

## Reconsidering Risk Assessment with Insanity Acquittees: Clinical and Legal Issues

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### Why are you here?

- CEUS ☺
  - CR is an important aspect of forensic assessment for state examiners.
  - Lack of systematic training.
  - Courts have not provided sufficient guidance on what to look at or how to evaluate.

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For every complex problem there is an answer that is clear, simple, and wrong.

H.L. Mencken

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~~Would be Reagan assassin~~  
**John Hinckley Jr. granted conditional release**

Hinckley, 61, will be allowed to live permanently with his mother in Virginia, under a ruling from a federal judge

MICHAEL GAROFALO SKIP TO COMMENTS

TOPICS: JODIE FOSTER, JOHN HINCKLEY, RONALD REAGAN, NEWS



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### Recent Article

- NYT magazine published "When Not Guilty is a Life Sentence" on September 27, 2017.
- Dealing with insanity acquittees languishing in state hospitals.
  - Mostly anecdotal piece.
  - Politics, says Joel Dvoskin, a former New York State Office of Mental Health forensic director, can determine if "you're going to stay locked up for a really long time, regardless of whether it's safe to let you go." Elected judges, fearing bad publicity, may be loath to release an offender into the community.
  - Are we improving? We do not know as there are not systematic statistics across the United States.

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### Goals of this presentation

1. Provide information on how CR evaluators make decisions.
2. Discuss salient case law and how different states interpret judicial decisions regarding conditional release.
3. Present extant data regarding how violence risk assessment data are and are not useful for decision-making.

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# Decision-Making and Conditional Release

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## CR Decisions: Basic Considerations and Observations

1. Involve political issues, and are not just clinical decisions.
2. Can be complicated and are always multifaceted.
3. Must involve more than just violence risk assessment.

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## State Evaluator Study

- Survey of 76 licensed forensic psychologists.
- Georgia, South Carolina, Minnesota, North Carolina, Hawaii, and Wisconsin.
- Web-based survey.
  - 27.2% of psychologists did more than 20 CR readiness evaluations in their career. Rest did fewer.
  - About 1/3 did over 100 of CR evaluations.
  - Only 38% received formal training in these evaluations.

Gowensmith, W.N., Bryant, A., & Vitacco, M.J. (2014). Decision-making in post-acquittal hospital release. How do forensic evaluators make their decisions? *Behavioral Sciences & the Law*.

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## Methodology

- Survey consisted of 21 potentially relevant factors in CR evaluation
- Task 1: Score each item on a scale from 1-10 regarding importance
- Task 2: Identify and rank top three factors

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## Relevant factors for CR

### Factors

- |   |  |
|---|--|
| 1. Risk for violence  | 14. Peer group / associates / family members the person is likely to return to                   |
| 2. Housing / Risk for homelessness  | 15. Adherence to clinical treatment (recovery) plan  |
| 3. Employment   | 16. Financial stability / benefits being in place  |
| 4. Adherence with medication  | 17. Applicant's articulation of their motivation to succeed on CR                                |
| 5. Attending scheduled appointments with mental health personnel                                | 18. Applicant's level of insight into their link between mental illness and criminal behavior    |
| 6. Attending scheduled appointments with supervising officer (i.e., probation)                  | 19. The applicant's criminal thinking (i.e., responsibility for behavior, scheming, etc.)        |
| 7. Attending scheduled court hearings   | 20. The applicant's criminal attitudes (i.e., rationalizing crime, negative attitude toward law) |
| 8. Risk of substance use or abuse (drugs and/or alcohol)  | 21. Leisure activities / down time / recreational pursuits                                       |
| 9. Risk of clinical decompensation  |  |
| 10. Risk of rehospitalization in a civil hospital due to clinical reasons                       |  |
| 11. Risk of rehospitalization in state hospital due to violations of terms and conditions of CR |  |
| 12. Ability to follow terms and conditions of CR  |  |
| 13. Motivation to follow terms & conditions of CR   |  |

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## Results

- Most important factor clinicians considered was "past violence." It had the largest score in the survey and was cited by the majority of clinicians as a factor in their decision.
- Second most cited factor was "adherence to medication."
- Rest were hodgepodge of factors and not highly systematic.
- Range between 1 and 48 months for what is an appropriate time before recommending release ( $M = 10.2$  mos).
- 58.4% of evaluators used Forensic Assessment Instrument to aid in determining readiness for release.
  - 38 used some type of risk assessment instrument
  - 7 used malingering instrument

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### Reliability among Evaluators

- Consistently showing that evaluators frequently disagree on who should be released from the hospital.
- Result from lack of agreement and what the law demands and how constructs of mental illness and dangerousness are defined.

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### Evaluator opinion agreement: All evaluations

	CST <sup>1</sup> (initial)	CST <sup>1</sup> (sub-sequent)	Sanity <sup>2</sup>	Violence Risk <sup>3</sup>	Conditional Release <sup>4</sup>	CR discharge
Number of cases	N = 182	N = 59	N = 161	N = 153	N = 35	N = 31
<b>Agreement</b>	70.9	61.0	55.1	67.3	54.3	51.6
<b>Disagreement</b>	29.1	39.0	30.3	28.1	40.0	45.2
<b>Unknown</b>	0.0	0.0	14.5	4.6	5.7	3.2

Gowensmith, W. N., Murrise, D. M., & Boccaccini, M. T. (2017). Field Reliability Influences Field Validity: Risk Assessments of Individuals found Not Guilty by Reason of Insanity. *Psychological Assessment*, 29, 786-794.

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### Evaluator agreement and rehospitalization rates

- 43 of 62 individuals released on CR
  - In 29 of these 43 cases, all three evaluators recommended CR
  - In 14 cases, evaluators disagreed about readiness for CR
- They followed these 43 cases for up to three years post-hospital discharge
  - Rates of rehospitalization were collected

Gowensmith, W. N., Murrise, D. M., & Boccaccini, M. T. (2017). Field Reliability Influences Field Validity: Risk Assessments of Individuals found Not Guilty by Reason of Insanity. *Psychological Assessment*, 29, 786-794.

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### Evaluator agreement and rehospitalization rates

	Rehospitalized	Not rehospitalized
Agreement	34.5% (N=10)	65.5% (N=19)
Disagreement	71.4% (N=10)	28.6% (N=4)

$\chi^2 (2, N = 43) = 6.18, p = .02$

Cramer's V = .02

Govenansmith, W. N., Murrie, D. M., & Boccaccini, M. T. (2017). Field Reliability Influences Field Validity: Risk Assessments of Individuals found Not Guilty by Reason of Insanity. *Psychological Assessment, 29*, 786-794.

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### Case law and Statutes

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### Overview of Case Law

- Consider case law dealing from multiple areas of mental health law.
- Specific emphases on rationale for continued civil commitment. Included here are cases dealing with competency, insanity, and SVP.
  - Emphasizing Foucha v. Louisiana (1992).

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### Jackson v. Indiana (1972)

- A case involving competency to proceed to trial. Theon Jackson committed for petty theft.
- Supreme Court indicated it was unconstitutional for a state to commit an individual indefinitely when not competent to proceed to trial.
- Court noted, "Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed."
  - Statement repeated in Foucha and Jones.

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### Jones v. United States (1983)

- Jones arrested for stealing a coat from a department store. Doctors believed he remained dangerous despite minimal charges.
- When a criminal defendant establishes that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

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### Other considerations with Jones

- Addington v. Texas, held that the government in a civil-commitment proceeding must demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous.
- Less concern of commitment based on "idiosyncratic behavior" as there is assumption of criminal behavior.
  - Crime(s) do not matter (political).
    - My experience.

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### Foucha v. Louisiana (1992)

- Terry Foucha committed to Louisiana state hospital after finding of NGRI on charges of burglary and illegal discharge of a firearm.
- Release was denied basis of fights in hospital (dangerousness) and presence of antisocial personality disorder. A psychotic disorder reportedly had remitted.
- Supreme Court ruled that if no longer mentally ill he can not remain committed.

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### Difficulties with Foucha

- What is mental illness?
  - What DSM-5 diagnoses qualify?
- What is dangerousness?
  - Realizing states that have varying standards.
  - Georgia uses imminent for most commitment hearings?
- How much of both need to be present?
  - Left for states to decide.

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### Three State Supreme Court cases (Post-Foucha)

- State v. Miller (Haw. 1997). The Supreme Court of Hawaii indicated an insanity acquittee's past misconduct is relevant when determining whether the insanity acquittee is still suffering from a mental illness. The court has discretion to consider all relevant evidence.
- State v. Klein (Wash. 2005). The Washington Supreme Court ruled an insanity acquittee was not required to have the same diagnoses that formed the basis for the plea. The court ruled that Ms. Klein on the basis of an addiction and personality disorder "presented a substantial danger to others or a substantial likelihood of committing criminal acts jeopardizing public safety."
- Dupree v. Schwarzkopf (GA, 2011). Georgia ruled antisocial personality disorder qualified for continued commitment under an insanity commitment.

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### Other Considerations and Questions

- Have states ignored Foucha?
  - Not ignored but states clearly have found ways to circumvent the spirit of the decision. Similar to the manner many states have found ways around Jackson.
- Consider SVP rulings.
  - Kansas v. Crane
  - Kansas v. Hendricks
- Clinician responsibilities

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### Georgia Code - Criminal Procedure – Title 17, Section 17-7-131

- (A) If a defendant appears to meet the criteria for outpatient involuntary treatment as defined in Part 3 of Article 3 of Chapter 3 of Title 37, which shall be the criteria for release on a trial basis in the community in preparation for a full release, the court may order a period of conditional release subject to certain conditions set by the court. The court is authorized to appoint an appropriate community service provider to work in conjunction with the Department of Human Resources to monitor the defendant’s compliance with these conditions and to make regular reports to the court.

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### Continued

- (B) If the defendant successfully completes all requirements during this period of conditional release, the court shall discharge the individual from commitment at the end of that period. Such individuals may be referred for community mental health, mental retardation, or substance abuse services as appropriate. The court may require the individual to participate in outpatient treatment or any other services or programs authorized by Chapter 3, 4, or 7 of Title 37.
- (C) If the defendant does not successfully complete any or all requirements of the conditional release period, the court may:
  - (i) Revoke the period of conditional release and return the defendant to a state hospital for inpatient services; or
  - (ii) Impose additional or revise existing conditions on the defendant as appropriate and continue the period of conditional release.

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**Insanity and Ohio:  
2945.40**

- In Ohio, a person is “not guilty by reason of insanity” relative to a charge of an offense only if the person proves that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person’s acts. (R.C. 2901.01(A)(14).
- NGRI is an affirmative defense that must be proved by the accused.
- Defendant must prove by a preponderance of the evidence.

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**Potential Release**

- If a person is found not guilty by reason of insanity, the verdict shall state that finding, and the trial court shall conduct a full hearing to determine whether the person is a mentally ill person subject to court order or a person with an intellectual disability subject to institutionalization by court order. Prior to the hearing, if the trial judge believes that there is probable cause that the person found not guilty by reason of insanity is a mentally ill person subject to court order or a person with an intellectual disability subject to institutionalization by court order, the trial judge may issue a temporary order of detention for that person to remain in effect for ten court days or until the hearing, whichever occurs first.

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**Risk Assessment and CR**

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### Much to consider

- Potential relationship between mental illness and violence.
  - Consider risk assessment instruments.
  - Uniqueness of forensic individuals.
- Effectiveness of risk assessment measures for individuals adjudicated NGRI.
- How to use risk assessment instruments for making the best decisions with individuals adjudicated NGRI.

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### Review of State-Wide Samples

- New York
- Wisconsin
- Maryland
- Virginia
- Georgia
- Oregon

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### New York Data

- Green, Belfi, Griswold, Schreiber, Prentky, and Kunz (2014) studied archival data to examine scores from the HCR-20 with 142 individuals adjudicated not guilty by reason of insanity and released to New York communities and followed for 3 and 10 year time frames.
  - The results found only the Historical (H) scale predicted conditional release outcome.
  - Prior supervision failure, negative attitude, substance abuse problems, and absent/less serious mental illness.
  - Consistent with a large study from Wisconsin that did not use structured professional judgment but instead relied on a host of demographic and clinical factors.
    - Very few rearrests for violence.

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## Wisconsin

- 363 individuals on conditional release over a 5-year time period. Ranged in age from 19 to 79 years (M = 41.09, SD = 13.12) and consisted of 286 males and 77 females.
- Individuals had a substantial criminal history and were diagnostically diverse. Primary psychotic-based diagnoses.
- 53.1% of the sample was arrested for a violent offense and 10.5% of the sample had a sexually-based offense.

Vitacco, M.J., Van Rybroeck, G.J., Erickson, S.K., Rogstad, J., Tripp, A., Harris, L., & Miller, R. (2008). Developing services for insanity acquittees released into the community: Maximizing success and minimizing recidivism. *Psychological Services, 5*, 118-128.

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## Wisconsin Results

- Of the total sample of 362 individuals on conditional release, 240 individuals maintained their release during the entire follow-up period. Of the 123 individuals who were revoked, only 7.11% committed a new crime. Only 3.68% were revoked for a violent offense, and no homicides.
- In looking at factors that predicted revocation three variables were significant: substance abuse diagnosis, previous revocation of conditional release, and symptoms that required hospitalization.

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## Maryland Sample

- The sample consisted of 356 individuals who were released to the community on conditional release. Age ranged from 19-82 years (M = 40). Males accounted for 78.1% of the sample and females made up 21.9%.
- 71.3% of the sample had a psychotic disorder as their primary diagnosis, and 22.5% of the sample were diagnosed with Antisocial Personality Disorder (ASPD) or Antisocial Traits.
- Approximately 50% of the sample was arrested for a violent offense.

Marshall, D.J., Vitacco, M.J., Read, J.B. & Haraway, M., (2014). Predicting voluntary and involuntary readmissions to forensic hospitals by insanity acquittees in Maryland. *Behavioral Sciences & the Law*.

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### Maryland Results

- 356 individuals were followed over a three-year total. 48 (14%) were re-arrested. Significant differences existed between those who presented voluntarily to the hospital versus those who needed to be involuntarily readmitted while on conditional release.
- Factors related to revocation of conditional release included substance abuse, readmission to a hospital during release, and less time in the community.

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### Maryland Results

- Many otherwise "relevant" variables do not seem to matter.
  - Housing issues with family.
  - Voluntary admission was allowed and extremely helpful.

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### Virginia Sample

- This study included a total of 127 forensic patients (99 males, 28 females) with an approximate age of 44 years old ( $M = 43.51$ ,  $SD = 12.41$ ) at the time of their conditional release from a state hospitals in Virginia. Followed over 3 years.
- The individuals studied have a substantial criminal history prior to their NGRI finding ( $M$  total charges = 7.42,  $SD = 10.55$ ), including violence ( $M$  violent charges = 1.87,  $SD = 3.08$ ).
- Most individuals adjudicated NGRI were initially arrested for a violent offense ( $n = 93$ , 73.2%), including 14 (11%) for murder.
- Diagnostically diverse, primarily psychotic.

Vitacco, M.J., Vauter, R., Erickson, S.K., Ragatz, L. (2014). Evaluating conditional release in Not Guilty by Reason of Insanity acquittees: A prospective follow-up study in Virginia. *Law and Human Behavior*, 38, 346-356.

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## Virginia Results

- The current study found the majority of individuals on conditional release ( $n = 96, 75.6\%$ ) were able to maintain their conditional release for the duration of the study follow-up, but 31 (24.4%) had their conditional release revoked. Regarding the 31 individuals who had their release revoked, only seven were arrested for a new charge and only three of them were considered serious (none for homicide).
- 20 standardized risk factors compiled by the state of Virginia and their relationship related to conditional release were analyzed. Previous failure on conditional release, dangerousness to others, nonadherence with hospital treatment, and number of previous violent charges were related to revocation. No other factors were related.

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## Georgia Sample

- Committed patients adjudicated by the court as NGRI.
- Files for 427 individuals were reviewed, 351 males.
- 252 African Americans and 175 European Americans.
- Average age was approximately 40 ( $M$  age = 40.65,  $SD = 12.64$ ).
- 118 had complete PCL scores and HCR-20s.
  - No age, race, or gender difference from total forensic population.
- Most individuals had a psychotic or mood disorder.
- Variable criminal history, several were hospitalized for a violent act, including 59 individuals with a charge of murder/manslaughter.

Vitacco, M.J., Tabernik, H., Zavadny, D., Bailey, K., & Waggoner, M.A. (2016). Projecting risk: The importance of the HCR-20 Risk Management scale in predicting outcomes with forensic patients. *Behavioral Sciences and the Law, 34*, 309-320.

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## Georgia Results

- Outcome was not predicated by any demographic variables. Age, gender, and ethnicity were unrelated to both release and return to a forensic hospital.
- Risk Assessment results did not predict release.
  - Historical ( $p = .74$ ).
  - Clinical ( $p = .41$ ).
  - Risk ( $p < .05$ ).
    - Two items were significant from the RM scale.
    - Total PCL-R/PCL:SV ( $p = .52$ ).
- Criminal behavior did appear to matter as the charge of murder or manslaughter did predict remaining in the hospital ( $p < .001$ ).

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### Oregon Results

- Items from the Historical (previous failure), Clinical (insight), and Risk Management (treatment response) all significantly predicted CR outcome.
  - Very few arrests for violence.
- Overall, the HCR did not add to outcome prediction.

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### Oregon Sample

- 200 individuals found NGRI and returned to the community on CR.
- All evaluated with the HCR-20.
- At the time of release, individuals ranged in age from 20 to 77 ( $M = 41.50$ ,  $SD = 12.15$ ). As expected in a forensic sample, the most common diagnosis was in the psychotic spectrum; however, mood and cognitive disorders were also frequently diagnosed in this forensic sample. The age at the time of the offense was approximately 35 years of age ( $M = 35.08$ ,  $SD = 11.74$ ).

■ Vitacco, M.J., Balduzi, E., Rideout, K et al., (revise and resubmit). Rethinking risk assessment with insanity acquittees. Law & Human Behavior.

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### Does Risk Assessment Matter for CR?

- This appears more debatable than some would like to suggest.
- Which instrument is particularly good for gauging the risk assessment of individuals on conditional release?
  - Violence Risk Appraisal Guide?
  - Historical, Clinical, Risk -20?
  - Psychopathy Checklist-Revised?
- Issues with the research.
- Best to use at admission and again at discharge?

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## Summary: Effectiveness of Conditional Release

- Multiple states with about 1000 individuals who have been found NGRI and on conditional release.
- What outcome matters?
- Bottom line: low recidivism rates for seriously mentally ill adults with violent histories who can succeed in community-based programming.
- Rule violations much more common than recidivism; and very low levels of violent recidivism.
- Supervision and monitoring are effective for reducing violence.
- Cost-effective and effective.
- Current assessment techniques are not encouraging.
  - "Anamnestic" approach—use with empirically validated factors.

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## What Next?

- Partnering with other states to take a look at their conditional release population.
- Consider development of specialized measure for conditional release.
- Development of specific risk assessment protocol to deal with individuals
  - Canada as a model with a large database for individuals released as NGRI. Even in Canada, most decisions are not made by considering structured assessment instruments, and instead focus on current behavior (Crocker et al., 2014).
  - In the United States we have databases by individual states, making comparisons difficult.

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## Questions

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