



POSITION ON PROPOSED LEGISLATION

BILL: SB 731 – Criminal Procedure – Committed Persons – Release Proceedings
POSITION: SUPPORT
DATE: February 25, 2020

Background On Conditional Release

The proposed bill makes changes to statutes that apply to the conditional release process. In Maryland, conditional release is understood as a “therapeutic release of a mentally ill individual from a psychiatric hospital as part of a continuing course of treatment.” *Bergstein v. State*, 322 Md. 506 (1991). It is not intended as absolute freedom, but rather to maintain an individual with a chronic mental illness safely in the community. NCR committees have the right to an annual conditional release hearing. The NCR committee has the right to choose whether to have the case heard by an administrative law judge, the committing judge or a jury.

As noted in a long line of cases in the U.S. Supreme Court and Maryland’s Court of Appeals, confinement in a psychiatric hospital, whether civilly or criminally, must rest on a finding of dangerousness to self or others. *O’Connor v. Donaldson*, 422 U.S. 563, 574-575 (1975), *Jones v. United States*, 463 U.S. 354, 368 (1983), *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992), *Hawkes v. State*, 433 Md. 105, 132-133 (2013). Maryland’s current conditional release statute explicitly adopts this standard – requiring that an individual show, by a preponderance of the evidence, that she would not be dangerous to herself or others due to a mental illness if released.

Ends Frivolous Appeals by Non-Participants

This bill proposes to end the practice of frivolous appeals of post-NCR (Not Criminally Responsible) cases by litigants that declined to appear or present evidence before the Maryland Office of Administrative Hearings. These appeals (exceptions) are never successful, are brought solely for the purpose of delay, and are costing Maryland taxpayers nearly \$70,000.00 for each additional three months of care.¹ The Office of the Public Defender has been involved in several cases where appeals (exceptions) have been filed by non-litigants and have taken *years* to fully resolve.

This bill will have the salutary effect of expanding state inpatient psychiatric bed space by avoiding unnecessary delay and ensuring appropriate discharge of only those patients that are most ready for release. This bill does not change any of the notice requirements of the current law which ensures all potential parties are aware of the opportunity to present their case at the initial hearing.

Ensures That the Rules Of Discovery are Applied

SB731 provides that the civil rules of discovery apply to all conditional release hearings regardless of the hearing setting. This change ensures the due process rights of all individuals seeking conditional release without needlessly clogging circuit court dockets with these hearings.

Ensures Alleged Violations of Release Conditions are Properly Founded

This bill also changes portions of two different statutes that apply to NCR committees *after* they have been conditionally released. Criminal Procedure Article 3-121 governs the protocol for violations of conditional release. Subsection (a) outlines the initial steps the Office of the State's Attorney must take if it receives allegations that a committed individual has violated one or more conditions of their release. In theory the State's Attorney could choose whether or not to file a Petition for Revocation and seek an individual's re-hospitalization. It must determine whether there is a "factual basis to believe that the committed person has violated the terms" *and* that "further action by the court is necessary."

In practice, many Offices of the State's Attorney rubber stamp the allegations of the Department of Health's monitor. It is a matter of record that in some offices, "we don't make a determination on our own whether somebody should be, for the lack of a better term, prosecuted. We just pass it along to the court and ask for a hospital warrant in every situation."

Offices of the State's Attorney often receive an unsigned draft Petition for Revocation from the Department, sign it and file it with the Court. This system undermines due process for the individual on conditional release. It minimizes the role of the State and counsel for the individual. For a violation of a technical nature – a missed appointment or being caught smoking in a group home – a Petition for Revocation is issued, a warrant signed, and an individual is taken into confinement. Even in cases where the Department, the Assistant Attorney General, the hospital treatment team and the ALJ all agree that the individual remains eligible for conditional release, the length of confinement as a result of the hospital warrant is routinely at least

two months. In many cases individuals are confined for several months, resulting in a loss of access to their outpatient services like housing and day programming.

Ensures Notification to Counsel

Sufficient due process for someone facing hospitalization is determining whether the individual poses a *bona fide* danger to self, others or property. Considering the pressure on inpatient beds for acutely ill pre-trial detainees, and that hospitalization within a state psychiatric hospital can average as much as \$264,067.00 per year, it is of vital importance to make certain that individuals being confined truly need it. Providing the OPD notice of a client’s alleged violation prior to their re-hospitalization affords the OPD the opportunity to investigate the allegations and work with the Office of the State’s Attorney and court to ensure that individuals who are psychiatrically stable, not dangerous, and are alleged to have committed minor “technical” violations remain in the community under appropriate conditions of release.

SB 731 also permits a committing court to hold a hearing, upon request, on Petitions to Change the Terms of Conditional Release. It also explicitly authorizes the committing court to shorten the conditional release term. In circumstances where an individual requests a change in their conditions of release, or opposes changes requested by the Department of Health or Office of the State’s Attorney, some courts have noted that there is no explicit right to a hearing in the statute. While many grant a hearing, others deny the individual an opportunity to be heard despite a specific request. This bill would clarify an individual’s opportunity to be heard and make certain that any party who moves for a change in conditions is heard.

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For all of the above-stated reasons, we urge an favorable vote on SB 731.

ⁱ According to the Perkins Hospital Financial Department the average cost of inpatient care per year at Perkins in fiscal year 2017 was \$264, 067.00