

Bill Number: SB216

Tracy Varda, Assistant State’s Attorney for Baltimore City
Opposed

The Unintended Consequences and Why the Bill Must Be Opposed

When a person has been found guilty of a crime but not criminally responsible, the person is committed to the Maryland Department of Health with a focus on treatment and behavioral health. The commitment usually involves a period of time in a state psychiatric hospital which typically leads to a court monitored community release known as Conditional Release which requires the person to adhere to specific conditions in order to remain in the community. **The purpose of Conditional Release is to provide therapeutic support in the community allowing for a safe and structured transition to community living.** Criminal Procedure §§ 3-112 through 3-123 set forth the procedures regarding the commitment and conditional release for those persons found guilty but not criminally responsible.

This bill seeks to amend Criminal Procedure §§3-116, 3-117, 3-119, 3-121 (a) – (d), and 3-122. This encompasses almost every piece of statutory law surrounding Conditional Release, essentially rewriting lengthy, detailed statues that were thoughtfully developed by all interested agencies and affected parties, including the Office of the Public Defender (OPD).

§3-116-117

This Bill would require the presence of an Assistant State’s Attorney (ASA) at all Conditional Release and Conditional Release Revocation Hearings or FORFEIT the right to take exceptions to the Administrative Law Judge’s (ALJ) opinion.

-Before a committed person is released from commitment, the Office of Administrative Hearings (OAH) conducts a hearing to determine if the person is eligible for release.

-After the hearing, the ALJ sends a report to the Circuit Court judge, the Maryland Department of Health (MDH), the committed person and his attorney, and the State’s Attorney’s Office (SAO) with a recommendation regarding release eligibility.

-Under the current statute, any party regardless of whether they attended the hearing may file an exception to the ALJ’s recommendation.

-The proposed changes to these statutes would have a profound fiscal impact on the 24 State’s Attorney’s Offices around the State.

- These hearings take place on a weekly basis within the 6 Regional Psychiatric Hospitals and State Residential Centers statewide (from Western Maryland to the Eastern Shore).
- Due to the statutory requirements regarding the timing of these hearings, they are scheduled with VERY little notice to the parties – usually less than one week (*no specified timeline of notice is given in the §3-115*).
- To enable an ASA to be present at each hearing would require each SAO to assign staff to either travel the state to attend the hearings or acquire office space and assign permanent staff in each State Psychiatric Hospital. **There were a total of 19 release/revocation hearings scheduled for the Baltimore City State’s Attorney’s Office alone for the months of January and February in 2020.**
- The need to arrange calendars for ASA’s to attend will likely lead to numerous postponements and would delay the release proceedings. This delay would cause a negative fiscal impact on the MDH.
- If the SAO of each jurisdiction do staff every Conditional Release and Revocation hearing, the ensuing litigation will result in a tremendous increase in time to conduct these hearings. This will also add a substantial staffing burden to the OAH, MDH, and OPD.
- At present, the various SAO’s designate staff to attend the hearings in a limited number of cases when a need is identified. The majority of cases can be agreed to by the parties without the presence of an ASA.
- **Requiring the presence of an ASA to preserve and protect any future appellate right places an unneeded burden on multiple agencies, but most egregiously on the 24 State’s Attorney’s Offices. Most importantly, there is no harm by the existing statutory scheme the proposed amendment would remedy.**
- It is important to note that current case law establishes that the standard of proof to overturn an ALJ opinion to be a showing of an abuse of judicial discretion. *Byers v. State, 184 Md.App. 499*. This existing standard limits the ability of overturning an ALJ opinion, except in the most egregious of circumstances.

§3-119

This Bill seeks to apply the Circuit Court Rules of Discovery to the Conditional Release Hearing process.

-The OAH conducts the hearings. Discovery procedures are addressed in the OAH's regulations. COMAR 28.02.01.16 sets forth the OAH discovery procedures and allows any party to request discovery rendering this provision unnecessary.

-This provision is ambiguous as it fails to specify whether civil or criminal Maryland Discovery rules would apply.

§3-121

The proposed changes to this section require that the OPD and defense attorney of record be given notice of any violations of Conditional Release prior to the issuance of a Hospital Warrant.

-When a person is on Conditional Release, his compliance is monitored by the Community Forensic Aftercare Program (CFAP). If he fails to adhere to the conditions of his Conditional Release, CFAP will notify the State's Attorney's Office. After an Assistant States Attorney (ASA) reviews the documentation and determines the person has violated his Conditional Release, the ASA will file a petition asking the Court to revoke the Conditional Release and issue a Hospital Warrant. **The Court then reviews the petition and if the Court determines that probable cause exists that the person violated his Conditional Release, the Court will issue a Hospital Warrant.** Once the Hospital Warrant is served, the person is immediately returned to the hospital.

-The Hospital Warrant process is an expedited, ex-parte hearing for the purpose of intervening as quickly as possible when a person is not compliant with conditions of release. This is to avoid further psychiatric deterioration, which is deleterious to the defendant and to public safety.

-To notify the defense of a violation before issuance of a warrant presents a substantial risk of harm to:

- law enforcement who will be serving the warrant
- staff at the treatment provider's program who may be reporting the lack of compliance
- the person on Conditional Release who may abscond from treatment in order to evade service of the warrant

-A violation of a Conditional Release does not require the issuance of a hospital warrant. When CFAP reports the violation they often recommend the person remain in the community and

enhance the treatment if appropriate. Requiring the defense to be notified with every violation may affect the Conditionally Released person's relationship with his treatment team as it puts an emphasis on noncompliance and flies in the face of the non-punitive therapeutic nature of Conditional Release.

-Under the current provision, the OPD or last attorney of record is sent a copy of the Hospital Warrant once it is issued. This notice is appropriate and sufficient to provide notice to the defense without the corollary risk to the treatment providers or law enforcement agencies.

The proposed changes also require that the State's Attorney's Office submit an affidavit stating that there is a factual basis for any alleged violation.

-To further require an officer of the court to present an affidavit is unnecessary and insinuates that the pleadings filed by the State's Attorney are disingenuous on their face.

In Romechia Simms v. Maryland Department of Health, et al., No. 20. September Term, 2019, the Court of Appeals addressed CP §3-121. (See attached.)

-Appellant had been on Conditional Release after being found not criminally responsible for the charge of involuntary manslaughter after she was discovered pushing her deceased three-year-old son in a swing for 40 straight hours. She challenged the issuance of a hospital warrant arguing that CP § 3-121 violated her right to due process by not having a dangerousness finding prior to issuance of the hospital warrant.

-The Court of Appeals examined CP §3-121 and determined that the procedures governing violations of Conditional Release did not violate due process. The Court pointed out that the statute requires a full hearing within 10 days of the serving of the Hospital Warrant assuring that the committed person will receive his full due process rights at the "speedy hearing."

-The Court found that a person who violates his Conditional Release is **presumed dangerous**.

-The Court held that CP § 3-121 "appropriately balances the interests of society against a committed person's conditional liberty interest."

§3-122

This provision adds the following language: The Court Shall Hold a Hearing After an Application is Made Under This Subsection to Determine Whether the Applicant has Satisfied the Requirements for Release Under §3-114 of this Title.

-This section currently sets forth the procedures for filing an Application for Change in Conditional Release. The proposed additional language is ambiguous. It is unclear whether it is meant to apply to all applications for changes in conditional release or just those applications addressing release eligibility.

-In 2019, there were 56 Applications for Change in Conditional Release filed by the Office of the Attorney General (OAG) or the SAO statewide. Of the 56 Applications, only 14 required a hearing.

-Regardless of its intent, requiring the Courts to hold hearings for all Applications for Change in Conditional Release would be burdensome on all parties. Currently, any party can request a hearing on the matter. This proposed provision would require a hearing regardless of the necessity and does not allow a judge to use her discretion in determining whether to hold a hearing. **This requirement represents a costly and unnecessary burden on the Courts.**

-Scheduling hearings every time an application is filed would require attorneys from the OAG, SAO and OPD to appear. **This is a tremendous waste of resources for all of these agencies when the majority of the applications can be handled without a hearing.**

The proposed change also adds the language “not exceeding five years” to the section that allows a court to extend the Conditional Release by an additional term of five years.

-In its current form, the statute allows the Court to extend a person’s Conditional Release indefinitely but for no more than five years at a time. The proposed language is ambiguous as it is unclear if the intent is to allow terms of less than five years or to prohibit the court from extending a Conditional Release for no more than a total of five years definitively.

-Under the current statute, a Conditional Release term can be extended as long as it is clinically necessary. When a person’s Conditional Release is close to expiring, the MDH reviews the person’s progress and makes a recommendation regarding the extension of the Conditional Release term based on clinical decisions and not arbitrary time limits.

-The statute as written allows the Court flexibility so that treatment services can be provided in the community so long as it is clinically indicated. The five year time limit requires the Court to conduct periodic reviews.

Summary

The purpose of Conditional Release is to provide a therapeutic rather than punitive approach to individuals with major mental illnesses who come through the criminal justice system. The highly structured treatment conditions allow these individuals to live safely in the community with the goal of decreasing hospitalizations and recidivism. The Not Criminally Responsible plea is an affirmative defense for which individuals avail themselves after they have been fully informed that the Court may have long term supervision over them. There are no defects in the current statute and no benefit to the proposed changes. Should the Bill be voted forward as proposed, it would unnecessarily impose a significant fiscal burden on all of the SAOs when there is no harm done by the existing statutory scheme to remedy. It would also increase the risk of harm to the treatment providers, law enforcement as well as the individuals on Conditional Release. Criminal Procedure §§3-116, 3-117, 3-119, 3-121 and 3-122 as they exist are more than sufficient and provide well established statutory protection for both the rights of the defendant/patient and public safety.

For these reasons, I urge an unfavorable report of SB 216.