

Department of Legislative Services
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FISCAL AND POLICY NOTE**Revised**

House Bill 34

(Delegate Smigiel)

Judiciary

Judicial Proceedings

**Criminal Procedure - Discharge from Commitment of Person Previously Found
Not Criminally Responsible - Judicial Hearing**

This bill authorizes a court, on its own initiative or on motion by either party, to receive additional evidence to assist in its determination after receiving a report from the Office of Administrative Hearings (OAH) containing recommendations regarding discharge or conditional release from commitment of a person previously found not criminally responsible (NCR) for a crime of violence.

Fiscal Summary

State Effect: Significant increase in general fund expenditures for the Department of Health and Mental Hygiene (DHMH) and the Office of the Public Defender (OPD) if the bill is interpreted as authorizing *de novo* hearings. Potential significant increase in general fund expenditures if the bill does not authorize *de novo* hearings, but does increase the number of judicial hearings regarding OAH recommendations for defendants found NCR for a crime of violence or if the bill results in DHMH staff having to testify in court at these hearings.

Local Effect: Although the bill may increase the number of *de novo* hearings conducted in circuit courts, it is assumed that circuit courts and State's Attorneys can handle the bill's requirements with existing resources.

Small Business Effect: None.

Analysis

Current Law: Under Maryland law, a defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity to appreciate the criminality of

that conduct or to conform that conduct to the requirements of law. The law further clarifies that a mental disorder does not mean an abnormality manifested only by repeated criminal behavior or other antisocial misconduct.

After a verdict of not criminally responsible, a court ordinarily is required to commit a defendant to the custody of DHMH for institutional inpatient care or treatment. However, the court may release a defendant after a not criminally responsible verdict if (1) DHMH issues a report within 90 days prior to the verdict stating that the defendant would not be a danger if released; and (2) the State's Attorney and the defendant agree to the release and any conditions the court decides to impose.

A committed defendant is eligible for release only if the defendant proves by a preponderance of the evidence that the defendant will not be a danger due to mental illness if released. Within 50 days after the finding of not criminally responsible and commitment to DHMH, unless waived by the defendant, DHMH is required to hold a hearing at the facility before an administrative law judge on the issue of whether the individual is eligible for discharge or conditional release or requires continued commitment to DHMH. At the hearing, the formal rules of evidence do not apply and the defendant is entitled to legal representation. In addition, DHMH and the State's Attorney are entitled to participate in the hearing. Within 10 days after the hearing, OAH must submit a written report with a summary of the evidence presented at the hearing and a recommendation as to whether the committed person has proven that he/she is eligible for conditional release or discharge. Any party may file exceptions to OAH's recommendations within 10 days after receiving the report.

The court may hold a hearing on its own initiative within 30 days after the court receives the OAH report. The court must hold a hearing within this 30-day timeframe if timely exceptions are filed, unless the committed person and the State's Attorney waive the hearing. The committed person is entitled to be present at the hearing and have legal representation. Though the hearing is held on the record that was made at the administrative (OAH) hearing, the court may continue the hearing and remand to OAH to take additional evidence. If the court holds a hearing or if a hearing is waived, the court has 15 days from the end of the hearing or the waiver to (1) determine whether the evidence indicates that the committed person proved by a preponderance of the evidence that he/she is eligible for release; and (2) enter an appropriate order containing a concise statement of the court's findings, the reasons behind the court's findings, and an order for continued commitment, conditional release, or discharge from commitment. The conditions of release are for a period of five years or less. However, the court may extend the conditions of release upon recommendation from the department.

If timely exceptions are not filed and the court determines that OAH recommendations are supported by the evidence and a hearing is not necessary, the court must enter an

order in accordance with the OAH's recommendations within 30 days of receiving OAH's report. The court must notify the Criminal Justice Information System Central Repository whenever it orders conditional release or discharge of a committed person.

If the court orders continued commitment, the defendant may apply for release not earlier than one year after the initial release hearing ends or is waived, and annually thereafter. For these subsequent applications for release, the defendant has the option to pursue the administrative procedure applicable to the initial application for release or a court procedure, including the option to pursue a jury trial. In addition, DHMH may apply at any time to the court to order the defendant's conditional release.

The following offenses are crimes of violence under § 14-101 of the Criminal Law Article:

- abduction;
- arson in the first degree;
- kidnapping;
- manslaughter, other than involuntary manslaughter;
- mayhem;
- maiming;
- murder;
- rape;
- robbery;
- carjacking;
- armed carjacking;
- sexual offense in the first or second degree;
- use of a handgun in the commission of a felony or other crime of violence;
- child abuse in the first degree;
- specified instances of sexual abuse of a minor;
- an attempt to commit any of the crimes listed above;
- continuing course of conduct with a child;
- assault in the first degree;
- assault with intent to murder;
- assault with intent to rape;
- assault with intent to rob; and
- assault with intent to commit a sexual offense in the first or second degree.

Background: In *Byers v. State*, 184 Md. App. 499, 966 A.2d 982 (2009), the Maryland Court of Special Appeals held that a circuit court erred when it denied an OAH recommendation for release of a committed person after reviewing the facts

de novo, rather than basing its decision on a review of the administrative decision. The court opined that the circuit court did not have the authority to take additional evidence in cases pertaining to initial requests for release from commitment after a finding of not criminally responsible. In these cases, the circuit court must remand the case to OAH to obtain additional evidence.

OAH advises that it conducted 287 administrative hearings for NCR individuals in DHMH facilities in fiscal 2009, 279 hearings in fiscal 2010, and 242 hearings in fiscal 2011. Both the Mental Health Administration (MHA) and the Developmental Disabilities Administration (DDA) participate in NCR hearings. Though data is not available on the number of hearings conducted for MHA residents compared to DDA residents, MHA is involved in the overwhelming majority of these cases.

As of May 2011 (the most recent readily available data), the population of NCR defendants in MHA facilities is as follows:

Clifton T. Perkins Hospital Center: 133

Regional Hospitals: 175

(Regional Hospitals include Eastern Shore Hospital Center, Thomas B. Finan Hospital Center, Springfield Hospital Center, and Spring Grove Hospital Center)

This population count does not include NCR defendants who are returned to MHA facilities after being conditionally released.

DHMH advises that all of NCR patients in Clifton T. Perkins Hospital Center are there for crimes of violence, while approximately 30% of NCR patients in the regional hospitals were found NCR for crimes of violence. Using this estimate, there are currently 186 patients in MHA facilities who were found NCR for crimes of violence.

State Expenditures: General fund expenditures increase significantly for DHMH and OPD if the bill is interpreted as authorizing *de novo* hearings.

While the bill retains the current statutory requirement that a judicial hearing on OAH recommendations regarding a defendant found NCR be held on the record (made before OAH), the bill also authorizes that a court, on its own initiative or on motion by either party, “may receive additional evidence to assist in making its determination” if the defendant was found NCR for a crime of violence.

Hearings are typically conducted on the record or *de novo*. A *de novo* hearing is a new hearing that is conducted as if the previous hearing never took place, whereas a hearing on the record is a review of the previous decision. In a review conducted on the record, a court is prohibited from taking additional evidence. Currently, a judicial hearing of an

OAH recommendation regarding an NCR defendant is held on the record. It is unclear if the bill's authorization of a court to take additional evidence on its own initiative or on motion by either party essentially creates a *de novo* court hearing for defendants found NCR for a crime of violence or if the court is limited in what type of additional evidence it can receive and the scope of that evidence.

Department of Health and Mental Hygiene

If the bill essentially authorizes *de novo* hearings, then general fund expenditures for DHMH will increase significantly.

Assuming that *de novo* hearings will be requested for 70% of the 186 defendants in MHA facilities found NCR for a crime of violence, the bill would result in 130 *de novo* hearings each year. *De novo* hearings are more involved and lengthier than the judicial hearings currently conducted on the record in these cases. Administrative hearings are held at the DHMH facility to which the defendant was committed. MHA advises that each administrative hearing typically takes one-half of a workday. A *de novo* judicial hearing will likely consume the same amount of time. However, in some instances, additional time may be needed for travel to jurisdictions located in more remote areas of the State, since judicial hearings take place in a court. If these hearings were conducted *de novo* instead of on the OAH record, general fund expenditures for DHMH would increase by \$308,700 in fiscal 2013 and by as much as \$457,400 in fiscal 2017 for a psychologist to provide testimony on the committed person's mental status, a social worker to testify on the recommended conditions of release (if applicable), and one-half of an assistant Attorney General position to provide legal representation for DHMH.

If the bill does not authorize *de novo* hearings but defendants or State's Attorneys view the opportunity to present additional evidence to a court as an incentive to request judicial hearings that would normally be waived, the bill will result in increased expenditures for DHMH to transport and supervise defendants at hearings.

If the additional evidence involves courtroom testimony by DHMH personnel who would normally not be present at these hearings, general fund expenditures for DHMH will increase to hire additional personnel to cover shifts at DHMH facilities during court appearances. MHA advises that its facilities are operating at full capacity with a staffing shortage and that diverting clinical personnel from patient care to provide testimony at lengthier hearings in distant locations cannot be absorbed under present conditions.

Office of the Public Defender

An NCR defendant who has been committed to a DHMH facility may apply for release on an annual basis. Defendants have the option of pursuing an administrative hearing or

petitioning directly to the court for a bench trial or jury trial. If the defendant requests an administrative hearing, the same procedures described above apply, and the bill may result in *de novo* court reviews of administrative hearings in these cases.

Additionally, this estimate assumes that a substantial majority of defendants will request a jury trial instead of an administrative hearing for their annual reviews. There will be little incentive to request an administrative hearing under the bill's provisions, since regardless of the outcome, any party who is dissatisfied is authorized to request a judicial hearing, which will essentially take the form of a *de novo* hearing and result in the same case being tried twice. An increase in jury (or bench) trials will require additional OPD staff and increased expenditures for expert witnesses, who typically cost \$150 per hour.

OPD advises that most NCR hearings are administrative and that many Perkins patients opt for an administrative hearing because they can receive a hearing within 30 days of their request, compared to up to six months for a court date in a circuit court. Also, the administrative hearings are held in an area of the hospital that the patients are comfortable with and without lock-up or shackles. Staff members familiar to the patient are on hand to keep the patient calm. According to OPD, patients typically do not appeal adverse administrative recommendations because they know they cannot testify in court or call witnesses, and they do not wish to travel to a distant courthouse in shackles. OPD advises that release cases in the traditional court system typically take two days to litigate. Assuming that 130 additional jury trials will take place each year, and that each trial requires 20 hours of OPD work (16 hours of litigation and 4 hours of preparation), OPD will be engaged in an additional 2,600 hours of trial-related work per year on NCR release jury trials alone. Pursuant to the Case Weighting Study by the National Center for State Courts in 2005, each Maryland assistant public defender works 1,378 hours per year on case-related tasks, resulting in the need for two assistant public defenders to cover the additional workload at an additional cost of \$128,100 in fiscal 2013 and approximately \$188,000 in fiscal 2017. OPD advises that a *de novo* hearing requires five hours case-related work. It is assumed that these additional public defenders will also assist with the additional 650 hours of case-related work generated by *de novo* hearings for initial commitment determinations. The caseload standard per attorney in the Mental Health Division of OPD is 843. In fiscal 2012, attorneys in this division handled an average of 800 cases. Additional related staff (such as social workers) may be required to assist with client representation in these jury trials.

To the extent that the bill results in a significant increase in the number of jury trial prayers by committed NCR defendants, DHMH will incur additional litigation-related expenses for personnel, travel, and case administration.

Additional Information

Prior Introductions: SB 133 of 2011 and SB 474 of 2010 received hearings in the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: Although SB 298 (Senator Stone, *et.al.*) – Judicial Proceedings – is designated as a cross file, the bills are not identical.

Information Source(s): Washington and Worcester counties, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Office of Administrative Hearings, Office of the Public Defender, State's Attorneys' Association, Department of Legislative Services

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