

Senate Judicial Proceedings Committee
SB 554: Criminal Procedure - Not Criminally Responsible Verdict –
Term of Commitment
February 9, 2024
POSITION: OPPOSE

Disability Rights Maryland (DRM) is the federally-mandated Protection and Advocacy agency for the State of Maryland, charged with defending and advancing the rights of persons with disabilities. DRM is tasked with monitoring state facilities for persons with disabilities, including the state psychiatric hospitals, to protect against abuse and neglect and ensure the civil rights of its patients are protected. DRM is concerned that SB 554 is unconstitutional, punitive, and violates the rights of individuals with disabilities, and is not reasonably calculated to improve public safety.

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: (1) appreciate the criminality of that conduct or (2) conform that conduct to the requirements of the law.” Md. Code Ann., Crim. Proc. § 3-109.

Modern jurisprudence on the insanity defense, referred to in Maryland as a verdict of Not Criminally Responsible (NCR), reflects the determination that treatment of those found NCR is not intended to be punitive, but rather intended to protect the public safety and treat the individual’s mental illness. The U.S. Supreme Court agrees. Where a State “may of course imprison convicted criminals for the purposes of deterrence and retribution” subject to constitutional limitations, “the State has no such punitive interest” with respect to persons found NCR. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Even though a finding of NCR results in automatic commitment of the individual for an indefinite period of time, “[t]he purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual’s mental illness and protect him and society from his potential dangerousness.” *Jones v. United States*, 463 U.S. 354,368 (1983); see also *Bergstein v. State*, 322 Md. 506, 516 (1991) (“The deprivation of liberty involved in the initial hospitalization or in rehospitalization clearly is not imposed as a punishment.”)

Against this backdrop, SB 554 proposes to amend the Criminal Procedure article to require an individual found NCR on first degree murder charges to be committed to a designated health care facility for life; an individual found NCR on second degree murder charges would be required to be committed for a term not exceeding 40 years. Currently the statute provides that an individual found NCR on any crime is indefinitely committed to a state hospital until the Forensic Review Board and the court determines that the person no longer poses a danger to themselves or the person or property of others. As an aside, the proposed change to commitment for “a term not exceeding 40 years”

for individuals found NCR on a second degree murder charge may actually be less restrictive than current law, permitting individuals who remain dangerous due to their mental illness if released from commitment to be discharged after a term of 40 years. We question whether this was the intent of the drafter.

More importantly, the proposed changes are unconstitutional and if enacted, would undoubtedly be challenged as such. As noted by Justice Brennan in *Jones*, 463 U.S. at 386, “[i]ndefinite commitment without the due process protections adopted in *Addington* and *O’Connor* is not reasonably related to any of the Government’s purported interests in confining insanity acquittees for psychiatric treatment. Due process “requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jones*, 463 U.S. at 368. Accordingly, the State may only continue to confine an individual who remains dangerous due to a mental disorder. *Id.* at 370. The Maryland statute embodies this constitutional standard, providing that an individual is eligible for release “if that person would not be a danger...to self or to the person or property of others if discharged” or if “released from confinement with conditions imposed by the Court.” Md. Code Ann., Crim. Pro. §§ 3-114(b),(c).

Individuals found NCR already face significant institutional challenges to discharge. Individuals may have difficulty assessing what their rights to discharge actually are, requesting a release hearing, and convincing their clinical providers that they would not be dangerous if released. Such challenges may (and often do) result in an individual being confined for a far lengthier period of time than the maximum sentence he or she would have received if convicted of the crime. See *Jones*, 463 U.S. at 369 (finding no correlation between the severity of the offense and the length of time necessary for treatment).

Once an individual is released from commitment, Maryland law provides for a defined five-year period of required conditions and monitoring to satisfy the State’s interest in protecting the individual from harm to self, others, or property due to a mental disorder. Md. Code Ann., Crim Pro. § 3-118(c). If, during this five-year period, it is alleged that the individual has violated the terms of the release order and is no longer eligible for release, the State may file an application with the court for revocation or modification of the order. § 3-121. If the court finds probable cause to believe that there has been a violation, a hospital warrant is issued for the individual to transport him or her to a facility designated by the Department. § 3-121(e). If the person is found to have violated their release order, their conditional release may be extended by another five years. Even when the individual has not violated their conditional release order, their conditional release may be renewed or extended based on the recommendations of their community providers, the State’s Attorney, the Court, and interested others.

The overall risk of violence among those discharged from mental institutions is low. A 2015 study followed 1800 individuals in Canada who were released from psychiatric institutions and found the recidivism rate was relatively low at three years --17%. For individuals who had been found NCR for a violent crime, the recidivism rate was even lower. People from the sample were also less likely to reoffend when under the purview of review boards, as they are in Maryland. Yanick Charette, *The National Trajectory*

Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 4: Criminal Recidivism, Can. J. Psychiatry 2015;60(3):127–134. Available online at <https://pubmed.ncbi.nlm.nih.gov/25886688/>.

The conditions of the typical conditional release order are quite restrictive and touch nearly every aspect of an individual's life. A person subject to an order of conditional release must disclose to his or her therapist any change in residence, employment, activities, marital status or family composition, or physical or mental health, legal issues, out-of-state travel, or any failure to meet clinic or program appointments, and must agree to abide by the therapist's recommendations on the subjects. Appropriate treatment is determined by mental health professionals and the Aftercare Program. The conditional release order requires the individual to receive psychiatric follow-up care "as often as deemed necessary," but initially bi-weekly by the treating psychiatrist and weekly by a therapist, with "any change of therapist, clinic or frequency of appointments" to be approved by the provider and sent to the Aftercare Program. The individual must attend and participate in any program or activity as recommended and arranged by a service provider or the Aftercare program, and must take any medication prescribed. An individual on conditional release waives all confidentiality during the release term – the Aftercare Program is permitted to communicate "with any person, including the mental health therapist/care provider having knowledge of the individual's clinical condition.

The goal of mental health treatment is recovery from mental illness, which is defined by the United States Substance Abuse and Mental Health Services Administration (SAMHSA) as "[a] process of change through which individuals improve their health and wellness, live a self-directed life, and strive to reach their full potential." See <https://www.samhsa.gov/find-help/recovery>. In light of all the existing protections designed to ensure the public's safety, it is concerning that SB 554 proposes to confine some individuals found NCR to the hospital for life, and others for up to 40 years, even when they are determined not to be dangerous, there are adequate safety measures through the NCR discharge and forensic aftercare process, and there is a low risk of violence from individuals released from hospitals after an NCR verdict. Maryland currently has approximately 180 individuals with mental illness detained in detention centers who have been found IST and court-ordered to an MDH facility for treatment and competency restoration. Those individuals are currently languishing in detention centers, in violation of their constitutional rights. By moving individuals who are NCR but have been determined not to be a danger if released to the community, with adequate supports and close monitoring by their providers and the community Aftercare Board, Maryland will be able to make the best use of its resources and transfer those in detention who most need treatment and restoration.

For these reasons, we urge that Senate Bill 554 be given an unfavorable report. Should you have any further questions, please contact Luciene Parsley, Litigation Director at Disability Rights Maryland, at 443-692-2494 or lucienep@disabilityrightsmd.org.