

**Department of Legislative Services**  
 Maryland General Assembly  
 2012 Session

**FISCAL AND POLICY NOTE**

Senate Bill 298 (Senator Stone, *et al.*)  
 Judicial Proceedings

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

This bill authorizes a court to hold a *de novo* hearing within 30 days after the court receives a report from the Office of Administrative Hearings (OAH) containing recommendations as to whether a person previously found not criminally responsible 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.

**Fiscal Summary**

**State Effect:** General fund expenditures increase by \$308,700 in FY 2013 for the Department of Health and Mental Hygiene (DHMH) and the Office of the Public Defender to hire additional personnel to testify and provide legal representation and support services at *de novo* hearings authorized under the bill. Out-years reflect annualization and assume a stable caseload. Revenues are not affected.

| (in dollars)   | FY 2013     | FY 2014     | FY 2015     | FY 2016     | FY 2017     |
|----------------|-------------|-------------|-------------|-------------|-------------|
| Revenues       | \$0         | \$0         | \$0         | \$0         | \$0         |
| GF Expenditure | 308,700     | 392,300     | 418,400     | 434,400     | 457,400     |
| Net Effect     | (\$308,700) | (\$392,300) | (\$418,400) | (\$434,400) | (\$457,400) |

*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.

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## **Analysis**

**Bill Summary:** The bill also authorizes the court to continue its own hearing for the purpose of taking 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.

**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.

**State Expenditures:** General fund expenditures increase by \$308,741 in fiscal 2013, which accounts for the bill’s October 1, 2012 effective date. This estimate reflects the cost of hiring (1) one-half assistant public defender to represent committed individuals at hearings; (2) one-half assistant Attorney General, 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 hearings. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

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|---|------------------|
| Positions                               | 5                |
| Salaries and Fringe Benefits            | \$278,548        |
| Operating Expenses                      | <u>30,193</u>    |
| <b>Total FY 2013 State Expenditures</b> | <b>\$308,741</b> |

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

OAH advises that it conducted 287 administrative hearings for not criminally responsible 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 not criminally responsible (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 = 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.

The bill authorizes a court to hold a *de novo* hearing upon motion by either party or on the court's own initiative. A *de novo* hearing is essentially a complete reconsideration of the issues and a second attempt at a complete hearing. It is likely that requests for *de novo* hearings will be made in a significant portion of cases involving defendants found NCR for a crime of violence given the (1) seriousness of the offenses considered to be crimes of violence; (2) the potential length of commitment for defendants found NCR for crimes of violence; and (3) the perceived danger to the community associated with these defendants.

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 conducted in these cases (which are conducted on the record created at the administrative hearing). At a *de novo* judicial hearing, a psychologist would provide testimony on the committed person's mental status, a social worker would testify on the recommended conditions of release (if applicable), and an assistant Attorney General would provide legal representation for DHMH. 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.

MHA facilities are operating at full capacity. MHA advises that there is a staffing shortage, and that diverting clinical personnel from providing services to giving testimony at lengthier hearings cannot be absorbed under present conditions. Should the staffing shortage worsen and the demand for *de novo* hearings exceed the assumptions in this estimate, DHMH would need to hire even more personnel to accommodate the requirements of the bill.

The Office of the Public Defender advises that each hearing will require five hours of work. Assuming that 130 *de novo* hearings occur each year, the bill would result in an additional workload of 650 hours. 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 one-half assistant public defender to cover the additional workload.

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### **Additional Information**

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

**Cross File:** Although HB 34 (Delegate Smigiel) – Judiciary 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

**Fiscal Note History:** First Reader - February 15, 2012  
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