IN THE CIRCUIT COURT FOR BALTIMORE CITY

GEORGE SWANN, by his next friend, Yvonne Perret 1116 Bedford Street Cumberland, MD 21502	* * * * *	
DONALD DISTANCE, by his next friend, Denise Coles 18 Lockett Court Baltimore, MD 21221	* * * * *	
JAMES SILVER, by his next friend, Stephen Johnson 3901 Park Heights Avenue; 2nd Floor Baltimore, MD 21215	* * * * *	Civil Action No. ______________
VERNELSON BRINKLEY, Jr, by his next friend, Emily Hoffman 1410 Weldon Place South Baltimore, MD 21211	* * * * *	
EDWARD JORDAN, by his next friend, Diane Triplett 2200 Kernan Drive Baltimore, MD 21207	* * * * *	
MARYLAND DISABILITY LAW CENTER 1800 N. Charles St., #400 Baltimore, Maryland 21201 Plaintiffs,	* * * * *	
v.	* *	
STATE OF MARYLAND Defendant	* *	

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PLAINTFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

I. Introduction.

The Plaintiffs' seek a declaration that Md. Code Ann., Crim.Proc. §3-106(c)(2003 Supp.)[1] is unconstitutional on its face and as applied to the Plaintiffs because it allows for their indefinite continued commitment for treatment to restore competency to stand trial regardless of whether they may soon be so restored. The Plaintffs also seek a permanent injunction enjoining the Defendant from committing, or continuing to commit, an individual beyond a reasonable period to determine whether there is a substantial likelihood that he may be restored to competency to stand trial in the foreseeable future and whether there has been sufficient progress toward that goal. The Plaintiffs further seek a permanent injunction enjoining the Defendant from continuing to confine them for treatment to restore capacity to stand trial for more than a one-year period, or the maximum sentence that they could have received if convicted of the charges against them, whichever is a lesser period. In addition, the individually named Plaintiffs seek a preliminary injunction enjoining the Defendant from continuing to confine them pursuant to Crim. Proc. § 3-106 (c) for treatment to restore competency to stand trial, in violation of their rights to due process and equal protection under Article 24 of the Maryland Declaration of Rights.

The Maryland Disability Law Center represents all persons, not individually named in the Complaint, who do not have a legal guardian and who have been denied their rights to due process and equal protection under Article 24 of the Maryland

[1] Hereafter cited as Crim. Proc.

Declaration of Rights, as set set forth herein. These individuals have all been committed to a state institution pursuant to a court order upon a finding that they were incompetent to stand trial, had a mental disorder or mental retardation and, as a result of the mental disorder or mental retardation, were a danger to self or to the person or property of others. Crim. Proc. §3-106(c). Their periods of confinement extend to fifteen years, eight months and, upon information and belief, there has never been any judicial finding that there was a substantial likelihood that they could be restored to competency to stand trial within the foreseeable future.

Each of the individually named Plaintiffs was committed to a state psychiatric facility or state residential center pursuant to Crim.Proc. § 3-106(c). Their periods of confinement, to date, range from three years to seven years, seven months. The hospital or residential center has advised the committing court that each individually named Plaintiff is unlikely to be restored to competency in the foreseeable future. The facilities have also advised the committing court that each individually named Plaintiff is not dangerous. In the case of Plaintiff George Swann, a fifty-nine year old man with mental retardation, the facility has conveyed this information every year for the past six years. The fact that these named Plaintiffs are neither dangerous nor likely to ever be restored to competency has triggered no action by the committing courts.

As will be shown at a hearing on the motion for a preliminary injunction, the Plaintiffs remain committed to institutions in violation of their rights under Article 24 of the Maryland Declaration of Rights. No Maryland court has decided the due process and equal protection rights of individuals who are committed to institutions for treatment to restore capacity to stand trial. However, the Supreme Court of the United States

considered this precise question in 1972. *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, the Supreme Court found that the constitution required that, at a minimum, "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id*. at 738. The Court therefore held that a state may not confine a person charged with a criminal offense for more than a reasonable period to determine whether there is a substantial likelihood that he may be restored to capacity to stand trial in the foreseeable future. *Id.* The Court further held that if the individual cannot soon stand trial, the state must either discharge him or initiate the customary civil commitment proceedings. *Id*.

Maryland courts have long interpreted Article 24 as having the same meaning as the Fourteenth Amendment to the United States Constitution. *Pitsenberger v. Pitsenberger,* 287 Md. 20; 410 A.2d 1052 (1980). Furthermore, Supreme Court interpretations of the Fourteenth Amendment function as authority for interpretations of Article 24. *Id*. Therefore, pursuant to the United States Supreme Court's ruling in *Jackson v. Indiana*, the State cannot use the unconstitutional provisions of the Maryland Criminal Procedure Statute to confine the Plaintiffs beyond a reasonable period to determine whether they may be soon restored to competency to stand trial or beyond a reasonable maximum treatment period to attempt to achieve that purpose.

II. Factual Background.

Plaintiff George Swann. Mr. Swann is a fifty-nine year old male with a diagnosis of mental retardation. Mr. Swann's medical records also indicate that he suffered a head injury in the past.

On October 22, 1996, police arrested Mr. Swann for allegedly reaching into the driver's side window of a car and attempting to take cash out of the hands of the driver, and charged him with attempted robbery and 2nd degree assault. [Exhibit A]. In January, 1997, the Circuit Court for Charles County ordered Mr. Swann to a state institution for an evaluation of his competence to stand trial. After a lengthy evaluation, the Court committed him to Rosewood State Residential Center on January 27, 1998, as incompetent to stand trial. [Exhibit B].

In the annual report to the court dated December 22, 1998, Rosewood advised that Mr. Swann was not competent to stand trial, *that he had made no progress toward achieving competency*, and that he was *not a danger to self or to the person or property of others*. [Exhibit B].

The 2001, 2002 and 2003 annual reports to the court consistently advised that Mr. Swann had made no progress toward acquiring competence to stand trial, that there was no evidence that he would achieve competence in the foreseeable future, and that he had never demonstrated any dangerous behavior. [Exhibit C].

Despite these notices to the court, dating back more than six years, that Mr. Swann is not likely to achieve competence to stand trial and that he is not dangerous, he remains confined in an institution for no purpose. Mr. Swann owns a home in Charles County where he wants to return to live with his sister.

Plaintiff Donald Distance. Mr. Distance is a twenty-nine year old male diagnosed with schizophrenia. Mr. Distance has a history of having suffered viral meningitis at age one, and was diagnosed at age five with mild mental retardation.

On August 14, 2000, police arrested Mr. Distance for allegedly striking his mother during a heated argument, and charged him with 2nd degree assault. [Exhibit D]. The court-ordered evaluation report on his competency to stand trial concluded that *"the probability of Mr. Distance being restored to competency is not likely*." [Exhibit, E emphasis added]. Despite this opinion, the District Court for Baltimore City committed Mr. Distance to Walter P. Carter Center on November 20, 2000 as incompetent to stand trial. [Exhibit F]. On January 10, 2001, he was transferred to Spring Grove Hospital Center (SGHC), where he remains to date.

On December 22, 2003, SGHC sent an annual report to the court advising again that Mr. Distance was not likely to be restored to competency in the foreseeable future and, further, that he was not dangerous. The report also advised that, should the legal charges be resolved, the hospital would work with Mr. Distance toward an appropriate discharge plan. [Exhibit G].

Despite notice to the court, dating back more than three years, that Mr. Distance would not likely be restored to competence to stand trial, and despite notice, dating back at least eight months, that he was not dangerous, he remains confined in an institution for no purpose. According to hospital records, a community residential services program interviewed Mr. Distance, but there can be no movement toward discharge due to the outstanding legal charge. [Exhibit H].

Plaintiff James Silver. Mr. Silver is a sixty-one year old male diagnosed with schizophrenia and tardive dyskinesia. Mr. Silver also suffered a brain injury at age fifteen as a result of an automobile accident.

On February 4, 1999, police arrested Mr. Silver for allegedly attempting to snatch a purse in Baltimore City, and charged him with robbery and 2nd degree assault. [Exhibit I]. The Circuit Court for Baltimore City committed Mr. Silver to SGHC on April 28, 1999, as incompetent to stand trial. [Exhibit J].

On October 26, 1999, SGHC advised in the annual report to the court that "it is our opinion to a reasonable degree of medical certainty, that Mr. James Silver remains incompetent to stand trial," and that *"it is unlikely that he will gain competency within the foreseeable future*." [Exhibit K, emphasis added].

The annual report to the court dated December 22, 2003, again advised the court that Mr. Silver was not likely to be restored to competence and, further, that he was not dangerous. [Exhibit L]. Hospital records indicated that a community placement would be sought once the legal charges were resolved. [Exhibit M].

In a letter to the court, dated June 28, 2004, SGHC suddenly changed course and declared that he was a danger to himself and others. [Exhibit N]. However, in Mr. Silver's hospital progress note, *dated only one day later*, on June 29, 2004, his treating psychiatrist stated that he was <u>not</u> currently dangerous and that "placement is pending resolution of the legal barriers to community re-entry." [Exhibit O].

Despite notice to the court, dating back nearly five years, that Mr. Silver would not likely attain capacity to stand trial, he remained committed for treatment for that purpose. Despite notice to the court that he was not dangerous, he remained confined. Recently, despite notice to the court that he is not restorable, but allegedly dangerous, he remains confined without the due process that is afforded all others confined pursuant to Maryland's civil commitment laws.

Plaintiff Vernelson Brinkley, Jr. Mr. Brinkley is a forty-six year old male diagnosed with encephalopathy and dementia.

Police arrested Mr. Brinkley on January 21, 2000, for allegedly stealing a black pipe and a red ball valve from a maintenance room at the Towson Common's Building, and charged him with 2nd degree attempted burglary, 4th degree theft, and malicious destruction of property. [Exhibit P]. The Baltimore County Circuit Court committed Mr. Brinkley to SGHC on May, 5, 2000 as incompetent to stand trial. [Exhibit Q].

On April 24, 2003, SGHC wrote a letter to the court advising that Mr. Brinkley's "dementia continues its relentless downward course," but that he is "calm, pleasant and cooperative despite his devastating illness." The hospital further advised that Mr. Brinkley is "quite simply rendered 'docile' by his disease process and can be clinically maintained in a less restrictive placement." The hospital asked that the court agree to an alternative disposition of the legal charges so that Mr. Brinkley may move into a community placement. [Exhibit R].

The 2003 annual report to the court dated December 22, 2003, again advised that Mr. Brinkley is not likely to regain competence and is not dangerous. [Exhibit S].

Despite notice to the court, dating back at least fifteen months, that Mr. Brinkley is not likely to regain competence and is not dangerous, he remains confined in an institution for no purpose. The hospital records reflect a plan to find a community services provider for Mr. Brinkley once the legal issues are resolved. [Exhibit T].

Plaintiff Edward Jordan. Mr. Jordan is a fifty-four year old male diagnosed with organic mood disorder due to a closed head injury at age 12, and borderline intellectual functioning.

Police arrested Mr. Jordan on September 25, 2000, after the pastor of a church made out a complaint against him, and charged him with harassment and trespass to private property. According to the charging document, the maximum penalty for each charge is 90 days and/or $500. [Exhibit U]. On April 4, 2001, the Baltimore County District Court committed him to SGHC as incompetent to stand trial. [Exhibit V].

In the annual report to the court dated November 12, 2002, SGHC advised that "*with a reasonable degree of medical certainty, Mr. Jordan's restoration to competency in the foreseeable future is nil*." The report also states that Mr. Jordan is *not a danger to self or others*. There is a handwritten notation on the report contained in Mr. Jordan's district court file, dated December 23, 2002, stating "no court action required at this time." [Exhibit W].

Thus, beginning in 2002 and continuing through the present date, the SGHC staff have documented in Mr. Jordan's hospital records their opinion that he was unlikely to attain competence to stand trial and that he was not currently dangerous.[2] [Exhibit Y]. As recently as May 27, 2004, SGHC sent a letter to the court stating again that Mr. Jordan cannot be restored to competency and that he is not dangerous. [Exhibit Z].

Despite notice to the court, dating back nearly two years, that Mr. Jordan was not likely to be restored to competency to stand trial and not dangerous, he remains confined in an institution for no purpose. According to the May 2004 notice to the court, SGHC

[2] Inexplicably, the 2003 annual report stated that he may achieve competence to stand trial and that he was dangerous. This appears to be a clerical error as the hospital records through the present date consistently state that he is permanently incompetent to stand trial and that he is not dangerous. In any event, the 2003 report also triggered no action by the court. There is again a handwritten note, dated January 24, 2003, stating that "no court action required at this time." [Exhibit X].

plans to discharge him to his mother's home and has arranged for outpatient services. (*See* Exhibit Z).

Plaintiff Maryland Disability Law Center. The Maryland Disability Law Center ("MDLC") is the state-designated Protection and Advocacy System ("P&A") authorized under federal law to protect and advocate for the rights of individuals with a mental illness or developmental disability. 42 U.S.C. §10801 et.seq., 42 U.S.C. § 15041 et.seq. MDLC is mandated to "pursue administrative, legal and other appropriate remedies to ensure the protection of individuals with a mental illness who are receiving care or treatment in the state," and to "protect and advocate the rights of individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes . . ." 42 U.S.C. §10805(a)(1)(B); 42 U.S.C. §10801(b)(2)(A).

Congress conferred upon the P&A system the authority to bring litigation in its own right to carrry out the mandate to protect the legal rights of persons with disabilities. *See* 42 C.F.R. § 51.6(f)(1997)(providing that allotments by Congress may be used to pay the costs incurred by a P&A system in bringing a lawsuit in its own right to redress violations); 62 Fed.Reg. 53553 (Oct. 15, 1997)(preamble discussion interpreting the regulation and citing to a Senate Report declaring Congress's intent that the P&A system has standing to pursue legal remedies); *see also Hoepfl v. Barlow*, 906 F.Supp. 317, 323 (E.D.Va. 1995); *Trautz v. Weisman*, 846 F.Supp. 1160 (S.D.N.Y. 1994); *Michigan Protection and Advocacy, Inc. v. Miller*, 849 F.Supp. 1202 (W.D.Mich. 1994).

MDLC represents those unnamed persons with disabilities who do not have a legal guardian and (i) have remained confined without a determination within a

reasonable period that there is a substantial likelihood that they will attain capacity to stand trial in the foreseeable future and without a demonstration of sufficient progress to justify continued confinement; (ii) have remained committed for treatment to restore competency to stand trial beyond a reasonable period to attempt to achieve that goal; and (iii) have remained committed for treatment to restore competency to stand trial beyond the maximum period that they could have been incarcerated if convicted of the charged offenses. Upon information and belief, there were approximately one hundred and fifty-five individuals confined to state institutions for treatment to restore competency to stand trial in 2003. MDLC has reviewed the annual reports for dozens of these individuals, some of whom have been committed for treatment to restore competency to stand trial for more than a decade.

III. Injunctive Relief is Imperative to Prevent Further Irreparable Harm to Plaintiffs.

In deciding whether to issue a preliminary injunction, this Court must examine the following four factors: (A) the likelihood that the Plaintiffs will succeed on the merits; (B) the 'balance of convenience,' determined by whether greater injury would be done to the Defendant by granting the injunction than would result from its refusal; (C) whether the Plaintiffs will suffer irreparable injury unless the injunction is granted; and (D) the public interest in granting or refusing the injunction. *Department of Transportation v. Armacost*, 299 Md. 392, 404-05; 474 A.2d 191, 197 (1984)(citing *State Dep't of Health and Mental Hygiene v. Baltimore County*, 281 Md. 548, 554-557; 383 A.2d 51, 55-57 (1977)). As set forth below, the Plaintiffs meet their burden of proving each factor necessary for the Court to grant the requested preliminary injunction.

A. Plaintiffs Are Likely to Succeed on the Merits.

The Plaintiffs will demonstrate at the hearing on this motion that Crim. Proc. § 3-101, et. seq., violates their due process right, guaranteed under Article 24 of the Maryland Declaration of Rights,[3] to have the "nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738; *McNeil v. Patuxent Institute*, 407 U.S. 245, 250 (1972). The Plaintiffs will further demonstrate that the Statute violates their right to due process by failing to provide constitutionally adequate procedures to establish the grounds for their continued confinement.

In addition, the Plaintiffs will demonstrate that there is no constitutionally adequate basis for distinguishing commitments of persons charged with a crime who cannot be restored to competency from civil commitments to state psychiatric institutions or admissions to state residential centers. 406 U.S. at 724. Thus, their continued confinement under standards and procedures that differ from those granted pursuant to civil commitment or admission violates their right to equal protection of the laws under Article 24 of the Maryland Declaration of Rights. *Id*.

1. The Statute Violates Plaintiffs' Right to Due Process Under Article 24 of the Maryland Declaration of Rights.

a. Substantive Due Process.

[3] Article 24 provides that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed, or deprived of his liberty or property, but by the judgment of his peers, or by the Law of the land."

The Criminal Procedure Statute violates the Plaintiffs' due process rights under Article 24 because it (i) allows their confinement beyond a reasonable period to evaluate whether there is a substantial likelihood that they will attain such competency in the foreseeable future and without demonstration of sufficient progress to justify continued confinement; (ii) allows their continued confinement for treatment to restore competency to stand trial beyond a reasonable maximum period of time to attempt to achieve the purpose of the commitment; and (iii) allows their continued confinement for treatment to restore competency to stand trial beyond the length of the maximum sentence that they could have received if convicted of the criminal charges.

The Statute further violates the due process rights of the individually named Plaintiffs because it allows their continued confinement under Crim. Proc. § 3-106 despite the determination by the Department of Health and Mental Hygiene, submitted to the courts, that they will not attain capacity to stand trial and that they are not dangerous.

i. The Statute violates Plaintiffs' right to due process because it allows their confinement beyond a reasonable period to evaluate whether there is a substantial likelihood that they will attain capacity to stand trial in the foreseeable future and without demonstration of sufficient progress toward that goal.

Pursuant to the Statute, a court may order the Department of Health and Mental Hygiene (DHMH) to conduct an evaluation to determine whether a defendant is competent to stand trial. Crim. Proc. §3-105(a)(1). DHMH must submit its findings to the court within seven days, unless there is a plea that the defendant was also not criminally responsible. §3-105(d)(2). If DHMH concludes that the defendant is not competent to stand trial, it must include in its report a supplementary opinion as to

whether the defendant has a mental disorder or mental retardation and would be a danger to self or to the person or property of others if released. §3-105(d)(3). If the court finds, based on the evidence contained in the report, that the defendant is incompetent to stand trial and dangerous to self or to the person or property of others, it may commit him for treatment to restore competency. §3-106(c).

The Statute does not, however, require judicial review and a finding, within a reasonable period, that there is a substantial likelihood that the individual will attain capacity to stand trial in the foreseeable future, thus violating Plaintiffs' right to have the nature and duration of their commitment bear some reasonable relation to its purpose. *Jackson v. Indiana*. 406 U.S. at 738. In *Jackson*, the Supreme Court examined a state statute that authorized the commitment of an incompetent defendant until such time that he was restored to competency. *Id*. at 720. Jackson, who was deaf and had mental retardation, had been charged with committing two thefts of a combined total of nine dollars. *Id*. at 715. He had remained confined for treatment for three and a half years, despite compelling evidence that he would never attain capacity to stand trial. *Id*. at 738-39. Because Jackson would likely not soon be restored to competency, his continued confinement no longer bore a reasonable relation to the purpose of the commitment (treatment to attain capacity). *Id*. at 738.

Consequently, the Court held that "a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the near future." *Id*. In addition, the Court held that "even if it is determined that the defendant probably soon will be able

to stand trial, his continued confinement must be justified by progress toward that goal." *Id*. Maryland, however, simply ignores *Jackson* and allows for indefinite commitment without any showing, ever, that the individual may be restored in the foreseeable future.

Because the Statute does, however, require a finding that the individual is dangerous to self or to the person or property of others, the State may *initially* confine him even where there is some evidence that it is unlikely that he will be restored to competency *See Greenwood v. United States*, 350 U.S. 366 (1956).[4] This finding of dangerousness, however, does not alter the purpose of the commitment under the Statute, which is treatment to restore the defendant to competence to stand trial. This is made clear by the Statute's mandate that the court set a trial date if, after receiving evidence, it finds that the defendant is now competent to stand trial. Crim. Proc. § 3-104(b). At that point, the purpose of the commitment has been accomplished and the defendant is released from the custody of DHMH to stand trial.

Thus, Maryland does not escape *Jackson's* due process requirement that the nature and duration of confinement bear some reasonable relation to its purpose and, therefore, that there be periodic judicial review of the individual's progress and a determination that there is a substantial likelihood that he will soon attain capacity to stand trial to justify continued commitment. 406 U.S. at 738. *See also Johnson v. Solomon*, 484 F.Supp.278, 289 (D.Md. 1979) (finding that mandatory periodic review of

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[4] In *Greenwood*, the Court upheld the initial confinement of a defendant who was found incompetent to stand trial and dangerous, even though there was conflicting evidence as to whether he could be restored. *Id*. at 375. Both the *Greenwood* and *Jackson* Courts emphasized, however, that the holding applied only to the narrow issue of the constitutionality of the initial confinement of a defendant who may not be restorable. *Id*.; 406 U.S. at 736. The *Jackson* Court further emphasized that *Greenwood* did not consider the issues of the duration of the confinement or the standards for release. 406 U.S. at 736.

commitments under the Juvenile Causes Act is constitutionally necessary because the "deprivation of liberty attendant upon a commitment can only be justified as long as that commitment is actually necessary.")

The Supreme Court of Hawaii analyzed a statute similar to Maryland's, authorizing commitment until the defendant became competent or until the court was satisfied that he may be released without danger to himself or the person or property of others. *State v. Raitz*, 63 Haw. 64, 66 (1980). The Court reviewed *Greenwood* and *Jackson* and concluded that "it is a continued confinement of a defendant beyond a reasonable period necessary to determine his lack of fitness to proceed and the expected duration of any incapacity, not an initial commitment for the foregoing purpose . . . that would violate precepts of equal protection and due process." *Id*. at 70. The Court thus held that defendants may not be held more than a reasonable period to determine whether there is a substantial probability of regaining fitness to proceed in the future. *Id*. at 73. In remanding the case to the circuit court to determine whether the defendant was competent to stand trial, and if not, to release him or subject him to the civil commitment proceedings, the court noted that "the probable nature of defendant's disability and the lapse of a year have rendered further detention under the initial commitment order incompatible with principles of due process proclaimed in *Jackson v. Indiana*." *Id*. at 76.

Similarly, here, the Maryland Statute allows treatment to restore competency to continue beyond a reasonable period without any regard to whether the individual may soon stand trial, thus violating due process. *Id*. at 70; 406 U.S. 738. Plaintiffs have remained confined in institutions for treatment to restore competency for periods extending to nearly sixteen years, without any finding by a court that they may be so

restored in the foreseeable future and without any demonstration by the State that they are making sufficient progress toward that goal.

Although the *Jackson* Court did not specify what is a "reasonable" period of time to determine whether there is a substantial likelihood that the individual may attain capacity to stand trial in the foreseeable future, twenty states have imposed maximum periods ranging from thirty days to one year, with ninety days being the most frequent period specified.[5] Thus, to remedy the Statute's due process violation, Plaintiffs urge that this Court adopt ninety days as a "reasonble period" and issue a permanent injunction enjoining the State from committing, or continuing to commit, an individual for treatment to restore competency to stand trial for more than ninety days without judicial review and a finding that there is a substantial likelihood that the person will attain capacity to stand trial within the foreseeable future and that there is sufficient progress toward that goal to justify continued commitment. If there is not a substantial likelihood that the individual will soon be restored to competency to stand trial, the State must release the person or, if appropriate, refer him for civil commitment or admission.

With respect to the individually named Plaintiffs, however, DHMH has already determined that they cannot be restored to competency to stand trial. Thus, this Court must order their release from confinement under Crim. Proc. § 3-106(c).

ii. The Statute violates Plaintiffs' right to due process because it allows their continued confinement for treatment to restore competency to stand trial beyond a reasonable maximum time limit for the State to attempt to achieve the purpose of the commitment.

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[5]Grant Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. Davis L.Rev. 1, 9-10 (1993).

Under Maryland law, a court may commit an individual for an indefinite period of treatment to restore capacity to stand trial. Crim. Proc. §3-106(b)(1). The duration of confinement, however, must bear some rational relation to the purpose, and *Jackson* very clearly held that due process requires that the goal of treatment must be attained, if at all, "*within the foreseeable future*." *Id.* at 738 (emphasis added). The unnamed Plaintiffs, represented by MDLC, have been committed for treatment to restore capacity to stand trial for periods up to fifteen years and eight months. The individually named Plaintiffs have been confined for periods ranging from three to seven and one-half years, well beyond a reasonable period to attempt to achieve the purpose of the commitment within the "foreseeable future."

Based on the lack of evidence in the record, and in light of differing state facilities and procedures, the *Jackson* Court declined to prescribe the time limits on treatment. *Id*. Thirty-eight states, however, have responded to *Jackson* by limiting treatment periods or, alternatively, by not providing for treatment to restore competency but allowing commitment, if at all, only through civil commitment.[6] Eighteen of those thirty-eight states have applied *Jackson* in good faith and limit treatment to periods ranging from a low of sixty days to a high of eighteen months, with the most frequently mandated periods being six months and one year.[7]

To remedy the Statute's due process violation, Plaintiffs urge that this Court adopt one year as a "reasonable period" of treatment and issue a permanent injunction enjoining the State from committing a person as incompetent to stand trial under the Criminal

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[6] *Id.*

[7] *Id. See also*, ABA Criminal Justice Standards Committee, American Bar Association, Criminal Justice Mental Health Standards, standard 7-4.13, 239 (1989)(recommending that a court adjudicate an individual as permanently incompetent at the expiration of a twelve or eighteen month period of treatement.)

Procedure Act for more than one year. Because the individually named Plaintiffs have all been held well beyond *any* reasonable maximum period of treatment, and because DHMH as already determined that they are not going to be restored to competency to stand trial, this Court must order their release from commitment under Crim. Proc. § 3-106(c).

iii. The Statute violates Plaintiffs' right to due process because it allows their continued commitment for treatment to restore capacity to stand trial without regard to the maximum sentence that they could have received if convicted of the criminal charges.

Pursuant to the Statute, a defendant may be committed for treatment to restore competency to stand trial for a period that extends beyond the maximum sentence that he could have received if convicted of the criminal charge. Although *Jackson* did not reach this issue, other courts have applied the constitutional requirement that the duration and nature of the commitment bear a rational relationship to its purpose, and found that a defendant may not be held for treatment to restore competency to stand trial for a period longer than the maximum sentence that he could have received if convicted. *See, e.g., Deisinger v. Treffert*, 85 Wis.2d 257, 268 (1974)(reading into the statute a requirement that "one found incompetent to stand trial is entitled to release when observatory confinement reaches the length of the potential maximum sentence for the underlying criminal offense"); *In re Davis*, 8 Cal.3d 798, 807 (1973)(instructing lower courts that, when deciding whether sufficient progress is being made toward restoring competence to justify continued commitment, if a defendant is charged with a minor crime a lengthy commitment to a state hospital is not justified).

In the instant case, Plaintiff Jordan, charged with trespassing and harassment, has been confined for treatment to restore competency to stand trial for more than three years despite the fact that the maximum criminal penalty he could have received if convicted for each charge was ninety days in jail and/or a five hundred dollar fine. Mr. Jordan's continued confinement, lasting years beyond the possible maximum sentence for the crimes with which he was charged, violates his right to due process to have the nature and duration of his commitment bear a rational relation to its purpose.[8]

To remedy the Statute's due process violation, Plaintiffs urge that this Court issue a permanent injunction enjoining the State from confining an individual for treatment to restore capacity to stand trial for longer than the maximum sentence that he could have received if convicted of the criminal offense.

iv. The Statute violates the named Plaintiffs right to due process because it allows their continued confinement despite the determination by DHMH that there is no substantial probability that they will attain capacity to stand trial and that they are not dangerous.

The Statute further violates the due process requirement that the nature and duration of commitment bear some rational relation to the purpose of the commitment, by allowing the continued confinement of an individual who, in fact, cannot attain capacity to stand trial. However, the *Jackson* Court specifically held that, if there is no substantial probability that the individual may be restored to competency to stand trial in the

[8] That Mr. Jordan has never been convicted of the criminal offense, distinguishes this case from *Jones v. United States*, 463 U.S. 354 (1983), where the Court found that the maximum sentence that a person found not guilty by reason of insanity could have received is irrelevant to the length of commitment for treatment for a mental illness. The Court specifically distinguished *Jackson* on this point. *Id*. at 364, n.12.

foreseeable future, the State must either release him or "institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen." 406 U.S. at 738. *See also*, *State v. Dedekian*, 680 A.2d 441, 443 (Pa. 1996)(interpreting the statute to require the court to dismiss charges if, at any time during the one year maximum period for treatment, it finds that the defendant may not be soon restored to competence to stand trial); *Davis*, 8 Cal.3d at 807 (requiring the state to furnish reports to the courts on whether a defendant committed for treatment to restore competency to stand trial may be restored soon and, if he is not likely to be restored soon, requiring the courts to release him or initiate civil commitment proceedings).

In the instant case, the individually named Plaintiffs have remained confined, for periods ranging from eight months to six years, following notification to the courts by DHMH that there is *no substantial probability that they can be restored in the foreseeable future*. Their continued confinement violates their right to due process under Article 24.

Moreover, although the Statute ostensibly requires release when the individual is no longer dangerous, there is no mandatory periodic review of this issue. As a result, the individually named Plaintiffs have remained confined despite the fact that they are no longer dangerous. The only mechanism for these Plaintiffs to seek their release on this basis is to file a petition for judicial release pursuant to Md. Code Ann., Health-Gen., § 7-507 (2003 Supp.)(governing persons with mental retardation) or §10-805 (governing persons with a mental disorder). If the individual is diagnosed with a mental disorder, he must prove that he does not have a mental disorder or that he has a mental disorder but does not need inpatient care or treatment for the protection of the individual or another.

Health-Gen. § 10-805(f)(1),(2), (g)(1),(2). If the individual is diagnosed with mental retardation, he must prove that he does not need residential services or there is a less restrictive setting in which the needed services can be provided that is available or will be available within a reasonable time. Health-Gen. § 10-507(f)(1),(2),(3).

However, it is not compatible with due process to place the burden on the individually named Plaintiffs, who are permanently incompetent to stand trial, to raise and prove this issue. In *Johnson v. Solomon*, for example, the Court, held that due process requires *mandatory periodic review* of the continued appropriateness for commitment and rejected placing the burden on the committed person, his guardian, or relative to initiate review of the basis for continued confinement under a vehicle such as habeas corpus. 484 F.Supp. at 288-290. The court found that, without formal, automatic review, the risk was too great that individuals will be "institutionalized far longer than required or actually become lost in a slow-moving, self-perpetuating bureaucracy." *Id*. at 289. The prophecy of *Johnson* is the current stark reality for the Plaintiffs in this action. They are sent away to locked facilities, only to be discarded and forgotten by the legal system.

In addition, once the initial purpose of the confinement, treatment to restore competency, no longer exists, an individual committed as incompetent to stand trial is entitled to the same standards and procedures that govern civil commitment or those that govern admissions to a state residential center. *Jackson*, 406 U.S. at 738 (requiring release or civil commitment once it is determined that the individual is not likely to soon be restored to competency); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992)(finding that because the defendant, who was no longer mentally ill, could not be held as an insanity acquitee, he was entitled to the constitutionally adequate procedures, provided in civil

commitment proceedings, to establish the grounds for continued confinement); *O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975)(concluding that even if the commitment was initially permissible, "it could not constitutionally continue after that basis no longer existed").

The purpose of the individually named Plaintiffs' commitment (treatment to restore competence for trial) no longer exists, and therefore, the State may continue to confine them only if it prevails in a civil commitment proceeding or an admissions hearing. Commitment proceedings are not applicable to Plaintiffs Distance, Brinkley and Jordan because the facilities have already notified the courts that they are not dangerous to self or others. As danger to self or others is a prerequisite for civil commitment, due process requires that this Court order a preliminary injunction to require the State to plan for these Plaintiffs' immediate discharge from SGHC.

With respect to Mr. Silver, SGHC notified the court on December 22, 2003 that he was not dangerous. (*See* Exhibit L). In a subsequent letter to the court, dated June 28, 2004, SGHC stated that he was dangerous. (*See* Exhibit M). However, his hospital records do not reflect any basis for this revised opinion. In a progress note dated one day after the June 28th letter to the court, his psychiatrist opined again that he was not currently dangerous and that "placement is pending resolution of the legal barriers to community re-entry." (*See* Exhibit N). Plaintiffs' counsel believes that the hospital records overwhelmingly support the conclusion that Mr. Silver is not dangerous and, therefore, this Court should order a preliminary injunction to require the State to plan for

his discharge. At the very least, he must be discharged from criminal commitment and referred for possible civil commitment.[9]

With respect to Mr. Swann, his records amply demonstrate that he does not need continued care in a segregated institution. As far back as February 1998, a consulting psychiatrist found that Mr. Swann would not be appropriate for long-term placement at Rosewood, and that he would benefit from a community placement. [Exhibit AA]. For the past seven years, he has consistently been described as pleasant and cooperative. He is able to independently take care of his daily needs, such as dressing, bathing and feeding himself. He has grounds privileges and a job at the laundry at Rosewood. (*See* Exhibits B and C). He has his own home, in Charles County, where he may return to live. Due process demands that this Court order preliminary injunctive relief to require his discharge from Rosewood.

b. <u>Procedural Due Process.</u>

In light of Maryland's flagrant disregard of the thirty two-year old constitutional principle that the nature and duration of commitment must bear some reasonable relation to its purpose, it is no surprise that the State also failed to provide the Plaintiffs with constitutionally adequate procedures to protect this right. Maryland law requires no finding by the committing courts that there is a substantial probability that the individual may be restored to competency to stand trial in the foreseeable future, nor any later reviews or hearings by the committing courts on whether continued confinement is

[9] The inconsistent statements from SGHC in both Mr. Silver and Mr. Jordan's cases provide additional evidence of the need for a court hearing and review. In both cases, a recommendation to the court was inconsistent with contemporaneous hospital treatment team recommendations.

justified by sufficient progress toward that goal. There is also no review of whether the individual is dangerous. This lack of review virtually ensures that the State will erroneously deprive citizens of their fundamental right to liberty. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)(stating that the function of legal process is to minimize the risk of erroneous decisions).

In the preceding discussion of substantive due process, the Plaintiffs urged that this Court permanently enjoin the State of Maryland from confining individuals for treatment to restore capacity to stand trial without an evaluation within a reasonable period of ninety days and a finding that there is a substantial likelihood that they may be restored in the foreseeable future and that there is sufficient progress to justify continued confinement.[10]

When weighing procedural due process claims, courts balance three factors. *See Beeman v. Department of Health and Mental Hygiene*, 107 Md.App. 122, 143; 666 A.2d 1314, 1324 (Md. Ct. Spec.App.1995)(citing to *Mathews,* 424 U.S. at 335). First is the private interest that will be affected by the official action. *Id*. At stake in commitment to an institution is freedom from bodily restraint, which is "at the core of the liberty protected by the Due Process clause." *Foucha,* 504 U.S. at 80 (citing *Youngberg v. Romeo*, 457 U.S. 397, 316 (1982)). Courts have long recognized that, "involuntary commitment to a mental hospital, like involuntary confinement for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor*, 422 U.S. at 580 (Burger, C.J., concurring); *Gross v. Pomerleau*, 465

[10] Again, if there is not a substantial likelihood that the individual may soon be restored to competency, he must be discharged or, if appropriate, referred for civil commitment or admission. 406 U.S. at 738. Even if the court finds that the person may be restored, however, if he is not dangerous, he must be released.

F.Supp.1167, 1173 (D.Md. 1979) (noting that the "legal and social consequences of commitment constitute a stigma of mental illness which can be as debilitating as that of a criminal conviction")(citing to *Stamus v. Leonhardt*, 414 F.Supp. 439, 449(D. IA 1976)).

The second factor is the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. *Beeman*, 107 Md. App. at 143. Maryland's lack of procedures guaranteed that the State would erroneously deprive the named Plaintiffs of their constitutional right to liberty. In the case of Mr. Distance, for example, DHMH advised the court in 2000, *prior to his commitment,* that "the probability of [his] being restored to competency is not likely." (*See* Exhibit E). DHMH continued to advise the court that he was not competent and not likely to be restored. (*See* Exhibit G). Thus, the State has erroneously deprived him of his freedom for nearly four years. With respect to Mr. Swann, DHMH has advised the court since 1998 that he is not dangerous and not likely to attain capacity to stand trial, and thus the State has erroneously deprived him of his freedom for the past six years. (*See* Exhibit B). Plaintiffs Silver, Brinkley and Jordan have similarly remained erroneously incarcerated in institutions for treatment to restore competency despite their being no substantial likelihood that they will stand trial. (*See* Exhibits L, P and U). In the face of these blatant constitutional violations, it is imperative that the State adopt the necessary procedural safeguards urged by the Plaintiffs.

The third factor to consider when weighing a due process claim is the State's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirements would entail. *Id.* Maryland had a legitimate interest in determining whether the Plaintiffs may become competent to stand

trial in the foreseeable future. This legitimate interest may have justified the Plaintiffs' initial commitment, but their continued confinement is constitutionally justified only if there is a substantial likelihood that they will soon stand trial. 406 U.S. at 738.

The State thus has *no* interest in continuing to confine Plaintiffs for treatment to restore competence to stand trial where there is no substantial likelihood that they will be soon so restored. *Id.* As one court put it, "eventually the time is reached when it becomes apparent that commitment can serve no purpose other than the custodial warehousing of an individual who cannot appropriately be dealt with by the criminal law. If incarceration continues at a time beyond which it can be justified as being for the purpose of protecting the rights of the defendant, the incarceration is, in effect, penal in nature and cannot be justified." *Haskins v. County Court of Dodge County*, 62 Wis.2d 250 (1974).

Implementing the necessary procedural safeguards naturally imposes a slightly greater administrative burden on courts than having no procedures at all. It is precisely the role of the judiciary, however, to "provide process where none exists." *Attorney General of Maryland v. Waldron*, 289 Md. 683, 692; 426 A.2d 929, 935 (1981)(*citing to State v. Cannon*, 196 Wis. 434 (1928), *quoting In re Bruen*, 102 Wash. 472 (1918)). Requiring the courts to review the status of individuals who are committed as incompetent to stand trial is not overly burdensome administratively, and due process requires that the courts step in and provide this judicial oversight.

With respect to DHMH, the facilities to which Plaintiffs are committed are already required to provide the courts with annual reports. Crim. Proc. § 3-108(a)(1) and (2). The facility records demonstrate that the Plaintiffs' treatment teams are continuously

addressing each individual's current progress and mental status. It is therefore no administrative burden on the facilities to provide the courts with information that they already possess and document. Moreover, the fiscal burden on the state will *diminish* by discharging those individuals for whom there is no purpose to their continued confinement.[11]

2. The Plaintiffs Remain Confined in Institutions Under Different Standards and Procedures Than Those That Apply to Persons Not Charged With a Criminal Offense, Thus Violating Their Right to Equal Protection Under Article 24 of The Maryland Declaration of Rights.

Although the Maryland Constitution does not contain an express equal protection clause, courts have held that equal protection is guaranteed by the due process provision of the Declaration of Rights. *See Kirch v. Prince George's County*, 331 Md. 89, 96; 626 A.2d 372, 375 (1993). Moreover, in deciding equal protection claims, Maryland courts rely on opinions of the United States Supreme Court for interpretation of those provisions of Article 24 that provide protection against unreasonable or arbitrary discrimination in "like manner and to the same extent as the Fourteenth Amendment to the United States Constitution." *Id*. at 97 (quoting *United States Mortgage Company v. Matthews*, 167 Md. 383, 395; 173 A. 903; *rev'd on other grounds*, 293 U.S. 232 (1934)).

In reviewing equal protection claims, Maryland courts use a strict scrutiny standard if a statutory classification impinges upon a fundamental right. *Hornbeck v. Somerset County Board of Education,* 295 Md. 597, 641; 458 A.2d 758, 781 (1983). Such a statute will withstand an equal protection challenge only if the State can prove that it is

[11] The cost of this "custodial warehousing" of the named Plaintiffs, for example, who will never be brought to trial for their minor alleged crimes and who are not dangerous, can be measured not only in lives lost but in financial terms. The estimated cost per admission to SGHC for "continuing care" in fiscal year 2004 is $159, 923. The annual estimated cost at Rosewood for fiscal year 2004 is $121,846. *See* Maryland Fiscal Year 2005 Budget, Operating Budget Volume Two (2004).

necessary to serve a compelling interest. *Id*. Because the statute at issue impinges upon a fundamental liberty interest, Plaintiffs urge that this Court utilize the strict scrutiny standard of review. *See Foucha*, 504, U.S. at 86 (stating that "[f]reedom from restraint being a fundamental right, the State must have a particularly convincing reason" for discriminating against insanity acquittees who are no longer mentally ill).[12]

a. Persons with a Mental Disorder Committed to a State Psychiatric Institution as Incompetent to Stand Trial are Subjected to a More Lenient Commitment Standard and More Stringent Release Procedures Than Those Who Are Civilly Committed.

The standards and procedures governing civil commitment vary widely from those used to commit an individual with a mental disorder for treatment to restore capacity to stand trial. First, under criminal commitment, an individual may be committed upon a finding that he is a danger only to property, which is not permitted under civil commitment. Crim. Proc. § 3-106(b)(1); Md. Code Ann., Health-Gen. § 10-632; C.O.M.A.R. 10.21.01.04C(4)(c). Second, in civil commitment, the state must prove that there is no less restrictive alternative, an option not provided under criminal commitment. *Id*. Finally, the State has the burden to prove, every six months, each element under civil commitment by clear and convincing evidence. C.O.M.A.R 10.21.01.08C(1)(a),(b); 10.21.01.09F; *see also Addington v. Texas*, 441 U.S. 418, 433 (1979)(holding that clear and convincing proof is required in a civil proceeding to commit an individual involuntarily for an indefinite period to a state mental hospital).

[12] *But see Heller v. Doe*, 509 U.S. 312, 318-19 (1993)(declining to apply a higher level of scrutiny than rational basis because respondents had not argued this issue below). Even applying the lowest level of scrutiny, however, the Statute fails because there is no rational basis for using less procedural and substantive standards to indefinitely commit persons who are charged with a criminal offense but who can never stand trial. *See Jackson*, 406 U.S. at 724.

The release standards for civil and criminal commitment also vary widely. Under civil commitment, the individual may be released at any time by the facility director. Md. Code Ann., Health-Gen. §10-806(b). By contrast, an incompetent to stand trial defendant may be released only when the court is "satisfied that the defendant is no longer incompetent or no longer a danger to self or to the person or property of others." Crim. Proc.§ 3-106(b)(1). However, the statute does not require that the court periodically review whether the person remains dangerous or whether he is permanently incompetent to stand trial. Moreover, as demonstrated in the instant case, the courts do not act even upon receiving actual notice from a facility that the individual is no longer a danger. The only potential avenue for a person committed as incompetent to stand trial to gain release is by filing a petition for judicial release and proving that he no longer requires care or treatment in an institution. Crim. Proc. § 3-3-106(c)(2); Md. Code Ann., Health-Gen., §§10-708 and 10-805.[13]

b. Persons with Mental Retardation Committed to a State Residential Center as Incompetent to Stand Trial Do Not Have the Same Opportunities For Release.

The opportunities for release from a state residential center are denied to a person committed as incompetent to stand trial. A person without criminal charges who is admitted to a state residential center is entitled to mandatory annual reevaluations to determine whether he continues to meet the requirements for admission, including whether services can be provided in a less restrictive setting. Md. Code Ann., Health

[13] These mechanisms for release are available to any person committed to an institution, regardless of the availability of other procedural protections.

Gen., §7-505(a). This mandatory review and consideration of a less restrictive setting is not available under the Criminal Procedure Statute.

In addition, a person confined at a state residential center who is a federal Medicaid recipient, is entitled to enroll in a waiver program that provides for their care in the community rather than in institutional settings. 42. U.S.C.A. §1396n(c)(2). Persons committed as incompetent to stand trial, however, are denied the opportunity to enroll in the waiver program.

Finally, the Secretary may order the person's release under a civil admission if he no longer needs residential services, or if there is an available, less restrictive service consistent with his welfare and safety. Md. Code Ann., Health-Gen., §7-508. Under criminal commitment, the individual may be released only if he becomes competent or is no longer dangerous. Crim. Proc. §3-106(b). However, again, there is no review of whether the individual remains dangerous and, therefore, can no longer be held under the Criminal Procedure Statute.

c. The Use of Different Standards and Procedures for Continued Cofinement of Plaintiffs who Cannot be Restored to Competency to Stand Trial Violates Their Right to Equal Protection Under Article 24.

As clearly articulated in *Jackson*, the unequal treatment or persons committed as incompetent to stand trial but who cannot be restored to competency, does not withstand constitutional scrutiny. In that case, Jackson argued that his continued indefinite confinement where there was little likelihood that he would soon regain competency to stand trial violated equal protection because, absent the criminal charges pending against him, the state would have had to proceed under other statutes generally applicable to all other citizens. 406 U.S. at 723. Under those statutes, the decision whether to commit

would have been made according to a different standard and, if commitment were warranted, applicable standards for release would have been more lenient. *Id*.

The Court agreed, holding that Indiana deprived Jackson of equal protection by subjecting him to a more lenient commitment standard and to a more stringent standard of release than those available to others. *Id*. at 730. In reaching this conclusion, the Court relied on its earlier decision in *Baxtrom v. Herold*, 383 U.S. 107 (1966), in which it found that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id*. at 111-112. The *Jackson* court noted that "if criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." 406 U.S. at 724.

Plaintiffs have been confined to institutions for treatment to restore competency to stand trial for periods up to nearly sixteen years. For those with a mental disorder confined in psychiatric facilities, their commitment was under more lenient standards, the release standards are more stringent, and they were denied procedural protections that apply to civil commitments. Those Plaintiffs with mental retardation are denied the same opportunities for release granted to all others. Where there is no substantial likelihood that the individual will attain capacity to stand trial, such as with the individually named Plaintiffs, the continuing confinement without the procedural and substantive standards attendant to civil commitment or admission violates equal protection under Article 24 of the Maryland Declaration of Rights.

B. Plaintiffs Will Suffer Immediate and Irreparable Harm Without an Injunction.

Plaintiffs are irreparably injured each day that they remain confined in segregated institutions for no purpose. Those individually named Plaintiffs who are confined to SGHC, remain on locked wards irrespective of the fact that their treatment teams consider them to be no threat to themselves or others. They are thus unable to enjoy even the simple luxury of walking on the grounds for fresh air or recreation, and are further denied the opportunity to join in the many educational, social and therapeutic activities that are offered only outside the ward. [14]

Moreover, beyond the significant deprivation of liberty, commitment to an institution "can engender adverse social consequences" that can have a "very significant impact on the individual." *Addington*, 441 U.S. at 426. As one federal court noted, commitment, even for a day, "involves a loss of liberty, privacy, free association and could well have the effect of creating a stigma against the person confined." *Gross*, 465 F.Supp. at 1173.

Plaintiffs, who have not been found guilty of committing the crimes that they are charged with and who may never stand trial, have been segregated from their friends, families and communities for years. It is impossible to measure the lost relationships and opportunities caused by their continuing confinement.

C. Defendant Will Suffer No Harm From an Injunction.

As discussed in section III.A.1.b, procedural due process, the State's legitimate interest in confining the Plaintiffs for treatment to restore competency to stand trial no

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[14] Plaintiff Swann, committed to a state residential center, has the "privilege" to walk unescorted on the grounds to work in the laundry and to attend activities off the ward. This is not due to any difference in his behavior compared to the other Plaintiffs, but is simply due to differing policies between the facilities.

longer exists if there is no substantial likelihood that they will soon be so restored. DHMH, the entity within the State Government providing custodial care, has already urged that the courts resolve the legal status of the individually named Plaintiffs confined at SGHC so that the facility may commence discharge planning.

Moreover, the State has no legitimate interest in confining those Plaintiffs who are no danger to themselves or others and are able to receive care in a less restrictive setting. Thus, their continued confinement is nothing more than an unconstitutional custodial warehousing that drains the State's fiscal resources. The continuing illegal confinement of the individually named Plaintiffs, who cannot be restored to competency and who are not dangerous, costs the State more than three-quarters of a million dollars each year.[15] DHMH stands to benefit by the discharge of persons wrongfully warehoused for their disabling condition – incompetency - when such status will never change.[16] It is therefore in the State's own interest to have this Court order the very relief that DHMH has already unsuccessfully sought within the constraints of the statute.

D. The Public Interest Strongly Favors Issuing an Injunction.

The public interest also strongly favors an injunction that would ensure that persons are not wrongfully kept in mental institutions. Again, society's interest in restoring the Plaintiffs' capacity to stand trial ends as soon as it is determined, by the very experts the courts relied upon to find them incompetent, that they cannot be so restored. Further, there is no risk to public safety where the facilities have determined that the individual is

[15] *See* note 11, discussing the average annual cost of institutional confinement.

[16] This is not abstract, but demonstrated by the case of James Dunkes, a man committed in 1996 to SGHC as incompetent to stand trial on minor charges. He was then forgotten by the committing court for eight years, which failed to review his status upon notice each year that he remained confined and incompetent to stand trial, *even though the criminal charges against him were dismissed in 1998. See* Walter F. Roche, Jr., *Held 6 years without charges*, The Baltimore Sun, May 21, 2004.

not dangerous. If an individual is not likely to be restored to competence, but the treating professionals believe that he remains dangerous to self or others, the court may refer that person for civil commitment or admission.

E. Scope of Relief

Plaintiffs request that this Court declare that Md. Code Ann., Crim. Proc. §3-106(c) violates their due process and equal protection rights as guaranteed by Article 24 of the Maryland Declaration of Rights;

The individually named Plaintiffs request that this Court issue a preliminary injunction enjoining their continued illegal confinement under Crim. Proc. § 3-106(c) and ordering Defendant to develop an immediate plan, in conjunction with Plaintiffs' counsel, for their timely discharge;

The Plaintiffs further request that this Court issue a permanent injunction enjoining the Defendant from committing an individual for more than ninety days without a finding that there is a substantial likelihood that such individual will attain capacity to stand trial in the foreseeable future and that sufficient progress has been made to justify continued confinement;

The Plaintiffs further request that this Court issue a permanent injunction enjoining the State of Maryland from confining an individual for treatment to restore capacity to

stand trial for more than one year, or the maximum sentence that he could have received if convicted of the charge, whichever period is lesser.

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