

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 702

BY SENATORS TRUMP AND ROMANO

[Passed April 10, 2021; in effect 90 days from passage (July 9, 2021)]

1 AN ACT to repeal §27-6A-12 of the Code of West Virginia, 1931, as amended; to amend and
2 reenact §27-6A-1, §27-6A-2, §27-6A-3, §27-6A-4, §27-6A-5, §27-6A-6, §27-6A-8, and
3 §27-6A-10 of said code; and to amend said code by adding thereto a new section,
4 designated §27-6A-13, all relating generally to criminal competency and criminal
5 responsibility of persons charged with, or found not guilty of, a crime by reason of mental
6 illness; defining terms; allowing initial forensic evaluation of a defendant at a state mental
7 health facility or state hospital under certain circumstances; adding criteria for evaluation
8 or report by a qualified forensic evaluator; use of outpatient competency restoration
9 services or inpatient management to attain competency; providing for records to be made
10 available to chief medical officer; modifying the time for the completion of proceedings;
11 updating outdated language in the code; creating criteria for competency restoration
12 treatment; establishing maximum time periods for competency restoration treatment of
13 persons charged with crimes involving nonviolent misdemeanors, nonviolent felonies, and
14 violent misdemeanors and violent felonies; providing procedure for a court to review
15 commitment status of persons committed to an inpatient mental health facility or state
16 hospital prior to effective date of current amendments; providing for evaluation and
17 disposition of a person found not guilty by reason of mental illness; providing for
18 conditional release; providing procedures relating to an acquittee who violates terms of
19 conditional release; repealing section requiring study and reporting; requiring Department
20 of Health and Human Resources to pay for competency restoration in certain
21 circumstances; establishing the Dangerousness Assessment Review Board; specifying
22 membership and duties of board; establishing internal effective dates; and authorizing the
23 West Virginia Department of Health and Human Resources to propose legislative rules
24 and emergency rules.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 6A. COMPETENCY AND CRIMINAL RESPONSIBILITY OF PERSONS
CHARGED OR CONVICTED OF A CRIME.**

**§27-6A-1. Qualified forensic evaluator; qualified forensic psychiatrist; qualified forensic
psychologist; definitions and requirements.**

1 (a) For purposes of this article:

2 (1) "Competency restoration" means the treatment or education process for attempting to
3 restore a criminal defendant's ability to consult with his or her attorney with a reasonable degree
4 of rational understanding, including a rational and factual understanding of the court proceedings
5 and charges against the person. Competency restoration services may be provided in a jail-
6 based, outpatient, or inpatient setting as may be ordered by the court.

7 (2) "Competency to stand trial" means the ability of a criminal defendant to consult with
8 his or her attorney with a reasonable degree of rational understanding, including a rational and
9 factual understanding of the procedure and charges against him or her.

10 (3) "Court" or "court of record" means the circuit court with jurisdiction over the charge or
11 charges against the defendant or acquittee.

12 (4) "Department" means the Department of Health and Human Resources.

13 (5) A "qualified forensic evaluator" is either a qualified forensic psychiatrist or a qualified
14 forensic psychologist as defined in this section.

15 (6) A "qualified forensic psychiatrist" is:

16 (A) A psychiatrist licensed under the laws in this state to practice medicine who has
17 completed post-graduate education in psychiatry in a program accredited by the Accreditation
18 Council of Graduate Medical Education; and

19 (B) Board-eligible or board-certified in forensic psychiatry by the American Board of
20 Psychiatry and Neurology or actively enrolled in good standing in a West Virginia training program

21 accredited by the Accreditation Council of Graduate Medical Education to make the evaluator
22 eligible for board certification by the American Board of Psychiatry and Neurology in forensic
23 psychiatry or has two years of experience in completing court-ordered forensic criminal
24 evaluations, including having been qualified as an expert witness by a West Virginia circuit court.

25 (7) A “qualified forensic psychologist” is:

26 (A) A licensed psychologist licensed under the laws of this state to practice psychology;

27 and

28 (B) Board-eligible or board-certified in forensic psychology by the American Board of
29 Professional Psychology or actively enrolled in good standing in a West Virginia training program
30 approved by the American Board of Forensic Psychology to make the evaluator eligible for board
31 certification in forensic psychology or has at least two years of experience in performing court-
32 ordered forensic criminal evaluations, including having been qualified as an expert witness by a
33 West Virginia circuit court.

34 (b) (A) qualified forensic evaluator may not perform a forensic evaluation on an individual
35 under §27-1-1 *et seq.* of this code if the qualified forensic evaluator has been the individual’s
36 treating psychologist or psychiatrist within one year prior to any evaluation order.

**§27-6A-2. Competency of defendant to stand trial; cause for appointment of qualified
forensic evaluator; written report; observation period; rules.**

1 (a) Whenever a court of record has reasonable cause to believe that a defendant in a
2 criminal matter in which an indictment has been returned, or a warrant or summons issued, may
3 be incompetent to stand trial, it shall, *sua sponte*, or upon motion filed by the state or by or on
4 behalf of the defendant, order a forensic evaluation of the defendant’s competency to stand trial
5 to be conducted by a qualified forensic evaluator. If a court of record orders both a competency
6 evaluation and a criminal responsibility or diminished capacity evaluation, the competency
7 evaluation shall be performed first, and if the qualified forensic evaluator is of the opinion that the
8 defendant is not competent to stand trial, no criminal responsibility or diminished capacity

9 evaluation may be conducted absent further order of the court. The initial forensic evaluation may
10 not be conducted at a state inpatient mental health facility unless the defendant is a current patient
11 there or the court of record has found that the initial forensic evaluation cannot be performed at a
12 community mental health center consistent with §27-2A-1(b)(4) of this code, at an outpatient
13 facility, at a Division of Corrections and Rehabilitation Facility by a qualified forensic evaluator or
14 at the office of the qualified forensic evaluator.

15 (b) The court shall require the party making the motion for the evaluation, and other parties
16 as the court considers appropriate, to provide to the qualified forensic evaluator appointed under
17 subsection (a) of this section any information relevant to the evaluations within 10 business days
18 of its evaluation order. The information shall include, but not be limited to:

19 (1) A copy of the warrant or indictment;

20 (2) Information pertaining to the alleged crime, including statements by the defendant
21 made to the police, investigative reports, and transcripts of preliminary hearings, if any;

22 (3) Any available psychiatric, psychological, medical, or social records that are considered
23 relevant;

24 (4) A copy of the defendant's criminal record; and

25 (5) If the evaluations are to include a diminished capacity assessment, the nature of any
26 lesser included criminal offenses.

27 (c) A qualified forensic evaluator shall schedule and arrange for the prompt completion of
28 any court-ordered evaluation which may include record review and a defendant interview and
29 shall, within 10 business days of the date of the completion of any evaluation, provide to the court
30 of record a written, signed report of his or her opinion on the issue of competency to stand trial. If
31 it is the qualified forensic evaluator's opinion that the defendant is not competent to stand trial,
32 the report shall state whether the defendant is substantially likely to attain competency within the
33 next 90 days and, as provided in this section, and, whether the defendant may attain competency
34 by receiving competency restoration services at an outpatient mental health facility, outpatient

35 mental health practice, or a jail-based competency restoration program, if available. If the qualified
36 forensic evaluator determines that a defendant is likely to attain competency, but that competency
37 restoration can only be attained by inpatient management in a mental health facility or state
38 hospital, the qualified forensic evaluator shall set forth in his or her report the reasons why
39 competency restoration is not viable in a less restrictive environment or a jail-based competency
40 restoration program.

41 (d) The report of a qualified forensic evaluator as to a defendant's competency shall be
42 performed with standards and requirements established by the department consistent with best
43 medical practices. The report shall address:

44 (1) The forensic evaluator's opinion on the defendant's competency to stand trial;

45 (2) A diagnosis, if any;

46 (3) A proposed plan for competency attainment if appropriate; and

47 (4) An opinion as to whether the individual is dangerous to himself, herself, or others.

48 (5) The court may extend the 10-day period for filing the report if a qualified forensic
49 evaluator shows good cause to extend the period, but in no event may the period exceed 30 days.

50 (e) If the court determines that the defendant has been uncooperative during the forensic
51 evaluation ordered pursuant to subsection (a) of this section, or there have been one or more
52 inadequate or conflicting forensic evaluations performed pursuant to subsection (a) of this section
53 and the court has reason to believe that an observation period is necessary in order to determine
54 if a person is competent to stand trial, the court may order the defendant be committed to a mental
55 health facility designated by the department for a period not to exceed 15 days and an additional
56 evaluation be conducted in accordance with subsection (a) of this section by a qualified forensic
57 evaluator. The court shall order that at the conclusion of the 15-day observation period the sheriff
58 of the county where the defendant was charged shall take immediate custody of the defendant
59 for transportation and disposition as ordered by the court.

60 (f) A mental health facility not operated by the state has no obligation to admit and treat a
61 defendant under this section if the facility has no outpatient competency restoration program
62 established and recognized by the department, notwithstanding the provisions of §27-2A-1(b)(4)
63 and §27-5-9 of this code: *Provided*, That medication administration and medication management
64 for stabilization on an outpatient basis shall be provided by the mental health facility.

65 (g) A mental health facility not operated by the state that constitutes a charitable or public
66 service organization as defined by §29-12-5(b)(1)(B) of this code, and provides competency
67 restoration services pursuant to a court order may purchase liability coverage for injury or civil
68 damages related to the provision of the services from the Board of Risk and Insurance
69 Management.

70 (h) In consultation with the Supreme Court of Appeals, the secretary may propose rules
71 for legislative approval in accordance with the provisions of §29A-3-1 *et seq.* of this code to
72 implement the provisions of this article. The secretary may promulgate emergency rules, pursuant
73 to §29A-3-15 of this code, as may be required.

**§27-6A-3. Competency of defendant to stand trial determination; preliminary finding;
hearing; evidence; disposition.**

1 (a) Within five days of the receipt of the qualified forensic evaluator's report and opinion
2 on the issue of competency to stand trial, the court of record shall make a preliminary
3 determination on the issue of whether the defendant is competent to stand trial. If the court of
4 record finds that the defendant is not competent, the court shall make a further finding as to
5 whether there is a substantial likelihood that the defendant can attain competency within 90 days,
6 and whether competency can be attained by receiving competency restoration services at an
7 outpatient mental health facility, outpatient mental health practice, or a jail-based competency
8 restoration program. If the court of record orders, or if the state or defendant or defendant's
9 counsel within 20 days of receipt of the preliminary findings makes a motion for a hearing, then a
10 hearing shall be held by the court of record within 15 days of the date of the motion for a hearing,

11 absent good cause being shown for a continuance. If a hearing order or motion is not filed within
12 20 days, the findings of the court become the final order.

13 (b) At a hearing to determine a defendant's competency to stand trial, the defendant has
14 the right to be present and he or she has the right to be represented by counsel and introduce
15 evidence and cross-examine witnesses. The defendant shall be afforded timely and adequate
16 notice of the issues at the hearing and shall have access to all forensic evaluator's opinions. All
17 rights generally afforded to a defendant in criminal proceedings shall be afforded to a defendant
18 in the competency proceedings, except trial by jury.

19 (c) The court of record pursuant to a preliminary finding or hearing on the issue of a
20 defendant's competency to stand trial and with due consideration of any forensic evaluation
21 conducted pursuant to §27-6A-2 and §27-6A-3 of this code, shall make findings of fact upon a
22 preponderance of the evidence as to the defendant's competency to stand trial based on whether
23 or not the defendant has sufficient present ability to consult with his or her lawyer with a
24 reasonable degree of rational understanding and whether he or she has a rational as well as a
25 factual understanding of the proceedings against him or her.

26 (d) If at any point in the proceedings the defendant is found not competent to stand trial
27 and substantially likely to attain competency, the court of record shall in the same order, upon the
28 evidence, make further findings as to whether the defendant, in order to attain competency,
29 should receive outpatient competency restoration services or if the attainment of competency
30 requires inpatient management in a mental health facility or state hospital. If inpatient
31 management is required, the court shall order the defendant be committed to an inpatient mental
32 health facility or state hospital designated by the department to attain competency to stand trial
33 and for a competency evaluation. The information and documents obtained as required by §27-
34 6A-2(b) of this code, shall be provided to the chief medical officer of the mental health facility or
35 state hospital within two days of entry of the court order. The term of this commitment under this

36 subsection may not exceed 90 days from the time of entry into the facility except as otherwise
37 provided by subsection (g) of this section.

38 (e) If at any point in the proceedings the defendant who has been indicted or charged with
39 a misdemeanor or felony which does not involve an act of violence against a person is found not
40 competent to stand trial and is found not substantially likely to attain competency after having
41 received competency restoration services for the lesser of 180 days or the maximum sentence
42 he or she would serve, if convicted of the offense, the defendant shall be released upon any
43 conditions that the court determines to be appropriate and shall have the criminal charges
44 dismissed without prejudice. The discharge order may, however, be stayed for 20 days to allow
45 civil commitment proceedings to be instituted by the prosecutor pursuant to §27-5-1 *et seq.* of this
46 code. The defendant shall be immediately released from any inpatient facility unless civilly
47 committed.

48 (f) Subject to subsection (i) of this section, if at any point in the proceedings a defendant
49 who has been indicted or charged with a misdemeanor or felony involving an act of violence
50 against a person is found not competent to stand trial and is found not substantially likely to attain
51 competency after having received competency restoration services for 180 days, he or she shall
52 be placed in the least restrictive setting and shall remain under the jurisdiction of the court upon
53 any conditions that the court considers appropriate and the charges against him or her shall be
54 held in abeyance. Release of the defendant may be stayed by the court for up to 30 days or longer
55 for good cause shown, upon the filing of a motion to challenge the individual's release to a less
56 restrictive setting. The circuit court may, *sua sponte* or upon motion, order that a dangerousness
57 evaluation be performed by a qualified forensic evaluator to aid in its consideration of the
58 proposed placement and supervision of the defendant. The dangerousness evaluation shall be
59 paid for by the department and completed within 30 days. The defendant shall be immediately
60 released from any inpatient facility to the least restrictive setting necessary under §27-5-1 *et seq.*
61 of this code, unless civilly committed.

62 (g)(1) If it is determined that a defendant indicted or charged as provided under subsection
63 (f) of this section has a substantial probability of regaining competency, then the defendant may
64 be ordered to remain in a mental health facility or state hospital for an additional reasonable time
65 until he or she attains competency, or the pending charges are disposed of according to law,
66 whichever is earlier in time: *Provided*, That a defendant may not be held in the mental health
67 facility or state hospital for a period longer than 240 days for competency restoration treatment.

68 (2) If, at the end of the maximum period for inpatient competency restoration treatment as
69 provided in this subsection, the court finds that the defendant has not attained competency and
70 is not substantially likely to attain competency in the foreseeable future, the defendant shall be
71 released to the least restrictive setting upon any conditions the court determines to be appropriate
72 and the charges against him or her held in abeyance for the maximum sentence he or she could
73 have received for the offense and the defendant released unless civil commitment proceedings
74 have been initiated pursuant to §27-5-1 *et seq.* of this code. Notwithstanding anything in this
75 article to the contrary, the court, in its discretion, may continue its oversight of the individual and
76 the court's jurisdiction over the individual: *Provided*, That notwithstanding any provision of this
77 article to the contrary, an individual may not be released as provided in this subsection until the
78 court reviews and approves a recent dangerousness risk assessment of the individual and the
79 chief medical officer's recommended release plan for the individual based on the needs of the
80 individual and the public. The court shall order the discharge of the individual if it finds by a
81 preponderance of the evidence that the individual has recovered from his or her mental illness
82 and that he or she no longer creates a substantial risk of bodily injury to another person.

83 (3) When a defendant is released upon a condition the court determines to be appropriate
84 and the charges against him or her are held in abeyance, the circuit court shall, no less frequently
85 than every six months, review the defendant's circumstances to determine if his or her condition
86 has deteriorated to the extent that requires civil commitment. Upon notice from the treatment
87 provider that a defendant who is released on the condition that he or she continues treatment

88 does not continue his or her treatment, the prosecuting attorney shall, by motion, cause the court
89 to reconsider the defendant's release. Upon a showing that the defendant is in violation of the
90 conditions of his or her release, the court may reorder the defendant to a mental health facility
91 under the authority of the department which is the least restrictive setting that will allow for the
92 protection of the public.

93 (h) The prosecuting attorney may, by motion, cause the competency to stand trial of a
94 defendant subject to the court's jurisdiction pursuant to subsection (f) of this section or released
95 pursuant to subsection (g) of this section to be determined by the court of record while the
96 defendant remains under the jurisdiction of the court. The court may order a forensic evaluation
97 of competency to stand trial be conducted by a qualified forensic evaluator and a report rendered
98 to the court in like manner as pursuant to §27-6A-2(a) and §27-6A-2(b) of this code.

99 (i) Any defendant found not competent to stand trial may at any time petition the court of
100 record for a hearing on his or her competency but may do so not more than every six months.

101 (j) Notice of court findings of a defendant's competency to stand trial, of commitment for
102 inpatient management to attain competency, of dismissal of charges, of order for inpatient
103 management to protect the public, of release or conditional release, or any hearings to be
104 conducted pursuant to this section shall be sent to the prosecuting attorney, the defendant, and
105 his or her counsel, and the mental health facility or state hospital. Notice of a court release hearing
106 or order for release or conditional release pursuant to subsection (e) of this section shall be
107 provided to the victim or next of kin of the victim of the offense for which the defendant was
108 charged by U.S. mail to such person's last known address. The burden is on the victim or next of
109 kin of the victim to keep the court apprised of his or her current mailing address.

110 (k) A mental health facility not operated by the state is not obligated to admit or treat a
111 defendant under this section except as otherwise provided by §27-2A-1(b)(4) and §27-5-9 of this
112 code.

113 (l) Notwithstanding anything in this article to the contrary, for each individual who is
114 committed to a state hospital, or committed to a state hospital and diverted to a licensed hospital
115 prior to the effective date of the amendments to this section enacted during the regular session
116 of the Legislature, 2021, who has received or will receive the maximum amount of competency
117 restoration treatment authorized under this section prior to January 1, 2022, and who the medical
118 director of the hospital and the court have determined is not restorable, the medical director shall
119 inform the court and prosecutor of record for each such individual as soon as practicable but no
120 later than March 31, 2022. The medical director shall immediately provide a recommendation to
121 the court and prosecutor for the clinical disposition, placement, or treatment of each individual.
122 The state hospital or prosecutor shall thereafter file a civil commitment proceeding, if warranted,
123 as provided under §27-5-1 *et seq.* of this code for each individual or make other appropriate
124 recommendations to the court of record. The court shall hold any hearing for each individual as
125 soon as practicable, but no later than June 30, 2022.

**§27-6A-4. Criminal responsibility or diminished capacity evaluation; court jurisdiction over
persons found not guilty by reason of mental illness.**

1 (a) If the court of record finds, upon hearing evidence or representations of counsel for the
2 defendant, that there is probable cause to believe that the defendant's criminal responsibility or
3 diminished capacity will be a significant factor in his or her defense, the court shall appoint a
4 qualified forensic evaluator to conduct a forensic evaluation of the defendant's state of mind at
5 the time of the alleged offense. However, if a qualified forensic evaluator is of the opinion that the
6 defendant is not competent to stand trial then no criminal responsibility or diminished capacity
7 evaluation may be conducted. The forensic evaluation may not be conducted at a state inpatient
8 mental health facility unless the defendant has been ordered to a mental health facility or state
9 hospital in accordance with §27-6A-2(c) or §27-6A-3(f) or §27-6A-3(h) of this code. To the extent
10 possible, qualified forensic evaluators who have conducted evaluations of competency under §27-
11 6A-2(a) of this code, shall be used to evaluate criminal responsibility or diminished capacity under

12 this subsection and all evaluations shall be performed consistent with the department's program
13 standards and requirements for the reports.

14 (b) The court shall require the party making the motion for the evaluations, and other
15 parties as the court considers appropriate, to provide to the qualified forensic evaluator appointed
16 under subsection (a) of this section any information relevant to the evaluation within 10 business
17 days of its evaluation order. The information shall include, but not be limited to:

18 (1) A copy of the warrant or indictment;

19 (2) Information pertaining to the alleged crime, including statements by the defendant
20 made to the police, investigative reports, and transcripts of preliminary hearings, if any;

21 (3) Any available psychiatric, psychological, medical, or social records that are considered
22 relevant;

23 (4) A copy of the defendant's criminal record; and

24 (5) If the evaluation is to include a diminished capacity assessment, the nature of any
25 lesser criminal offenses.

26 (c) A qualified forensic evaluator shall schedule and arrange within 15 days of the receipt
27 of appropriate documents the completion of any court-ordered evaluation which may include
28 record review and defendant interview and shall, within 10 business days of the date of the
29 completion of any evaluation, provide to the court of record a written, signed report of his or her
30 opinion on the issue of criminal responsibility, and if ordered, on diminished capacity. The court
31 may extend the 10-day period for filing the report if a qualified forensic evaluator shows good
32 cause to extend the period, but in no event may the period exceed 30 days. If there are no
33 objections by the state or defense counsel, the court may, by order, dismiss the requirement for
34 a written report if the qualified forensic evaluator's opinion may otherwise be made known to the
35 court and interested parties.

36 (d) If the court determines that the defendant has been uncooperative during a forensic
37 evaluation ordered pursuant to subsection (a) of this section or there are inadequate or conflicting

38 forensic evaluations performed pursuant to subsection (a) of this section, and the court has
39 reason to believe that an observation period and additional forensic evaluation or evaluations are
40 necessary in order to determine if a defendant was criminally responsible or with diminished
41 capacity, the court may order the defendant be admitted to a mental health facility or state hospital
42 designated by the department for a period not to exceed 15 days and an additional evaluation be
43 conducted and a report rendered in like manner as subsections (a) and (b) of this section by a
44 qualified forensic evaluator. At the conclusion of the observation period, the court shall enter a
45 disposition order and the sheriff of the county where the defendant was charged shall take
46 immediate custody of the defendant for transportation and disposition as ordered by the court.

47 (e) If the verdict in a criminal trial is a judgment of not guilty by reason of mental illness,
48 the court shall determine on the record the offense or offenses of which the acquittee could have
49 otherwise been convicted, and the maximum sentence he or she could have received. The
50 acquittee shall remain under the court's jurisdiction until the expiration of the maximum sentence
51 or until discharged by the court. The court shall order a qualified forensic evaluator to conduct a
52 dangerousness evaluation to include dangerousness risk factors to be completed within 30 days
53 of admission to the mental health facility and a report rendered to the court within 10 business
54 days of the completion of the evaluation. The dangerousness evaluation shall be performed
55 consistent with the department's program standards and requirements for such evaluations. The
56 medical director of the mental health facility shall provide the court a written clinical summary
57 report of the defendant's condition at least annually during the time of the court's jurisdiction. The
58 court's jurisdiction continues an additional 10 days beyond any expiration to allow civil
59 commitment proceedings to be instituted by the prosecutor pursuant to §27-5-1 *et seq.* of this
60 code. The defendant shall then be immediately released from the facility unless civilly committed.

61 (f) In addition to any court-ordered evaluations completed pursuant to §27-6A-2, §27-6A-
62 3, and §27-6A-4 of this code, the defendant or the state has the right to an evaluation or
63 evaluations by a forensic evaluator or evaluators of his or her choice and at his or her expense.

64 (g) The court shall place persons acquitted under subsection (e) of this section in the
65 temporary custody of the department for evaluation to determine if the acquittee may be released
66 with or without conditions or if the acquittee requires commitment. The court may authorize that
67 the evaluation be conducted on an outpatient basis. If the court authorizes an outpatient
68 evaluation, the department shall determine, on the basis of all information available, whether the
69 evaluation shall be conducted on an outpatient basis or whether the acquittee shall be confined
70 in a hospital for evaluation. If the court does not authorize an outpatient evaluation, the acquittee
71 shall be confined in a hospital for evaluation. If an acquittee who is being evaluated on an
72 outpatient basis fails to comply with the evaluation, the department shall petition the court for an
73 order to confine the acquittee in a hospital for the evaluation. A copy of the petition shall be sent
74 to the acquittee's attorney and the prosecutor of the acquittee's case. The evaluation shall be
75 conducted by a qualified clinical evaluator skilled in the diagnosis of mental illness and intellectual
76 disability and qualified by training and experience to perform the evaluations. The evaluator shall
77 determine whether the acquittee currently has mental illness or intellectual disability and shall
78 assess the acquittee and report on his or her condition and need for hospitalization with respect
79 to the factors set forth in §27-6A-5(b) of this code. The evaluator shall conduct an examination
80 and report his or her findings separately within 30 days of the department's assumption of custody
81 of the acquittee. Copies of the report shall be sent to the acquittee's attorney, the prosecuting
82 attorney for the jurisdiction where the person was acquitted, and the comprehensive community
83 mental health center designated by the department. If the evaluator recommends conditional
84 release or release without conditions, the court shall extend the evaluation period to permit the
85 department and the comprehensive community mental health center or licensed behavioral health
86 provider to jointly prepare a conditional release or discharge plan, as applicable, prior to the
87 hearing.

88 (h) A mental health facility not operated by the state is not required to admit or treat a
89 defendant or acquittee under this section except as otherwise provided by §27-2A-1(b)(4) and
90 §27-5-9 of this code.

**§27-6A-5. Release of acquittee to less restrictive environment; discharge from jurisdiction
of the court; conditional release; and commitment.**

1 (a) Upon receipt of the evaluation report as provided in §27-6A-4(e) of this code, and, if
2 applicable, a conditional release or discharge plan, the court shall schedule the matter for hearing
3 to determine the appropriate disposition of the acquittee. The hearing shall be conducted within
4 30 days receipt of the evaluation report. The circuit court may, sua sponte or upon motion, order
5 that an independent dangerousness evaluation by an independent qualified forensic evaluator be
6 performed to aid in its consideration of the proposed placement and supervision of the acquittee.
7 The dangerousness evaluation shall be paid for by the department and shall be performed
8 consistent with the department's program standards and requirements for the evaluations. As an
9 alternative to ordering an independent dangerousness assessment, the court may avail itself of
10 the services of the Dangerousness Assessment Review Board established in §27-6A-12 of this
11 code. Except as otherwise ordered by the court, the attorney who represented the defendant at
12 the criminal proceedings shall represent the acquittee through the proceedings pursuant to this
13 section. The matter may be continued on motion of either party for good cause shown. The
14 acquittee shall be provided with adequate notice of the hearing, of the right to be present at the
15 hearing, of the right to assistance of counsel in preparation for and during the hearing, and the
16 right to introduce evidence and cross-examine witnesses at the hearing. The hearing is a civil
17 proceeding.

18 (b) At the conclusion of the hearing, the court cannot commit the acquittee to a mental
19 health facility or state hospital unless it finds by clear and convincing evidence that the acquittee
20 has a mental illness or an intellectual disability, and that because of the nature or severity of

21 acquittee's condition, the acquittee cannot be treated on an outpatient basis and requires inpatient
22 management. The decision of the court shall be based upon consideration of the following factors:

23 (1) To what extent the acquittee has mental illness or an intellectual disability;

24 (2) The likelihood that the acquittee will engage in conduct presenting a substantial risk of
25 bodily harm to other persons or to himself or herself in the foreseeable future;

26 (3) The likelihood that the acquittee can be adequately controlled with supervision and
27 treatment on an outpatient basis; and

28 (4) Any other factors reflected in §27-5-4 of this code.

29 (c) If inpatient hospitalization is ordered by the court, the mental health facility or state
30 hospital shall periodically provide written clinical reports to the court regarding the continued need
31 for hospitalization as provided by this subsection. A report shall be sent to the court after the initial
32 six months of treatment and every two years after the initial report is made. The court shall provide
33 copies of the reports to the prosecutor and attorney for the acquittee. Within 30 days after receipt
34 of the report, the court shall hold a hearing to consider the issue of the continued commitment of
35 the acquittee. The acquittee may request a change in the conditions of confinement, and the trial
36 court shall conduct a hearing on that request if six months or more have elapsed since the most
37 recent hearing was conducted under this section.

38 (d) Notwithstanding anything in this section to the contrary, the court shall order the
39 acquittee released if the court finds that the acquittee meets the criteria for conditional release as
40 set forth in subsection (f) of this section. The court may order any other conditions it determines
41 to be necessary in accordance with subsection (c) of this section. If the court finds that the
42 acquittee does not need inpatient hospitalization nor does the acquittee meet the criteria for
43 conditional release, the court shall release the acquittee without conditions, provided the court
44 has approved a discharge plan prepared by the appropriate comprehensive community mental
45 health center or licensed behavioral health provider in consultation with the department.

46 (e) The court shall order that any person, acquitted by reason of mental illness and
47 committed pursuant to this section, who is sentenced to a term of incarceration for any other
48 offense in the same proceeding or in any proceeding conducted prior to the proceeding in which
49 the person is acquitted by reason of mental illness, complete any sentence imposed for the other
50 offense prior to being placed in the custody of the department until released from commitment
51 pursuant to §27-1-1 *et seq.* of this code. The court shall order that any acquittee by reason of
52 mental illness and committed pursuant to this section who is sentenced to a term of incarceration
53 in any proceeding conducted during the period of commitment be transferred to the custody of
54 the correctional facility where he or she is to serve his or her sentence, and, upon completion of
55 his or her sentence, that person shall be placed in the custody of the department until released
56 from commitment pursuant to §27-1-1 *et seq* of this code.

57 (f) At any time the court considers the acquittee's need for inpatient hospitalization
58 pursuant to this section, the court shall place the acquittee on conditional release if it finds that:
59 (1) Based on consideration of the factors which the court must consider in its commitment decision
60 as provided in subsection (b) of this section, the acquittee does not need inpatient hospitalization
61 but may require outpatient treatment or monitoring to prevent his or her condition from
62 deteriorating to a degree that he or she would become likely to cause serious harm to self or
63 others; (2) appropriate outpatient supervision and treatment are reasonably available; (3) the
64 acquittee is not mentally ill or does not have significant dangerousness risk factors associated
65 with mental illness; (4) there is significant reason to believe that the acquittee, if conditionally
66 released, would comply with the conditions specified; and (5) conditional release will not present
67 an undue risk to public safety. The court shall subject a conditionally released acquittee to any
68 orders and conditions it determines will best meet the acquittee's need for treatment and
69 supervision and best serve the interests of justice and society.

70 (g) The comprehensive community mental health center or licensed behavioral health
71 provider designated by the department shall implement the court's conditional release orders and

72 shall submit written reports to the court on the acquittee's progress and adjustment in the
73 community no less frequently than every six months. An acquittee's conditional release shall not
74 be revoked solely because of his or her voluntary admission to a state hospital.

75 (h) If at any time the court that conditionally released an acquittee pursuant to subsection
76 (f) of this section finds reasonable cause exists to believe that an acquittee on conditional release
77 has violated the conditions of his or her release or is no longer a proper subject for conditional
78 release based on application of the criteria for conditional release and requires inpatient
79 hospitalization, it may order an evaluation of the acquittee by a qualified forensic evaluator. If the
80 court, based on the evaluation and after hearing evidence on the issue, finds by a preponderance
81 of the evidence that an acquittee on conditional release has violated the conditions of his or her
82 release or is no longer a proper subject for conditional release based on application of the criteria
83 for conditional release and has a mental illness or an intellectual disability and requires inpatient
84 hospitalization, the court may revoke the acquittee's conditional release and order him or her
85 returned to the custody of the department.

86 (i) At any hearing pursuant to this section, the acquittee shall be provided with adequate
87 notice of the hearing, of the right to be present at the hearing, of the right to the assistance of
88 counsel in preparation for and during the hearing, and of the right to introduce evidence and cross-
89 examine witnesses at the hearing. The hearing shall be scheduled on an expedited basis. Written
90 notice of the hearing shall be provided to the prosecuting attorney for the committing jurisdiction.
91 The hearing is a civil proceeding.

92 (j) If during the term of the acquittee's conditional release the court finds that the acquittee
93 has violated the conditions of his or her release, but does not require inpatient hospitalization, the
94 court may hold the acquittee in contempt of court for violation of the conditional release order.

95 (k) The court may modify the conditions of release or remove the conditions placed on
96 release pursuant to subsection (f) of this section upon petition by the comprehensive community
97 mental health center or licensed behavioral health provider, the prosecuting attorney, the

98 acquittee, or upon its own motion based upon the report of the comprehensive community mental
99 health center or behavioral health provider: *Provided*, That the acquittee may petition no more
100 frequently than annually and only six months after the conditional release order is entered. Upon
101 petition, the court shall require the comprehensive community mental health center or behavioral
102 health provider to provide a report on the acquittee's progress while on conditional release.

103 (l) As it considers appropriate and based on the report from the comprehensive community
104 mental health center or behavioral health provider and any other evidence provided to it, the court
105 may issue a proposed order for modification or removal of conditions. The court shall provide
106 notice of the order, and their right to object to it, within 10 days of its issuance, to the acquittee,
107 the comprehensive community mental health center or behavioral health provider, and the
108 prosecuting attorney for the committing jurisdiction and for the jurisdiction where the acquittee is
109 residing on conditional release. The proposed order shall become final if no objection is filed within
110 10 days of its issuance. If an objection is filed, the court shall conduct a hearing at which the
111 acquittee, the prosecuting attorney, and the comprehensive community mental health center or
112 behavioral health provider have an opportunity to present evidence challenging the proposed
113 order. At the conclusion of the hearing, the court shall issue an order specifying conditions of
114 release or removing existing conditions of release, as the court considers appropriate.

§27-6A-6. Judicial hearing of defendant's defense other than not guilty by reason of mental illness.

1 If a defendant who has been found to be not competent to stand trial believes that he or
2 she can establish a defense of not guilty to the charges pending against him or her, other than
3 the defense of not guilty by reason of mental illness, the defendant may request an opportunity to
4 offer a defense thereto on the merits before the court which has criminal jurisdiction. If the
5 defendant is unable to obtain legal counsel, the court of record shall appoint counsel for the
6 defendant to assist him or her in supporting the request by affidavit or other evidence. If the court
7 of record in its discretion grants the request, the evidence of the defendant and of the state shall

8 be heard by the court of record sitting without a jury. If after hearing the petition the court of record
9 finds insufficient evidence to support a conviction, it shall dismiss the indictment and order the
10 release of the defendant from criminal custody. The release order, however, may be stayed for
11 10 days to allow civil commitment proceedings to be instituted by the prosecutor pursuant to §27-
12 5-1 *et seq.* of this code: *Provided*, That a defendant committed to a mental health facility or state
13 hospital pursuant to §27-6A-3 (d) or §27-6A-3 (f) shall be immediately released from the facility
14 unless civilly committed.

§27-6A-8. Credit for time; expenses.

1 (a) If a person is convicted of a crime, any time spent in involuntary confinement in a
2 mental health facility or state hospital as a result of being charged with the crime shall be credited
3 to the sentence.

4 (b) All inpatient care and treatment shall be paid by the department.

5 (c) All competency restoration services not covered by other government, third-party
6 funding sources, or other grant agreements shall be paid by the department.

§27-6A-10. Medications and management of court-ordered individuals.

1 (a) At any time pursuant to §27-6A-2, §27-6A-3, or §27-6A-4 of this code, an individual is
2 court ordered to a mental health facility or state hospital, the individual has the right to receive
3 treatment under the standards of medical management.

4 (b) An individual with health care decision-making capacity may refuse medications or
5 other management unless court-ordered to be treated, or unless a treating clinician determines
6 that medication or other management is necessary in emergencies or to prevent danger to the
7 individual or others: *Provided*, That medication management intended to treat an individual's
8 condition that causes or contributes to incompetency shall constitute treatment.

**§27-6A-12. Study of adult criminal competency and responsibility issues; requiring and
requesting report and proposed legislation; submission to legislature.**

1 [Repealed.]

§27-6A-13. Dangerousness Assessment Review Board.

1 (a) There is hereby created the Dangerousness Assessment Advisory Board. The board
2 shall consist of the following persons:

3 (1) The Commissioner of the Bureau of Behavioral Health and Health Facilities, or a
4 designee of the commissioner who was not involved in the decision under review;

5 (2) The forensic coordinator of the state;

6 (3) A representative of the protection and advocacy system for the state as defined by 29
7 U.S.C. § 794e, 42 U.S.C. §15041 *et seq.*; and 42 U.S.C. § 10801 *et seq.*;

8 (4) An employee of the Division of Corrections and Rehabilitation designated by the
9 commissioner with experience in inmate classification;

10 (5) An employee of the Division of Rehabilitation Services with experience in independent
11 living programs;

12 (6) Two board-certified forensic psychiatrists appointed by the Governor with the advice
13 and consent of the Senate; and

14 (7) Two psychologists who are West Virginia qualified forensic evaluators with at least five
15 years demonstrated experience in state and federal courts, appointed by the Governor with the
16 advice and consent of the Senate.

17 (b) The purpose of the board is to provide opinion, guidance, and informed objective
18 expertise to circuit courts as to the appropriate level of custody or supervision necessary to ensure
19 that persons who have been judicially determined to be incompetent to stand trial and not
20 restorable or not guilty by reason of mental illness are in the least restrictive environment available
21 to protect the person, other persons, and the public generally.

22 (c) A circuit court when reviewing a proposed less restrictive placement for a person found
23 incompetent to stand trial and not restorable or not guilty by reason of mental illness may request
24 the assistance of the board in considering the proposed placement plan. The circuit court may

25 request that the medical director convene the board to seek its opinion or opinions on the
26 appropriateness of the proposed placement. The secretary shall provide necessary suggestions,
27 space, and support staff to the board to conduct its activities.

28 (d) The provisions of §6-9A-1 *et seq.* and §29B-1-1 *et seq.* of this code are inapplicable to
29 the operation of the board.

30 (e) In performing its duties under this section, the board shall have access to all court
31 records, and medical and mental health records available to the court and all documents of any
32 type used by the medical director in developing the proposed placement plan.

33 (f) Each member of the board whose regular salary is not paid by the State of West Virginia
34 shall be paid the same compensation and expense reimbursement that is paid to members of the
35 Legislature for their interim duties as recommended by the Citizens Legislative Compensation
36 Commission and authorized by law for each day or portion thereof engaged in the discharge of
37 official duties. Reimbursement for expenses shall not be made, except upon an itemized account,
38 properly certified by the members of the board. All reimbursement for expenses shall be paid out
39 of the State Treasury upon a requisition upon the State Auditor.

40 (g) A board member shall recuse himself or herself if the board member has previously
41 evaluated a person whose classification or placement is under review.

42 (h) The members of the board shall be immune from suit and liability, either personally or
43 in their official capacity, for any claim for damage to or loss of property or personal injury or other
44 civil liability caused or arising out of any actual or alleged act, error, or omission that occurred
45 within the scope of their board, duties, or responsibilities: *Provided*, That nothing in this
46 subsection shall be construed to protect any person from suit and/or liability for any damage,
47 loss, injury, or liability caused by the intentional or willful and wanton misconduct of that person.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman, Senate Committee

.....
Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2021.

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Governor