued for his arrest for the felony offense of leaving Virginia while he was on conditional release, pursuant to Va. Code § 19.2-182.15. In May 2021, at a hearing that Pendleton did not attend because he had fled, Judge DiMatteo revoked his conditional release and ordered him returned to Respondent Smith's custody. Op. 2. The arrest warrant remains active, and Pendleton is identified as a fugitive in the Arlington County Circuit Court records. *Ibid.*

On November 1, 2023, Pendleton filed a habeas petition in the Eastern District of Virginia seeking "relief from his unlawful and prolonged detention under Virginia's facially unconstitutional NGRI statutes." *Id.* at 3. On November 30, 2023, the district court dismissed Pendleton's petition, holding that he was "not currently detained, but has a bench warrant issued for his arrest" and, in any event, "he has not exhausted his state court remedies," and denied a certificate of appealability. *Id.* at 3–5. The court held that "Pendleton—who is a fugitive from justice—should return to Virginia and seek relief directly from the Circuit Court of Arlington County where his arrest warrant and conditional release proceedings are pending." *Id.* at 5 (quotation marks omitted).

Despite not being granted a certificate of appealability, Pendleton noticed an appeal of the district court's decision. ECF No. 1. He also filed a Motion for Release (Mot.) (ECF No. 7), requesting that this Court "[i]ssue a writ of habeas corpus ordering Respondents to release Petitioner" and "[i]ssue a protective order forbidding disclosure of Petitioner's current name." Mot. at 2. This Court ordered a response to the motion. ECF No. 9.

ARGUMENT

Pendleton cannot show extraordinary circumstances that would warrant his release pending appeal. He has also not provided this Court any reason to seal his legal name or the Arlington trial records. For those reasons, his motion should be denied.

1. Pendleton requests a "preliminary release order pursuant to FRAP Rule 23(b)(3) because there is exactly zero chance his custody in Virginia is lawful." Mot. at 1. This request fails because he has not shown extraordinary circumstances necessary for his release under Rule 23(b)(3): he is not in custody in Virginia, and he has not exhausted his state court remedies.

Federal Rule of Appellate Procedure 23(b)(3) provides that, "[w]hile a decision not to release a prisoner is under review," this Court may order that the prisoner be "released on personal recognizance, with or without surety." An appellant attempting to secure his release from custody pursuant to this rule must show "extraordinary circumstances" that necessitate the release. *United States v. Cordaro*, 2016 WL 11707873, at *1 (3d Cir. Mar. 31, 2016) (citing *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992)); see also *In re Addison*, 17 Fed. Appx. 95, 96 (4th Cir.

2001) (denying motion for release on personal recognizance under Rule 23(b)(3)). Pendleton cannot show such extraordinary circumstances.

First and foremost, Pendleton is not being detained; instead, he is a fugitive. The fugitive disentitlement doctrine "limits access to courts in the United States by a fugitive who has fled a criminal conviction in a court in the United States." *In re Prevot*, 59 F.3d 556, 562 (6th Cir. 1995). This Court has applied this doctrine to bar petitions for federal habeas corpus by fugitives. See, *e.g.*, *Brooks v. Muncy*, 856 F.2d 186, at *1 (4th Cir. Aug. 22, 1988). Indeed, if the writ were granted, Respondent Smith would be physically unable to "produce the body and free the prisoner either absolutely or conditionally," because he does not have custody of Pendleton. *Taylor v. Egeler*, 575 F.2d 773 (6th Cir. 1978).

Second, Pendleton did not exhaust his state court remedies. As a general rule, "in the absence of exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent, courts require exhaustion of alternative remedies before a prisoner can seek federal habeas relief." *Timms v. Johns*, 627 F.3d 525, 530–31 (4th Cir. 2010) (cleaned up). In this regard, "[i]n the case of those detained by states, principles of federalism and comity generally require the

exhaustion of available state court remedies before [the federal courts] conduct habeas review of the detention." *Id.* at 531 n.5. Here, as the district court held, the issues raised by Pendleton "may be resolved either by (1) a trial on the merits in the Circuit Court, or (2) subsequent direct and collateral appeals." Op. 4. Instead of seeking federal relief at this juncture, Pendleton "should return to Virginia and seek relief directly from the Circuit Court of Arlington County where his arrest warrant and conditional release proceedings are pending." *Id.* at 5 (quotation marks omitted).

2. Pendleton also requests that various information be sealed before this Court, including his current legal name and the Arlington trial records. See Mot. at 1–2. Because Pendleton has provided no explanation as to why this information should be sealed, this Court should deny his request.

Local Rule 25(c)(2) provides that motions to seal should typically be handled by lower courts. This Court will consider a motion to seal only when, as relevant here, "the need to seal all or part of the record on appeal arises in the first instance during the pendency of an appeal." Local Rule 25(c)(2)(A). A motion to seal filed with this Court must "state the reasons

why sealing is necessary" and "explain why a less drastic alternative to sealing will not afford adequate protection." Local Rule 25(c)(2)(B).

Pendleton's request should be denied for several reasons. First, he did not present a motion to seal before the district court. See *United States v. Garner*, 853 Fed. Appx. 882, 883 (4th Cir. 2021) (denying appellant's motion to seal "as he must present such a motion in the district court" (citing 4th Cir. R. 25(c)(2)(A)). Second, he has not explained why sealing is necessary and why a less drastic alternative to sealing would not afford adequate protection. See, *e.g.*, *Ault v. Waid*, 414 Fed. Appx. 546 (4th Cir. 2011) (denying motion to seal under Local Rule 25(c)(2)); *Yuanjie Du v. McCarthy*, 710 Fed. Appx. 611 (4th Cir. 2018) (same). Finally, he included his legal name in (and attached Arlington trial records to) his habeas petition, see, *e.g.*, Pet. for Writ of Habeas Corpus and Exhibits, Case No. 3:23-cv-734, ECF Nos. 1 to 1-2 (E.D. Va. Nov. 1, 2023), thus undermining the need for sealing at all. See, *e.g.*, *Elfeky v. Secretary U.S. Dep't of Homeland Sec.*, 751 Fed. Appx. 318, 322 (3d Cir. 2018) (affirming denial of motion to seal petitioner's asylum status because "he had already disclosed his asylum status years ago when he filed the lawsuit" (quotation marks omitted)); *Lampon-Paz v.*

Department of Homeland Sec., 532 Fed. Appx. 125, 126 n.3 (3d Cir. 2013) (denying motion to seal information that "was already disclosed in [petitioner's] complaint").

CONCLUSION

For these reasons, Respondent Nelson Smith respectfully requests that Pendleton's Motion for Release be denied.

Respectfully submitted,

NELSON SMITH

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January 8, 2024

Counsel for Nelson Smith

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of June, 2023.

Jonathan Eric Pendleton, Petitioner,

against Record No. 230161

Clerk of Arlington County Circuit Court, et al., Respondents.

Upon a Petition for a Writ of Habeas Corpus

Finding that the petitioner failed to provide proof of service of the petition for a writ of habeas corpus filed herein, as required by Rule 5:7(a)(3), the Court dismisses the said petition.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: Deputy Clerk

Appendix G

Appendix H:

RELEVANT STATUTORY PROVISIONS

Va. Code § 16.1-69.24. Contempt of court.

A. A judge of a district court shall have the same powers and jurisdiction as a judge of a circuit court to punish summarily for contempt, but in no case shall the fine exceed $250 and imprisonment exceed 10 days for the same contempt. From any such fine or sentence, there shall be an appeal of right within the period prescribed in this title and to the court or courts designated therein for appeals in other cases, and the proceedings on such appeal shall conform in all respects to the provisions of §§ 18.2-456 through 18.2-459.

Va. Code § 19.2-167. Accused not to be tried while insane or feebleminded.

No person shall, while he is insane or feebleminded, be tried for a criminal offense.

Va. Code § 19.2-169.5. Evaluation of sanity at the time of the offense; disclosure of evaluation results.

A. Raising issue of sanity at the time of offense; appointment of evaluators. -- If, at any time before trial, the court finds, upon hearing evidence or representations of counsel for the defendant, that there is probable cause to believe that the defendant's sanity will be a significant factor in his defense and that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant's sanity at the time of the offense and, where appropriate, to assist in the development of an insanity defense. Such mental health expert shall be a psychiatrist or a clinical psychologist who (i) has performed forensic examinations, (ii) has successfully completed forensic evaluation training recognized by the Commissioner of Behavioral Health and Developmental Services, (iii) has demonstrated to the Commissioner competence to perform forensic evaluations, and (iv) is included on a list of approved evaluators maintained by the Commissioner. The defendant shall not be entitled to a mental health expert of his own choosing or to funds to employ such expert.

D. The evaluators shall prepare a full report concerning the defendant's sanity at the time of the offense, including whether he may have had a significant mental disease or defect which rendered him insane at the time of the offense. The report shall be prepared within the time period designated by the court, said period to include the time necessary to obtain and evaluate the information specified in subsection C.

Va. Code § 19.2-182.2. Verdict of acquittal by reason of insanity to state the fact; temporary custody and evaluation.

When the defense is insanity of the defendant at the time the offense was committed, the jurors shall be instructed, if they acquit him on that ground, to state the fact with their verdict. The court shall place the person so acquitted (the acquittee) in temporary custody of the Commissioner of Behavioral Health and Developmental Services (hereinafter referred to in this chapter as the Commissioner) for evaluation as to whether the acquittee may be released with or without conditions or requires commitment. The court may authorize that the evaluation be conducted on an outpatient basis. If the court authorizes an outpatient evaluation, the Commissioner shall determine, on the basis of all information available, whether the evaluation shall be conducted on an outpatient basis or whether the acquittee shall be confined in a hospital for evaluation. If the court does not authorize an outpatient evaluation, the acquittee shall be confined in a hospital for evaluation. If an acquittee who is being evaluated on an outpatient basis fails to comply with such evaluation, the Commissioner shall petition the court for an order to confine the acquittee in a hospital for evaluation. A copy of the petition shall be sent to the acquittee's attorney and the attorney for the Commonwealth. The evaluation shall be conducted by (i) one psychiatrist and (ii) one clinical psychologist. The psychiatrist or clinical psychologist shall be skilled in the diagnosis of mental illness and intellectual disability and qualified by training and experience to perform such evaluations. The Commissioner shall appoint both evaluators. In the case of an acquittee confined in a hospital, at least one of the evaluators shall not be employed by the hospital in which the acquittee is primarily confined. The evaluators shall determine whether the acquittee currently has mental illness or intellectual disability and shall assess the acquittee and report on his condition and need for hospitalization with respect to the factors set forth in § 19.2-182.3. The evaluators shall conduct their examinations and report their findings separately within 45 days of the Commissioner's assumption of custody. Copies of the report shall be sent to the acquittee's attorney, the attorney for the Commonwealth for the jurisdiction where the person was acquitted and the community services board or behavioral health authority as designated by the Commissioner. If either evaluator recommends conditional release or release without conditions of the acquittee, the court shall extend the evaluation period to permit (a) the Department of Behavioral Health and Developmental Services and (b) the appropriate community services board or behavioral health authority to jointly prepare a conditional release or discharge plan, as applicable, prior to the hearing.

Va. Code § 19.2-182.3. Commitment; civil proceedings.

Upon receipt of the evaluation report and, if applicable, a conditional release or discharge plan, the court shall schedule the matter for hearing on an expedited basis, giving the matter priority over other civil matters before the court, to determine the appropriate disposition of the acquittee. Except as otherwise ordered by the court, the attorney who represented the defendant at the criminal proceedings shall represent the acquittee through the proceedings pursuant to this section. The matter may be continued on motion of either party for good cause shown. The acquittee shall be provided with adequate notice of the hearing, of the right to be present at the

hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. The hearing is a civil proceeding.

At the conclusion of the hearing, the court shall commit the acquittee if it finds that he has mental illness or intellectual disability and is in need of inpatient hospitalization. For the purposes of this chapter, mental illness includes any mental illness, as defined in § 37.2-100, in a state of remission when the illness may, with reasonable probability, become active. The decision of the court shall be based upon consideration of the following factors:

1. To what extent the acquittee has mental illness or intellectual disability, as those terms are defined in § 37.2-100;

2. The likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to other persons or to himself in the foreseeable future;

3. The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and

4. Such other factors as the court deems relevant.

If the court determines that an acquittee does not need inpatient hospitalization solely because of treatment or habilitation he is currently receiving, but the court is not persuaded that the acquittee will continue to receive such treatment or habilitation, it may commit him for inpatient hospitalization. The court shall order the acquittee released with conditions pursuant to §§ 19.2-182.7, 19.2-182.8, and 19.2-182.9 if it finds that he is not in need of inpatient hospitalization but that he meets the criteria for conditional release set forth in § 19.2-182.7. If the court finds that the acquittee does not need inpatient hospitalization nor does he meet the criteria for conditional release, it shall release him without conditions, provided the court has approved a discharge plan prepared by the appropriate community services board or behavioral health authority in consultation with the appropriate hospital staff.

The court shall order that any person acquitted by reason of insanity and committed pursuant to this section who is sentenced to a term of incarceration for any other offense in the same proceeding or in any proceeding conducted prior to the proceeding in which the person is acquitted by reason of insanity complete any sentence imposed for such other offense prior to being placed in the custody of the Commissioner of Behavioral Health and Developmental Services until released from commitment pursuant to this chapter. The court shall order that any person acquitted by reason of insanity and committed pursuant to this section who is sentenced to a term of incarceration in any proceeding conducted during the period of commitment be transferred to the custody of the correctional facility where he is to serve his sentence, and, upon completion of his sentence, such person shall be placed in the custody of the Commissioner of

Behavioral Health and Developmental Services until released from commitment pursuant to this chapter.

Va. Code § 19.2-182.5. Review of continuation of confinement hearing; procedure and reports; disposition.

A. The committing court shall conduct a hearing twelve months after the date of commitment to assess the need for inpatient hospitalization of each acquittee who is acquitted of a felony by reason of insanity. A hearing for assessment shall be conducted at yearly intervals for five years and at biennial intervals thereafter. The court shall schedule the matter for hearing as soon as possible after it becomes due, giving the matter priority over all pending matters before the court.

B. Prior to the hearing, the Commissioner shall provide to the court a report evaluating the acquittee's condition and recommending treatment, to be prepared by a psychiatrist or a psychologist. The psychologist who prepares the report shall be a clinical psychologist and any evaluating psychiatrist or clinical psychologist shall be skilled in the diagnosis of mental illness and qualified by training and experience to perform forensic evaluations. If the examiner recommends release or the acquittee requests release, the acquittee's condition and need for inpatient hospitalization shall be evaluated by a second person with such credentials who is not currently treating the acquittee. A copy of any report submitted pursuant to this subsection shall be sent to the attorney for the Commonwealth for the jurisdiction from which the acquittee was committed.

C. The acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. Written notice of the hearing shall be provided to the attorney for the Commonwealth for the committing jurisdiction. The hearing is a civil proceeding and may be conducted using a two-way electronic video and audio communication system that meets the standards set forth in subsection B of § 19.2-3.1, unless objected to by the acquittee, the acquittee's attorney, or the attorney for the Commonwealth.

According to the determination of the court following the hearing, and based upon the report and other evidence provided at the hearing, the court shall (i) release the acquittee from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in § 19.2-182.7, provided the court has approved a discharge plan prepared jointly by the hospital staff and the appropriate community services board or behavioral health authority; (ii) place the acquittee on conditional release if he meets the criteria for conditional release, and the court has approved a conditional release plan prepared jointly by the hospital staff and the appropriate community services board or behavioral health authority; or (iii) order that he remain in the custody of the Commissioner if he continues to require inpatient hospitalization based on consideration of the factors set forth in § 19.2-182.3.

D. An acquittee who is found not guilty of a misdemeanor by reason of insanity on or after July 1, 2002, shall remain in the custody of the Commissioner pursuant to this chapter for a period not to exceed one year from the date of acquittal. If, prior to or at the conclusion of one year, the Commissioner determines that the acquittee meets the criteria for conditional release or release without conditions pursuant to § 19.2-182.7, emergency custody pursuant to § 37.2-808, temporary detention pursuant to §§ 37.2-809 to 37.2-813, or involuntary commitment pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, he shall petition the committing court. Written notice of an acquittee's scheduled release shall be provided by the Commissioner to the attorney for the Commonwealth for the committing jurisdiction not less than thirty days prior to the scheduled release. The Commissioner's duty to file a petition upon such determination shall not preclude the ability of any other person meeting the requirements of § 37.2-808 to file the petition.

Va. Code § 19.2-182.7. Conditional release; criteria; conditions; reports.

At any time the court considers the acquittee's need for inpatient hospitalization pursuant to this chapter, it shall place the acquittee on conditional release if it finds that (i) based on consideration of the factors which the court must consider in its commitment decision, he does not need inpatient hospitalization but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need inpatient hospitalization; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the acquittee, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety. The court shall subject a conditionally released acquittee to such orders and conditions it deems will best meet the acquittee's need for treatment and supervision and best serve the interests of justice and society.

The community services board or behavioral health authority as designated by the Commissioner shall implement the court's conditional release orders and shall submit written reports to the court on the acquittee's progress and adjustment in the community no less frequently than every six months. An acquittee's conditional release shall not be revoked solely because of his voluntary admission to a state hospital.

After a finding by the court that the acquittee has violated the conditions of his release but does not require inpatient hospitalization pursuant to § 19.2-182.8, the court may hold the acquittee in contempt of court for violation of the conditional release order.

Va. Code § 19.2-182.8. Revocation of conditional release.

If at any time the court that released an acquittee pursuant to § 19.2-182.7 finds reasonable ground to believe that an acquittee on conditional release (i) has violated the conditions of his release or is no longer a proper subject for conditional release based on application of the criteria

for conditional release and (ii) requires inpatient hospitalization, it may order an evaluation of the acquittee by a psychiatrist or clinical psychologist, provided the psychiatrist or clinical psychologist is qualified by training and experience to perform forensic evaluations. If the court, based on the evaluation and after hearing evidence on the issue, finds by a preponderance of the evidence that an acquittee on conditional release (a) has violated the conditions of his release or is no longer a proper subject for conditional release based on application of the criteria for conditional release and (b) has mental illness or intellectual disability and requires inpatient hospitalization, the court may revoke the acquittee's conditional release and order him returned to the custody of the Commissioner.

At any hearing pursuant to this section, the acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. The hearing shall be scheduled on an expedited basis and shall be given priority over other civil matters before the court. Written notice of the hearing shall be provided to the attorney for the Commonwealth for the committing jurisdiction. The hearing is a civil proceeding.

Va. Code § 19.2-182.11. Modification or removal of conditions; notice; objections; review.

A. The committing court may modify conditions of release or remove conditions placed on release pursuant to § 19.2-182.7, upon petition of the supervising community services board or behavioral health authority, the attorney for the Commonwealth, or the acquittee or upon its own motion based on reports of the supervising community services board or behavioral health authority. However, the acquittee may petition only annually commencing six months after the conditional release order is issued. Upon petition, the court shall require the supervising community services board or behavioral health authority to provide a report on the acquittee's progress while on conditional release.

B. As it deems appropriate based on the community services board's or behavioral health authority's report and any other evidence provided to it, the court may issue a proposed order for modification or removal of conditions. The court shall provide notice of the order, and their right to object to it within ten days of its issuance, to the acquittee, the supervising community services board or behavioral health authority and the attorney for the Commonwealth for the committing jurisdiction and for the jurisdiction where the acquittee is residing on conditional release. The proposed order shall become final if no objection is filed within ten days of its issuance. If an objection is so filed, the court shall conduct a hearing at which the acquittee, the attorney for the Commonwealth, and the supervising community services board or behavioral health authority have an opportunity to present evidence challenging the proposed order. At the conclusion of the hearing, the court shall issue an order specifying conditions of release or removing existing conditions of release.

Va. Code § 19.2-182.15. Escape of persons placed on conditional release; penalty.

Any person placed on conditional release pursuant to § 19.2-182.7 who leaves the Commonwealth without permission from the court which conditionally released the person shall be guilty of a Class 6 felony.

§ 37.2-814. Commitment hearing for involuntary admission; written explanation; right to counsel; rights of petitioner.

A. The commitment hearing for involuntary admission shall be held after a sufficient period of time has passed to allow for completion of the examination required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-816, and initiation of mental health treatment to stabilize the person's psychiatric condition to avoid involuntary commitment where possible, but shall be held within 72 hours of the execution of the temporary detention order as provided for in § 37.2-809; however, if the 72-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the person may be detained, as herein provided, until the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed.

B. At the commencement of the commitment hearing, the district court judge or special justice shall inform the person whose involuntary admission is being sought of his right to apply for voluntary admission for inpatient treatment as provided for in § 37.2-805 and shall afford the person an opportunity for voluntary admission. The district court judge or special justice shall advise the person whose involuntary admission is being sought that if the person chooses to be voluntarily admitted pursuant to § 37.2-805, such person will be prohibited from possessing, purchasing, or transporting a firearm pursuant to § 18.2-308.1:3. The judge or special justice shall ascertain if the person is then willing and capable of seeking voluntary admission for inpatient treatment. In determining whether a person is capable of consenting to voluntary admission, the judge or special justice may consider evidence regarding the person's past compliance or noncompliance with treatment. If the judge or special justice finds that the person is capable and willingly accepts voluntary admission for inpatient treatment, the judge or special justice shall require him to accept voluntary admission for a minimum period of treatment not to exceed 72 hours. After such minimum period of treatment, the person shall give the facility 48 hours' notice prior to leaving the facility. During this notice period, the person shall not be discharged except as provided in § 37.2-837, 37.2-838, or 37.2-840. The person shall be subject to the transportation provisions as provided in § 37.2-829 and the requirement for preadmission screening by a community services board as provided in § 37.2-805.

C. If a person is incapable of accepting or unwilling to accept voluntary admission and treatment, the judge or special justice shall inform the person of his right to a commitment hearing and right to counsel. The judge or special justice shall ascertain if the person whose admission is sought is represented by counsel, and, if he is not represented by counsel, the judge or special justice shall appoint an attorney to represent him. However, if the person requests an

opportunity to employ counsel, the judge or special justice shall give him a reasonable opportunity to employ counsel at his own expense.

D. A written explanation of the involuntary admission process and the statutory protections associated with the process shall be given to the person, and its contents shall be explained by an attorney prior to the commitment hearing. The written explanation shall describe, at a minimum, the person's rights to (i) retain private counsel or be represented by a court-appointed attorney, (ii) present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, (iii) be present during the hearing and testify, (iv) appeal any order for involuntary admission to the circuit court, and (v) have a jury trial on appeal. The judge or special justice shall ascertain whether the person whose involuntary admission is sought has been given the written explanation required herein.

E. To the extent possible, during or before the commitment hearing, the attorney for the person whose involuntary admission is sought shall interview his client, the petitioner, the examiner described in § 37.2-815, the community services board staff, and any other material witnesses. He also shall examine all relevant diagnostic and other reports, present evidence and witnesses, if any, on his client's behalf, and otherwise actively represent his client in the proceedings. A health care provider shall disclose or make available all such reports, treatment information, and records concerning his client to the attorney, upon request. The role of the attorney shall be to represent the wishes of his client, to the extent possible.

F. The petitioner shall be given adequate notice of the place, date, and time of the commitment hearing. The petitioner shall be entitled to retain counsel at his own expense, to be present during the hearing, and to testify and present evidence. The petitioner shall be encouraged but shall not be required to testify at the hearing, and the person whose involuntary admission is sought shall not be released solely on the basis of the petitioner's failure to attend or testify during the hearing.

Va. Code § 37.2-817. Involuntary admission.

A. The district court judge or special justice shall render a decision on the petition for involuntary admission after the appointed examiner has presented the report required by § 37.2-815, and after the community services board that serves the county or city where the person resides or, if impractical, where the person is located has presented a preadmission screening report with recommendations for that person's placement, care, and treatment pursuant to § 37.2-816. These reports, if not contested, may constitute sufficient evidence upon which the district court judge or special justice may base his decision. The examiner, if not physically present at the hearing, and the treating physician at the facility of temporary detention shall be available whenever possible for questioning during the hearing through a two-way electronic video and audio or telephonic communication system as authorized in § 37.2-804.1.

B. Any employee or designee of the local community services board, as defined in § 37.2-809, representing the community services board that prepared the preadmission screening report shall attend the hearing in person or, if physical attendance is not practicable, shall participate in the hearing through a two-way electronic video and audio or telephonic communication system as authorized in § 37.2-804.1. Where a hearing is held outside of the service area of the community services board that prepared the preadmission screening report, and it is not practicable for a representative of the community services board that prepared the preadmission screening report to attend or participate in the hearing, arrangements shall be made by the community services board that prepared the preadmission screening report for an employee or designee of the community services board serving the area in which the hearing is held to attend or participate on behalf of the community services board that prepared the preadmission screening report. The employee or designee of the local community services board, as defined in § 37.2-809, representing the community services board that prepared the preadmission screening report or attending or participating on behalf of the community services board that prepared the preadmission screening report shall not be excluded from the hearing pursuant to an order of sequestration of witnesses. The community services board that prepared the preadmission screening report shall remain responsible for the person subject to the hearing and, prior to the hearing, shall send the preadmission screening report through certified mail, personal delivery, facsimile with return receipt acknowledged, or other electronic means with documented acknowledgment of receipt to the community services board attending the hearing. Where a community services board attends the hearing on behalf of the community services board that prepared the preadmission screening report, the attending community services board shall inform the community services board that prepared the preadmission screening report of the disposition of the matter upon the conclusion of the hearing. In addition, the attending community services board shall transmit the disposition through certified mail, personal delivery, facsimile with return receipt acknowledged, or other electronic means with documented acknowledgment of receipt.

At least 12 hours prior to the hearing, the court shall provide to the community services board that prepared the preadmission screening report the time and location of the hearing. If the representative of the community services board that prepared the preadmission screening report will be present by telephonic means, the court shall provide the telephone number to the community services board. If a representative of a community services board will be attending the hearing on behalf of the community services board that prepared the preadmission screening report, the community services board that prepared the preadmission screening report shall promptly communicate the time and location of the hearing and, if the representative of the community services board attending on behalf of the community services board that prepared the preadmission screening report will be present by telephonic means, the telephone number to the attending community services board.

C. After observing the person and considering (i) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (ii) any past actions of the person, (iii) any past mental health treatment of the person, (iv) any examiner's certification, (v)

any health records available, (vi) the preadmission screening report, and (vii) any other relevant evidence that may have been admitted, including whether the person recently has been found unrestorably incompetent to stand trial after a hearing held pursuant to subsection E of § 19.2-169.1, if the judge or special justice finds by clear and convincing evidence that (a) the person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (2) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, and (b) all available less restrictive treatment alternatives to involuntary inpatient treatment that would offer an opportunity for the improvement of the person's condition have been investigated and determined to be inappropriate, the judge or special justice shall by written order and specific findings so certify and order that the person be admitted involuntarily to a facility for a period of treatment not to exceed 30 days from the date of the court order. Such involuntary admission shall be to a facility designated by the community services board that serves the county or city in which the person was examined as provided in § 37.2-816. If the community services board does not designate a facility at the commitment hearing, the person shall be involuntarily admitted to a facility designated by the Commissioner. Upon the expiration of an order for involuntary admission, the person shall be released unless (A) he is involuntarily admitted by further petition and order of a court, which shall be for a period not to exceed 180 days from the date of the subsequent court order, (B) he makes application for treatment on a voluntary basis as provided for in § 37.2-805, or (C) he is ordered to mandatory outpatient treatment following a period of inpatient treatment pursuant to § 37.2-817.01.

Va. Code § 37.2-817.01. Mandatory outpatient treatment.

A. Prior to ordering involuntary admission pursuant to § 37.2-817, a judge or special justice shall investigate and determine whether (i) mandatory outpatient treatment is appropriate as a less restrictive alternative to admission pursuant to subsection B or (ii) mandatory outpatient treatment following a period of inpatient treatment is appropriate pursuant to subsection C.

B. After observing the person and considering (i) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (ii) any past actions of the person, (iii) any past mental health treatment of the person, (iv) any examiner's certification, (v) any health records available, (vi) the preadmission screening report, and (vii) any other relevant evidence that may have been admitted, if the judge or special justice finds by clear and convincing evidence that (a) the person has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (2) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (b) less restrictive alternatives to involuntary inpatient treatment that would offer an opportunity for improvement of his condition have been investigated and are determined to be appropriate, as

reflected in the initial outpatient treatment plan prepared in accordance with subsection F, (c) the person has the ability to adhere to the mandatory outpatient treatment plan, and (d) the ordered treatment will be delivered on an outpatient basis by the community services board or designated provider to the person, the judge or special justice shall by written order and specific findings so certify and order that the person be admitted involuntarily to mandatory outpatient treatment. Less restrictive alternatives shall not be determined to be appropriate unless the services are actually available in the community. The duration of mandatory outpatient treatment shall be determined by the court based on recommendations of the community services board but shall not exceed 180 days; in prescribing the terms of the order, including its length, the judge or special justice shall consider the impact on the person's opportunities and obligations, including education and employment. Upon expiration of an order for mandatory outpatient treatment, the person shall be released from the requirements of the order unless the order is continued in accordance with § 37.2-817.4.

C. Upon finding by clear and convincing evidence that, in addition to the findings described in subsection C of § 37.2-817, (i) the person has a history of lack of adherence to treatment for mental illness that has, at least twice within the past 36 months, resulted in the person being subject to an order for involuntary admission pursuant to subsection C of § 37.2-817 or being subject to a temporary detention order and then voluntarily admitting himself in accordance with subsection B of § 37.2-814, except that such 36-month period shall not include any time during which the person was receiving inpatient psychiatric treatment or was incarcerated, as established by evidence admitted at the hearing, (ii) in view of the person's treatment history and current behavior, the person is in need of mandatory outpatient treatment following inpatient treatment in order to prevent a relapse or deterioration that would be likely to result in the person meeting the criteria for involuntary inpatient treatment, (iii) the person has the ability to adhere to the comprehensive mandatory outpatient treatment plan, and (iv) the person is likely to benefit from mandatory outpatient treatment, the judge or special justice may order that, upon discharge from inpatient treatment, the person adhere to a comprehensive mandatory outpatient treatment plan.

The period of mandatory outpatient treatment shall begin upon discharge of the person from involuntary inpatient treatment, either upon expiration of the order for inpatient treatment pursuant to subsection C of § 37.2-817 or pursuant to § 37.2-837 or 37.2-838. The duration of mandatory outpatient treatment shall be determined by the court on the basis of recommendations of the community services board, and the maximum period of mandatory outpatient treatment shall not exceed 180 days; in prescribing the terms of the order, including its length, the judge or special justice shall consider the impact on the person's opportunities and obligations, including education and employment.

The treating physician and facility staff shall develop the comprehensive mandatory outpatient treatment plan in conjunction with the community services board and the person. The comprehensive mandatory outpatient treatment plan shall include all of the components described in, and shall be filed with the court and incorporated into, the order for mandatory

outpatient treatment following a period of involuntary inpatient treatment in accordance with subsection G. The community services board where the person resides upon discharge shall monitor the person's progress and adherence to the comprehensive mandatory outpatient treatment plan. Upon expiration of the order for mandatory outpatient treatment following a period of involuntary inpatient treatment, the person shall be released unless the order is continued in accordance with § 37.2-817.4.

D. At any time prior to the discharge of a person who has been involuntarily admitted pursuant to subsection C of § 37.2-817, the person, the person's treating physician, a family member or personal representative of the person, or the community services board serving the county or city where the facility is located, the county or city where the person resides, or the county or city where the person will receive treatment following discharge may file a motion with the court for a hearing to determine whether such person should be ordered to mandatory outpatient treatment following a period of inpatient treatment upon discharge if such person, on at least two previous occasions within 36 months preceding the date of the hearing, has been (i) involuntarily admitted pursuant to subsection C of § 37.2-817 or (ii) the subject of a temporary detention order and voluntarily admitted himself in accordance with subsection B of § 37.2-814, except that such 36-month period shall not include any time during which the person was receiving inpatient psychiatric treatment or was incarcerated, as established by evidence admitted at the hearing. A district court judge or special justice shall hold the hearing within 72 hours after receiving the motion for a hearing to determine whether the person should be ordered to mandatory outpatient treatment following a period of involuntary inpatient treatment; however, if the 72-hour period expires on a Saturday, Sunday, or legal holiday, the hearing shall be held by the close of business on the next day that is not a Saturday, Sunday, or legal holiday. The district court judge or special justice may enter an order for a period of mandatory outpatient treatment following a period of involuntary inpatient treatment upon finding that the person meets the criteria set forth in subsection C.

E. Mandatory outpatient treatment may include day treatment in a hospital, night treatment in a hospital, outpatient involuntary treatment with antipsychotic medication pursuant to Chapter 11 (§ 37.2-1100 et seq.), or other appropriate course of treatment as may be necessary to meet the needs of the person. Mandatory outpatient treatment shall not include the use of restraints or physical force of any kind in the provision of the medication. The community services board that serves the county or city in which the person resides shall recommend a specific course of treatment and programs for the provision of mandatory outpatient treatment.

F. Any order for mandatory outpatient treatment entered pursuant to subsection B shall include an initial mandatory outpatient treatment plan developed by the community services board that completed the preadmission screening report. The plan shall, at a minimum, (i) identify the specific services to be provided, (ii) identify the provider who has agreed to provide each service, (iii) describe the arrangements made for the initial in-person appointment or contact with each service provider, and (iv) include any other relevant information that may be available regarding the mandatory outpatient treatment ordered. The order shall require the community

services board to monitor the implementation of the mandatory outpatient treatment plan and the person's progress and adherence to the initial mandatory outpatient treatment plan.

G. The community services board where the person resides that is responsible for monitoring the person's progress and adherence to the comprehensive mandatory outpatient treatment plan shall file a comprehensive mandatory outpatient treatment plan no later than five days, excluding Saturdays, Sundays, or legal holidays, after an order for mandatory outpatient treatment has been entered pursuant to subsection B. The community services board where the person resides that is responsible for monitoring the person's progress and adherence to the comprehensive mandatory outpatient treatment plan shall file a comprehensive mandatory outpatient treatment plan prior to discharging a person to mandatory outpatient treatment pursuant to subsection C or D. The comprehensive mandatory outpatient treatment plan shall (i) identify the specific type, amount, duration, and frequency of each service to be provided to the person; (ii) identify the provider that has agreed to provide each service included in the plan; (iii) certify that the services are the most appropriate and least restrictive treatment available for the person; (iv) certify that each provider has complied and continues to comply with applicable provisions of the Department's licensing regulations; (v) be developed with the fullest possible involvement and participation of the person and his family, with the person's consent, and reflect his preferences to the greatest extent possible to support his recovery and self-determination, including incorporating any preexisting crisis plan or advance directive of the person; (vi) specify the particular conditions to which the person shall be required to adhere; and (vii) describe (a) how the community services board shall monitor the person's progress and adherence to the plan and (b) any conditions, including scheduled meetings or continued adherence to medication, necessary for mandatory outpatient treatment to be appropriate for the person. The community services board shall submit the comprehensive mandatory outpatient treatment plan to the court for approval. Upon approval by the court, the comprehensive mandatory outpatient treatment plan shall be filed with the court and incorporated into the order of mandatory outpatient treatment entered pursuant to subsection B, C, or D, as appropriate. A copy of the comprehensive mandatory outpatient treatment plan shall be provided to the person by the community services board upon approval of the comprehensive mandatory outpatient treatment plan by the court.

H. If the community services board responsible for developing a comprehensive mandatory outpatient treatment plan pursuant to subsection B, C, or D determines that the services necessary for the treatment of the person's mental illness are not available or cannot be provided to the person in accordance with the order for mandatory outpatient treatment, it shall petition the court for rescission of the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment in accordance with the provisions of subsection D of § 37.2-817.1.

I. Upon entry of any order for mandatory outpatient treatment pursuant to subsection B or mandatory outpatient treatment following a period of involuntary inpatient treatment pursuant to subsection C or D, the clerk of the court shall provide a copy of the order to the person who is

the subject of the order, to his attorney, and to the community services board required to monitor the person's progress and adherence to the comprehensive mandatory outpatient treatment plan. The community services board shall acknowledge receipt of the order to the clerk of the court on a form established by the Office of the Executive Secretary of the Supreme Court and provided by the court for this purpose within five business days.

J. The court may transfer jurisdiction of the case to the district court where the person resides at any time after the entry of the mandatory outpatient treatment order. The community services board responsible for monitoring the person's progress and adherence to the comprehensive mandatory outpatient treatment plan shall remain responsible for monitoring the person's progress and adherence to the plan until the community services board serving the locality to which jurisdiction of the case has been transferred acknowledges the transfer and receipt of the order to the clerk of the court on a form established by the Office of the Executive Secretary of the Supreme Court and provided by the court for this purpose. The community services board serving the locality to which jurisdiction of the case has been transferred shall acknowledge the transfer and receipt of the order within five business days.

K. Any order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.

Va. Code § 37.2-817.1. Monitoring and court review of mandatory outpatient treatment.

A. As used in this section, "material nonadherence" means deviation from a comprehensive mandatory outpatient treatment plan by a person who is subject to an order for mandatory outpatient treatment following a period of involuntary inpatient treatment pursuant to subsection C or D of § 37.2-817.01 or an order for mandatory outpatient treatment pursuant to subsection B of § 37.2-817.01 that it is likely to lead to the person's relapse or deterioration and for which the person cannot provide a reasonable explanation.

B. The community services board where the person resides shall monitor the person's progress and adherence to the comprehensive mandatory outpatient treatment plan prepared in accordance with § 37.2-817.01. Such monitoring shall include (i) contacting or making documented efforts to contact the person regarding the comprehensive mandatory outpatient treatment plan and any support necessary for the person to adhere to the comprehensive mandatory outpatient treatment plan, (ii) contacting the service providers to determine if the person is adhering to the comprehensive mandatory outpatient treatment plan and, in the event of material nonadherence, if the person fails or refuses to cooperate with efforts of the community services board or providers of services identified in the comprehensive mandatory outpatient treatment plan to address the factors leading to the person's material nonadherence, petitioning for a review hearing pursuant to this section. Service providers identified in the comprehensive

mandatory outpatient treatment plan shall report any material nonadherence and any material changes in the person's condition to the community services board. Any finding of material nonadherence shall be based upon a totality of the circumstances.

C. The community services board responsible for monitoring the person's progress and adherence to the comprehensive mandatory outpatient treatment plan shall report monthly, in writing, to the court regarding the person's and the community services board's compliance with the provisions of the comprehensive mandatory outpatient treatment plan. If the community services board determines that the deterioration of the condition or behavior of a person who is subject to an order for mandatory outpatient treatment following a period of involuntary inpatient treatment pursuant to subsection C or D of § 37.2-817.01 or a mandatory outpatient treatment order pursuant to subsection B of § 37.2-817.01 is such that there is a substantial likelihood that, as a result of the person's mental illness, the person will, in the near future, (i) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (ii) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, it shall immediately request that the magistrate issue an emergency custody order pursuant to § 37.2-808 or a temporary detention order pursuant to § 37.2-809. Entry of an emergency custody order, temporary detention order, or involuntary inpatient treatment order shall suspend but not rescind an existing order for mandatory outpatient treatment following a period of involuntary inpatient treatment pursuant to subsection C or D of § 37.2-817.01 or a mandatory outpatient treatment order pursuant to subsection B of § 37.2-817.01.

D. The district court judge or special justice shall hold a hearing within five days after receiving the petition for review of the comprehensive mandatory outpatient treatment plan; however, if the fifth day is a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the hearing shall be held by the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed. The clerk shall provide notice of the hearing to the person, the community services board, all treatment providers listed in the comprehensive mandatory outpatient treatment order or discharge plan, and the original petitioner for the person's involuntary treatment. If the person is not represented by counsel, the court shall appoint an attorney to represent the person in this hearing and any subsequent hearing under this section or § 37.2-817.4, giving consideration to appointing the attorney who represented the person at the proceeding that resulted in the issuance of the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment. The same judge or special justice that presided over the hearing resulting in the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment need not preside at the nonadherence hearing or any subsequent hearings. The community services board shall offer to arrange the person's transportation to the hearing if the person is not detained and has no other source of transportation.

Any of the following may petition the court for a hearing pursuant to this subsection: (i) the person who is subject to the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment; (ii) the community services board responsible for monitoring the person's progress and adherence to the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment; (iii) a treatment provider designated in the comprehensive mandatory outpatient treatment plan; (iv) the person who originally filed the petition that resulted in the entry of the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment; (v) any health care agent designated in the advance directive of the person who is the subject of the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment; or (vi) if the person who is the subject of the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment has been determined to be incapable of making an informed decision, the person's guardian or other person authorized to make health care decisions for the person pursuant to § 54.1-2986.

A petition filed pursuant to this subsection may request that the court do any of the following:

1. Enforce a mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment and require the person who is the subject of the order to adhere to the comprehensive mandatory outpatient treatment plan, in the case of material nonadherence;

2. Modify a mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment or a comprehensive mandatory outpatient treatment plan due to a change in circumstances, including changes in the condition, behavior, living arrangement, or access to services of the person who is the subject to the order; or

3. Rescind a mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment.

At any time after 30 days from entry of the mandatory outpatient treatment order pursuant to subsection B of § 37.2-817.01 or from the discharge of the person from involuntary inpatient treatment pursuant to an order under subsection C or D of § 37.2-817.01, the person may petition the court to rescind the order. The person shall not file a petition to rescind the order more than once during a 90-day period.

E. If requested in a petition filed pursuant to subsection D or on the court's own motion, the court may appoint an examiner in accordance with § 37.2-815 who shall personally examine the person on or before the date of the review, as directed by the court, and certify to the court

whether or not he has probable cause to believe that the person meets the criteria for mandatory outpatient treatment as specified in subsection B, C, or D of § 37.2-817.01, as may be applicable. The examination shall include all applicable requirements of § 37.2-815. The certification of the examiner may be admitted into evidence without the appearance of the examiner at the hearing if not objected to by the person or his attorney. If the person is not incarcerated or receiving treatment in an inpatient facility, the community services board shall arrange for the person to be examined at a convenient location and time. The community services board shall offer to arrange for the person's transportation to the examination if the person has no other source of transportation and resides within the service area or an adjacent service area of the community services board. If the person refuses or fails to appear, the community services board shall notify the court, or a magistrate if the court is not available, and the court or magistrate shall issue a mandatory examination order and capias directing the primary law-enforcement agency in the jurisdiction where the person resides to transport the person to the examination. The person shall remain in custody until a temporary detention order is issued or until the person is released, but in no event shall the period exceed eight hours.

F. If the person fails to appear for the hearing, the court may, after consideration of any evidence regarding why the person failed to appear at the hearing, (i) dismiss the petition, (ii) issue an emergency custody order pursuant to § 37.2-808, or (iii) reschedule the hearing pursuant to subsection D and issue a subpoena for the person's appearance at the hearing and enter an order for mandatory examination, to be conducted prior to the hearing and in accordance with subsection E.

G. After observing the person and considering (i) the recommendations of any treating or examining physician or psychologist licensed to practice in the Commonwealth, if available, (ii) the person's adherence to the comprehensive mandatory outpatient treatment plan, (iii) any past mental health treatment of the person, (iv) any examiner's certification, (v) any health records available, (vi) any report from the community services board, and (vii) any other relevant evidence that may have been admitted at the hearing, the judge or special justice shall make one of the following dispositions:

1. In a hearing on any petition seeking enforcement of a mandatory outpatient treatment order, upon finding that continuing mandatory outpatient treatment is warranted, the court shall direct the person to fully comply with the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment and may make any modifications to such order or the comprehensive mandatory outpatient treatment plan that are acceptable to the community services board or treatment provider responsible for the person's treatment. In determining the appropriateness of the outpatient treatment specified in such order and the comprehensive mandatory outpatient treatment plan, the court may consider the person's material nonadherence to the existing mandatory treatment order.

2. In a hearing on any petition seeking modification of a mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient

treatment, upon a finding that (i) one or more modifications of the order would benefit the person and help prevent relapse or deterioration of the person's condition, (ii) the community services board and the treatment provider responsible for the person's treatment are able to provide services consistent with such modification, and (iii) the person is able to adhere to the modified comprehensive mandatory outpatient treatment plan, the court may order such modification of the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment or the comprehensive mandatory outpatient treatment plan as the court finds appropriate.

3. In a hearing on any petition filed to enforce, modify, or rescind a mandatory outpatient treatment order, upon finding that mandatory outpatient treatment is no longer appropriate, the court may rescind the order.

H. The judge or special justice may schedule periodic status hearings for the purpose of obtaining information regarding the person's progress while the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment remains in effect. The clerk shall provide notice of the hearing to the person who is the subject of the order and the community services board responsible for monitoring the person's condition and adherence to the plan. The person shall have the right to be represented by counsel at the hearing, and if the person does not have counsel the court shall appoint an attorney to represent the person. However, status hearings may be held without counsel present by mutual consent of the parties. The community services board shall offer to arrange the person's transportation to the hearing if the person is not detained and has no other source of transportation. During a status hearing, the treatment plan may be amended upon mutual agreement of the parties. Contested matters shall not be decided during a status hearing, nor shall any decision regarding enforcement, rescission, or renewal of the order be entered.

Va. Code § 37.2-817.4. Continuation of mandatory outpatient treatment order.

A. At any time within 30 days prior to the expiration of a mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment, any person or entity that may file a petition for review of a mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment pursuant to subsection D of § 37.2-817.1 may petition the court to continue the order for a period not to exceed 180 days.

B. If the person who is the subject of the order and the monitoring community services board, if it did not initiate the petition, join the petition, the court shall grant the petition and enter an appropriate order without further hearing. If either the person or the monitoring community services board does not join the petition, the court shall schedule a hearing and provide notice of the hearing in accordance with subsection D of § 37.2-817.1.

C. Upon receipt of a contested petition for continuation, the court shall appoint an examiner who shall personally examine the person pursuant to subsection E of § 37.2-817.1. The community services board required to monitor the person's adherence to the mandatory outpatient treatment order or order for mandatory outpatient treatment following a period of involuntary inpatient treatment shall provide a report addressing whether the person continues to meet the criteria for being subject to a mandatory outpatient treatment order pursuant to subsection B of § 37.2-817.01 or order for mandatory outpatient treatment following a period of involuntary inpatient treatment pursuant to subsection C or D of § 37.2-817.01, as may be appropriate.

D. If, after observing the person, reviewing the report of the community services board provided pursuant to subsection C and considering the appointed examiner's certification and any other relevant evidence submitted at the hearing, the court finds that the person continues to meet the criteria for mandatory outpatient treatment pursuant to subsection B, C, or D of § 37.2-817.01, it may continue the order for a period not to exceed 180 days; in prescribing the terms of the order, including its length, the judge or special justice shall consider the impact on the person's opportunities and obligations, including education and employment. Any order of mandatory outpatient treatment that is in effect at the time a petition for continuation of the order is filed shall remain in effect until the disposition of the hearing.