

Department of Legislative Services
 Maryland General Assembly
 2013 Session

FISCAL AND POLICY NOTE

Senate Bill 556 (Senator Stone)
 Judicial Proceedings

Criminal Procedure - Persons Committed as Not Criminally Responsible - Release

This bill makes several changes to procedures governing the release from commitment of a person found not criminally responsible (NCR) for a crime.

Fiscal Summary

State Effect: General fund expenditures increase by at least \$620,300 in FY 2014 for the Department of Health and Mental Hygiene (DHMH) and the Office of the Public Defender (OPD) to hire additional personnel to testify and provide legal representation and support services at bench trials and court hearings authorized under the bill. Out-years reflect annualization and assume a stable caseload. Revenues are not affected.

(in dollars)	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	620,300	809,500	847,500	887,300	929,000
Net Effect	(\$620,300)	(\$809,500)	(\$847,500)	(\$887,300)	(\$929,000)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

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

Bill Summary:

Participation of State's Attorneys in NCR Release Hearings: In any hearing before the Office of Administrative Hearings (OAH) or a court regarding release, discharge, or a change in conditional release of a person committed as NCR, the State's Attorney must be a party to the proceedings, and has a right to be present, present evidence, and examine/cross-examine witnesses.

Notice Requirements: DHMH must send notice of a release hearing to the State's Attorney at least 10 days before the hearing and include a copy of the evaluation and the report prepared for the hearing.

Consideration of State's Attorney Recommendations: The bill requires OAH to give consideration to any specific conditions on conditional release recommended by the State's Attorney.

Judicial Hearings: The bill authorizes a court to hold a *de novo* hearing within 30 days after the court receives a report from OAH containing recommendations as to whether a person previously found NCR for a crime of violence is eligible for discharge or conditional release from commitment. The *de novo* hearing may be held on the court's own initiative or on motion by either party, and the court may receive evidence, hear witnesses, and engage in its own fact-finding at the hearing. The committed person is entitled to be present at the hearing and to be represented by counsel.

The bill also authorizes the court to continue its own hearing so that the court may take additional evidence. The bill clarifies that within 15 days after a judicial hearing on OAH recommendations ends or is waived, the court must (1) determine whether the evidence on the record that was made before OAH indicates as a matter of law that the committed person proved by a preponderance of evidence eligibility for release, with or without conditions, in accordance with applicable statutes; or (2) determine whether the evidence taken by the court indicates as a matter of fact and law that the committed person proved by a preponderance of the evidence eligibility for release, with or without conditions, in accordance with applicable statutes.

Subsequent Application for Release from Commitment: The bill requires OAH to schedule a hearing on a subsequent application for release from commitment. OAH must provide notice of the hearing to DHMH, the committed person, counsel for the committed person, and the State's Attorney at least 10 days before the hearing.

Subsequent Petition for Release from Commitment: The bill repeals a committed NCR person's right to request a jury trial on a subsequent petition for release from commitment. As a result, these petitions are considered by a judge during a bench trial.

Conditional Release Request by DHMH: The bill requires the court to hold a hearing and issue an order on a request by DHMH for the conditional release of an NCR commitment, unless the State's Attorney, DHMH, the committed person, and counsel for the committed person waive the hearing. The court has 30 days from receipt of DHMH's application to hold the hearing and issue the order. The State's Attorney, DHMH, and the committed person must be given notice of a hearing and the opportunity to be heard at the hearing.

Application for Change in Conditional Release: If DHMH considers a committed NCR person eligible for conditional release, the bill requires the court to hold a hearing on DHMH's application for the committed person's release, unless the State's Attorney, DHMH, the committed person, and counsel for the committed person waive the hearing. The court must hold the hearing within 30 days of the application. DHMH, the committed person, and the State's Attorney must be given notice of the hearing and an opportunity to be heard. The court must consider the application and any evidence presented at the hearing before making any changes or maintaining the status quo.

Current Law: Under Maryland law, a defendant is NCR for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation (intellectual disability), 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 NCR, 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 an NCR 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.

Initial Hearing for Release from Commitment: 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 NCR 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 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.

Subsequent Application for Release from Commitment: 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.

Conditional Release Request by DHMH: In addition, DHMH may apply at any time to the court to order the defendant's conditional release. The department is required to send a copy of the application to the defendant, the defendant's counsel, and the State's Attorney. After receipt of the application, the court may hold a hearing on the application or may issue an order either continuing commitment or allowing the conditional release.

Revocation or Modification of Conditional Release: If the State's Attorney receives a report that a defendant who was given a conditional release has violated a condition of release, or if the State's Attorney is notified by the court or DHMH that the defendant has violated a condition of release, the State's Attorney must conduct an investigation. If the State's Attorney determines that there was a violation and believes that further action is necessary, the State's Attorney must notify the department and file with the court a petition for modification or revocation of conditional release. The court is required to review the petition. If the court determines that there is not probable cause to believe that a violation occurred, the court must note this determination on the petition and notify the State's Attorney, the department, and the person reporting the violation. If the court decides that there is probable cause to believe that a violation occurred, the court must issue a hospital warrant for the defendant's apprehension and return to the department's jurisdiction and notify the State's Attorney, the defendant's counsel, the department, the person reporting the violation, and the administrative law judge. The individual is usually returned to the facility from which the individual had been released.

Unless all parties agree to an extension or the administrative law judge finds good cause, a hearing must be held within 10 days of the defendant's return to the department under the hospital warrant. At the hearing, the defendant is entitled to representation by an attorney, and all parties are entitled to submit evidence and call witnesses. The State is required to show by a preponderance of the evidence that the violation occurred. If the State meets this burden, the defendant may nevertheless prove by a preponderance of the evidence eligibility for continued release. The administrative law judge is required to report the findings and recommendations to the court promptly. Any party may file timely exceptions. After receipt of the report, and after reviewing any exceptions filed, the court may revoke the release, continue the release, modify the terms of release, or extend the conditional release for an additional five-year term.

Application for Change in Conditional Release: DHMH and the State's Attorney may apply to the court to change the conditions of release at any time. Unless good cause is shown for an earlier hearing, a defendant on conditional release may apply to the court for a change in conditions after six months under conditional release. Thereafter, the defendant may file an application for a change annually. If, however, the defendant has a physician's or psychologist's affidavit stating that the defendant's mental condition has improved, the defendant may apply for a change at any time.

Crimes of Violence: 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 NCR. In these cases, the circuit court must remand the case to OAH to obtain additional evidence.

State Expenditures: General fund expenditures increase by at least \$620,318 in fiscal 2014, which accounts for the bill's October 1, 2013 effective date. This estimate reflects the cost of hiring (1) three additional assistant public defenders and four secretaries to assist with OPD representation of committed individuals at bench trials and court hearings; (2) one social worker and one psychologist to represent DHMH at *de novo* judicial hearings; and (3) one police officer and one direct care assistant to assist with patient transport and supervision at court proceedings. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. This estimate accounts

for the conversion of current part-time positions to full-time positions, and the reclassification of positions to reflect their new litigation responsibilities.

Positions (new)	11
Salaries and Fringe Benefits	\$577,500
Operating Expenses	<u>42,818</u>
Total Minimum FY 2014 State Expenditures	\$620,318

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses. This estimate does not include OPD expenditures for medical records review and expert testimony at bench trials or court hearings.

The bill authorizes a *de novo* judicial hearing following an OAH hearing for the release of a criminal defendant found NCR for a crime of violence. While the bill also retains the current statutory requirement that a judicial hearing on OAH recommendations regarding a defendant found NCR for a nonviolent crime 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 continue its hearing so that the court may take additional evidence.”

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 continue a hearing to take additional evidence essentially creates a *de novo* court hearing for defendants found NCR for an offense other than 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. Assuming that the bill creates a *de novo* hearing for all NCR defendants, the bill could potentially diminish the value of an administrative hearing, since the aggrieved party (either the State’s Attorney or the defendant) will have a second chance at a new hearing in a circuit court.

Given that pursuit of an OAH hearing will very likely be followed by a *de novo* hearing before a court, OPD advises that it will probably opt out of the OAH process and instead pursue a civil bench trial on a client’s subsequent petition for release from NCR commitment. (The bill repeals the right to a jury trial on these petitions, but retains the right to a bench trial.) According to OPD, a defendant has more rights and discovery options in a civil trial than in a court hearing, and OPD would rather pursue the proceeding that provides a client with more rights and options than invest in a process that provides fewer rights and will result in two hearings (including a *de novo* hearing) anyway.

Thus, it is likely that the bill will significantly increase the number of trials on petitions for subsequent release from commitment for NCR defendants.

Office of the Public Defender

OPD's Mental Health Division handles approximately 350 NCR release cases every year. The division, which has eight attorneys, also handles a significant number of civil commitment cases in approximately 40 hospitals throughout the State.

OPD advises that exceptions are infrequently filed to an OAH report following a release hearing. This is mainly because a court has limited options to address OAH's report. A court can (1) find that there is substantial evidence to support OAH's recommendations/findings; (2) disagree with OAH's findings because of a lack of substantial evidence; or (3) determine that there is insufficient information and send the case back to OAH so that OAH can obtain more evidence. As a result, OPD does not frequently go to court following an OAH hearing. When OPD does go to court for an exceptions hearing, the hearing is limited in scope and no additional evidence or testimony is presented. OPD also advises that it participates in approximately 10 jury trials on petitions for release from NCR commitment every year.

Under the bill, OPD has to prepare for an additional 340 (bench) trials every year, which require significantly more preparation than the on-the-record hearings. To provide legal representation at these trials, which are conducted at the circuit court with jurisdiction over the case (unlike an OAH hearing, which is conducted at the hospital where the defendant and the public defender are located), and continue to provide coverage at civil commitment hearings at other hospitals, OPD needs to employ an additional three attorney positions and four secretarial positions.

OPD incurs additional significant general fund expenditures to have experts conduct reviews of defendants' medical records. Additional significant general fund expenditures are incurred for expert testimony at court hearings, travel expenses for OPD personnel, and social work services for aftercare plans for NCR defendants. OPD advises that expert review of medical records costs \$1,000 per record and expert testimony can cost up to \$2,000 per case.

Department of Health and Mental Hygiene

At a bench trial or a *de novo* judicial hearing, a psychologist provides testimony on the committed person's mental status, and a social worker testifies on the recommended conditions of release (if applicable). Administrative hearings are held at the DHMH facility to which the defendant was committed. Each administrative hearing typically takes one-half of a workday, while a *de novo* judicial hearing or a bench trial can take

anywhere from one-half to an entire day. 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 the circuit court with jurisdiction over the defendant's case.

Both the Mental Health Administration (MHA) and the Developmental Disabilities Administration (DDA) within DHMH 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. MHA facilities are operating at full capacity. MHA has historically advised that there is a staffing shortage, and that diverting clinical personnel from providing services to giving testimony at lengthier trials and hearings cannot be absorbed under present conditions. Should the staffing shortage worsen and the demand for *de novo* hearings and trials exceed the assumptions in this estimate, DHMH would need to hire even more personnel to accommodate the bill's requirements

Additional Information

Prior Introductions: Similar bills have been introduced during previous legislative sessions. SB 298 of 2012 received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 34, passed the House with amendments, and was referred to the Senate Judicial Proceedings Committee, where no further action was taken. SB 133 of 2011 and SB 474 of 2010 both received hearings in the Senate Judicial Proceedings Committee, but no further action was taken on either bill.

Cross File: HB 1112 (Delegate Mitchell, *et al.*) - Judiciary.

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

Fiscal Note History: First Reader - February 25, 2013
mc/kdm

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