

# **WEST VIRGINIA LEGISLATURE**

**2021 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 702**

BY SENATORS TRUMP AND ROMANO

[Originating in the Committee on the Judiciary;

reported on March 29, 2021]



1 A BILL 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11 updating outdated language in the code; creating criteria for competency restoration  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) ~~(2)~~ 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 ~~(3) A “qualified forensic evaluator” is either a qualified forensic psychiatrist or a qualified  
35 forensic psychologist as defined in this section.~~

36 ~~(4) “Department” means the Department of Health and Human Resources~~

37 (b) ~~No~~ (A) qualified forensic evaluator may not perform a forensic evaluation on an  
38 individual under §27-1-1 *et seq.* of this code if the qualified forensic evaluator has been the  
39 individual’s 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, ~~at any stage of the proceedings~~ order a forensic evaluation of the  
5 defendant’s competency to stand trial to be conducted by a qualified forensic evaluator. ~~or one or~~  
6 ~~more a qualified forensic psychiatrists. or one or more qualified forensic psychologists.~~ If a court

7 of record or other judicial officer orders both a competency evaluation and a criminal responsibility  
8 or diminished capacity evaluation, the competency evaluation shall be performed first, and if the  
9 ~~a~~-qualified forensic evaluator is of the opinion that a the defendant is not competent to stand trial,  
10 no criminal responsibility or diminished capacity evaluation may be conducted ~~without~~ absent  
11 further order of the court. The initial forensic evaluation may not be conducted at a state inpatient  
12 mental health facility unless the defendant ~~resides~~ is a current patient there or the court of record  
13 has found that the initial forensic evaluation cannot be performed at a community mental health  
14 center consistent with §27-2A-1(b)(4) of this code, at an outpatient facility, or at the office of the  
15 qualified forensic evaluator.

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

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

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

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

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

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

28 (c) A qualified forensic evaluator shall schedule and arrange for the prompt completion of  
29 any court-ordered evaluation which may include record review and a defendant interview and  
30 shall, within 10 business days of the date of the completion of any evaluation, provide to the court  
31 of record a written, signed report of his or her opinion on the issue of competency to stand trial. If  
32 it is the qualified forensic evaluator's opinion that the defendant is not competent to stand trial,

33 the report shall state whether the defendant is substantially likely to attain competency within the  
34 next ~~three months~~ 90 days and, as provided in this section, in order to attain competency to stand  
35 ~~trial~~ and, whether the defendant may attain competency by receiving competency restoration  
36 services at an outpatient mental health facility, outpatient mental health practice, or a jail-based  
37 competency restoration program, if available. If the qualified forensic evaluator determines that a  
38 defendant is likely to attain competency, but that competency restoration can only be attained by  
39 inpatient management in a mental health facility or state hospital, the qualified forensic evaluator  
40 shall set forth in his or her report the reasons why competency restoration is not viable in a less  
41 restrictive environment or a jail-based competency restoration program.

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

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

46 (2) A diagnosis, if any;

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

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

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

51 ~~If there are no objections by the state or defense counsel, the court may, by order, dismiss the~~  
52 ~~requirement for a written report if the qualified forensic evaluator's opinion may otherwise be made~~  
53 ~~known to the court and interested parties~~

54 ~~(d)~~ (e) If the court determines that the defendant has been uncooperative during the  
55 forensic evaluation ordered pursuant to subsection (a) of this section, or there have been one or  
56 more inadequate or conflicting forensic evaluations performed pursuant to subsection (a) of this  
57 section and the court has reason to believe that an observation period is necessary in order to  
58 determine if a person is competent to stand trial, the court may order the defendant be committed

59 to a mental health facility designated by the department for a period not to exceed 15 days and  
60 an additional evaluation be conducted in accordance with subsection (a) of this section by ~~one or~~  
61 ~~more qualified forensic psychiatrists, or a qualified forensic psychiatrist and a qualified forensic~~  
62 ~~psychologist~~ forensic evaluator. The court shall order that at the conclusion of the 15-day  
63 observation period the sheriff of the county where the defendant was charged shall take  
64 immediate custody of the defendant for transportation and disposition as ordered by the court.

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

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

76 ~~(g)~~ (h) In consultation with the Supreme Court of Appeals, the secretary may propose rules  
77 for legislative approval in accordance with the provisions of §29A-3-1 *et seq.* of this code to  
78 implement the provisions of this article. The secretary may promulgate emergency rules, pursuant  
79 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 ~~finding~~  
3 determination on the issue of whether the defendant is competent to stand trial. ~~and if~~ If the court

4 of 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 ~~the next~~  
6 ~~three months~~ 90 days, and whether competency can be attained by receiving competency  
7 restoration services at an outpatient mental health facility, outpatient mental health practice, or a  
8 jail-based competency restoration program. If the court of record orders, or if the state or  
9 defendant or defendant's counsel within 20 days of receipt of the preliminary findings ~~requests~~  
10 makes a motion for a hearing, ~~a hearing~~, then a hearing shall be held by the court of record within  
11 15 days of the date of the motion for a hearing ~~preliminary finding~~, absent good cause being  
12 shown for a continuance. If a hearing order or ~~request~~ motion is not filed within 20 days, the  
13 ~~preliminary~~ findings of the court become the final order.

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

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

27 ~~(d) If at any point in the proceedings the defendant is found competent to stand trial, the~~  
28 ~~court of record shall forthwith proceed with the criminal proceedings.~~

29 ~~(e) If at any point in the proceedings the defendant is found not competent to stand trial,~~  
30 ~~the court of record shall at the same hearing, upon the evidence, make further findings as to~~  
31 ~~whether or not there is a substantial likelihood that the defendant will attain competency within~~  
32 ~~the next ensuing three months~~

33 ~~(f) (d) If at any point in the proceedings the defendant is found not competent to stand trial~~  
34 ~~and is found substantially likely to attain competency, the court of record shall in the same order,~~  
35 ~~upon the evidence, make further findings as to whether the defendant, requires, in order to attain~~  
36 ~~competency, should receive outpatient competency restoration services or if the attainment of~~  
37 ~~competency requires inpatient management in a mental health facility or state hospital. If inpatient~~  
38 ~~management is required, the court shall order the defendant be committed to an inpatient mental~~  
39 ~~health facility or state hospital designated by the department to attain competency to stand trial~~  
40 ~~and for a competency evaluation. The information and documents obtained as required by §27-~~  
41 ~~6A-2(b) of this code, shall be provided to the chief medical officer of the mental health facility or~~  
42 ~~state hospital within two days of entry of the court order. The term of this commitment under this~~  
43 ~~subsection may not exceed ~~three months~~ 90 days from the time of entry into the facility except as~~  
44 ~~otherwise provided by subsection (g) of this section. However, upon request by the chief medical~~  
45 ~~officer of the mental health facility and based on the requirement for additional management to~~  
46 ~~attain competency to stand trial, the court of record may, prior to the termination of the three~~  
47 ~~month period, extend the period up to nine months from entry into the facility. A forensic evaluation~~  
48 ~~of competency to stand trial shall be conducted by a qualified forensic evaluator and a report~~  
49 ~~rendered to the court, in like manner as subsections (a) and (c), section two of this article, every~~  
50 ~~three months until the court determines the defendant is not competent to stand trial and is not~~  
51 ~~substantially likely to attain competency~~

52 ~~(g) (e) If at any point in the proceedings the defendant who has been indicted or charged~~  
53 ~~with a misdemeanor or felony which does not involve an act of violence against a person is found~~  
54 ~~not competent to stand trial and is found not substantially likely to attain competency after having~~

55 received competency restoration services for the lesser of 180 days or the maximum sentence  
56 he or she would serve, if convicted of the offense, the defendant shall be released upon any  
57 conditions that the court determines to be appropriate and shall have the criminal charges  
58 dismissed without prejudice. ~~and if the defendant has been indicted or charged with a~~  
59 ~~misdemeanor or felony which does not involve an act of violence against a person, the criminal~~  
60 ~~charges shall be dismissed~~ The ~~dismissal~~ discharge order may, however, be stayed for 20 days  
61 to allow civil commitment proceedings to be instituted by the prosecutor pursuant to §27-5-1 *et*  
62 *seq.* of this code. The defendant shall be immediately released from any inpatient facility unless  
63 civilly committed.

64 ~~(h)~~ (f) If Subject to subsection (i) of this section, if at any point in the proceedings the a  
65 defendant who has been indicted or charged with a misdemeanor or felony involving an act of  
66 violence against a person is found not competent to stand trial and is found not substantially likely  
67 to attain competency after having received competency restoration services for 180 days, he or  
68 she shall be placed in the least restrictive setting and shall remain under the jurisdiction of the  
69 court upon any conditions that the court considers appropriate and the charges against him or her  
70 shall be held in abeyance. Release of the defendant may be stayed by the court for up to 30 days  
71 or longer for good cause shown, upon the filing of a motion to challenge the individual's release  
72 to a less restrictive setting. The circuit court may, sua sponte or upon motion, order that a  
73 dangerousness evaluation be performed by a qualified forensic evaluator to aid in its  
74 consideration of the proposed placement and supervision of the defendant. The dangerousness  
75 evaluation shall be paid for by the department and completed within 30 days. The defendant shall  
76 be immediately released from any inpatient facility to the least restrictive setting necessary under  
77 §27-5-1 *et seq.* of this code, unless civilly committed. ~~and if the defendant has been indicted or~~  
78 ~~charged with a misdemeanor or felony in which the misdemeanor or felony does involve an act of~~  
79 ~~violence against a person, then the court shall determine on the record the offense or offenses of~~  
80 ~~which the person otherwise would have been convicted, and the maximum sentence he or she~~

81 ~~could have received. A defendant shall remain under the court's jurisdiction until the expiration of~~  
82 ~~the maximum sentence unless the defendant attains competency to stand trial and the criminal~~  
83 ~~charges reach resolution or the court dismisses the indictment or charge. The court shall order~~  
84 ~~the defendant be committed to a mental health facility designated by the department that is the~~  
85 ~~least restrictive environment to manage the defendant and that will allow for the protection of the~~  
86 ~~public. Notice of the maximum sentence period with an end date shall be provided to the mental~~  
87 ~~health facility. The court shall order a qualified forensic evaluator to conduct a dangerousness~~  
88 ~~evaluation to include dangerousness risk factors to be completed within thirty days of admission~~  
89 ~~to the mental health facility and a report rendered to the court within ten business days of the~~  
90 ~~completion of the evaluation. The medical director of the mental health facility shall provide the~~  
91 ~~court a written clinical summary report of the defendant's condition at least annually during the~~  
92 ~~time of the court's jurisdiction. The court's jurisdiction shall continue an additional ten days beyond~~  
93 ~~any expiration to allow civil commitment proceedings to be instituted by the prosecutor pursuant~~  
94 ~~to article five of this chapter. The defendant shall then be immediately released from the facility~~  
95 ~~unless civilly committed~~

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

102 (2) If, at the end of the maximum period for inpatient competency restoration treatment as  
103 provided in this subsection, the court finds that the defendant has not attained competency and  
104 is not substantially likely to attain competency in the foreseeable future, the defendant shall be  
105 released to the least restrictive setting upon any conditions the court determines to be appropriate  
106 and the charges against him or her held in abeyance for the maximum sentence he or she could

107 have received for the offense and the defendant released unless civil commitment proceedings  
108 have been initiated pursuant to §27-5-1 et seq. of this code. Notwithstanding anything in this  
109 article to the contrary, the court, in its discretion, may continue its oversight of the individual and  
110 the court's jurisdiction over the individual: *Provided*, That notwithstanding any provision of this  
111 article to the contrary, an individual may not be released as provided in this subsection until the  
112 court reviews and approves a recent dangerousness risk assessment of the individual and the  
113 chief medical officer's recommended release plan for the individual based on the needs of the  
114 individual and the public. The court shall order the discharge of the individual if it finds by a  
115 preponderance of the evidence that the individual has recovered from his or her mental illness  
116 and that he or she no longer creates a substantial risk of bodily injury to another person.

117 (3) When a defendant is released upon a condition the court determines to be appropriate  
118 and the charges against him or her are held in abeyance, the circuit court shall, no less frequently  
119 than every six months, review the defendant's circumstances to determine if his or her condition  
120 has deteriorated to the extent that requires civil commitment. Upon notice from the treatment  
121 provider that a defendant who is released on the condition that he or she continues treatment  
122 does not continue his or her treatment, the prosecuting attorney shall, by motion, cause the court  
123 to reconsider the defendant's release. Upon a showing that the defendant is in violation of the  
124 conditions of his or her release, the court may reorder the defendant to a mental health facility  
125 under the authority of the department which is the least restrictive setting that will allow for the  
126 protection of the public.

127 ~~(i) If the defendant has been ordered to a mental health facility pursuant to subsection (h)~~  
128 ~~of this section and the court receives notice from the medical director or other responsible official~~  
129 ~~of the mental health facility that the defendant no longer constitutes a significant danger to self or~~  
130 ~~others, the court shall conduct a hearing within thirty days to consider evidence, with due~~  
131 ~~consideration of the qualified forensic evaluator's dangerousness report or clinical summary~~  
132 ~~report to determine if the defendant shall be released to a less restrictive environment. The court~~

133 ~~may order the release of the defendant only when the court finds that the defendant is no longer~~  
134 ~~a significant danger to self or others. When a defendant's dangerousness risk factors associated~~  
135 ~~with mental illness are reduced or eliminated as a result of any treatment, the court, in its~~  
136 ~~discretion, may make the continuance of appropriate treatment, including medications, a condition~~  
137 ~~of the defendant's release from inpatient hospitalization. The court shall maintain jurisdiction of~~  
138 ~~the defendant in accordance with said subsection. Upon notice that a defendant ordered to a~~  
139 ~~mental health facility pursuant to said subsection who is released on the condition that he or she~~  
140 ~~continues treatment does not continue his or her treatment, the prosecuting attorney shall, by~~  
141 ~~motion, cause the court to reconsider the defendant's release. Upon a showing that defendant is~~  
142 ~~in violation of the conditions of his or her release, the court shall reorder the defendant to a mental~~  
143 ~~health facility under the authority of the department which is the least restrictive setting that will~~  
144 ~~allow for the protection of the public~~

145       ~~(j)~~ (h) The prosecuting attorney may, by motion, cause the competency to stand trial of a  
146 defendant subject to the court's jurisdiction pursuant to subsection ~~(h)~~ (f) of this section or  
147 released pursuant to subsection ~~(i)~~ (g) of this section to be determined by the court of record while  
148 the defendant remains under the jurisdiction of the court. The court may order a forensic  
149 evaluation of competency to stand trial be conducted by a qualified forensic evaluator and a report  
150 rendered to the court in like manner as ~~subsections (a) and (c), section two of this article~~ pursuant  
151 to §27-6A-2(a) and §27-6A-2(b) of this code.

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

154       ~~(l)~~ (j) Notice of court findings of a defendant's competency to stand trial, of commitment  
155 for inpatient management to attain competency, of dismissal of charges, of order for inpatient  
156 management to protect the public, of release or conditional release, or any hearings to be  
157 conducted pursuant to this section shall be sent to the prosecuting attorney, the defendant, and  
158 his or her counsel, and the mental health facility or state hospital. Notice of a court release hearing

159 or order for release or conditional release pursuant to subsection ~~(g)~~ (e) of this section shall be  
160 ~~made available~~ provided to the victim or next of kin of the victim of the offense for which the  
161 defendant was charged by U.S. mail to such person's last known address. The burden is on the  
162 victim or next of kin of the victim to keep the court apprised of ~~that person's~~ his or her current  
163 mailing address.

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

167 (l) Notwithstanding anything in this article to the contrary, for each individual who is  
168 committed to a state hospital, or committed to a state hospital and diverted to a licensed hospital  
169 prior to the effective date of the amendments to this section enacted during the regular session  
170 of the Legislature, 2021, who has received or will receive the maximum amount of competency  
171 restoration treatment authorized under this section prior to January 1, 2022, and who the medical  
172 director of the hospital and the court have determined is not restorable, the medical director shall  
173 inform the court and prosecutor of record for each such individual as soon as practicable but no  
174 later than March 31, 2022. The medical director shall immediately provide a recommendation to  
175 the court and prosecutor for the clinical disposition, placement, or treatment of each individual.  
176 The state hospital or prosecutor shall thereafter file a civil commitment proceeding, if warranted,  
177 as provided under §27-5-1 et seq. of this code for each individual or make other appropriate  
178 recommendations to the court of record. The court shall hold any hearing for each individual as  
179 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 ~~one of~~

4 ~~more qualified forensic psychiatrists or a qualified forensic psychologists~~ evaluator to conduct a  
5 forensic evaluation of the defendant's state of mind at the time of the alleged offense. However,  
6 if a qualified forensic evaluator is of the opinion that the defendant is not competent to stand trial  
7 ~~that~~ then no criminal responsibility or diminished capacity evaluation may be conducted. The  
8 forensic evaluation may not be conducted at a state inpatient mental health facility unless the  
9 defendant has been ordered to a mental health facility or state hospital in accordance with §27-  
10 6A-2(c) or §27-6A-3(f) or §27-6A-3(h) of this code. To the extent possible, qualified forensic  
11 evaluators who have conducted evaluations of competency under §27-6A-2(a) of this code, shall  
12 be used to evaluate criminal responsibility or diminished capacity under this subsection and all  
13 evaluations shall be performed consistent with the department's program standards and  
14 requirements for the reports.

15 (b) The court shall require the party making the motion for the evaluations, and other  
16 parties as the court considers appropriate, to provide to the qualified forensic evaluator appointed  
17 under subsection (a) of this section any information relevant to the evaluation within 10 business  
18 days 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 evaluation is to include a diminished capacity assessment, the nature of any  
26 lesser criminal offenses.

27 (c) A qualified forensic evaluator shall schedule and arrange within 15 days of the receipt  
28 of appropriate documents the completion of any court-ordered evaluation which may include  
29 record review and defendant interview and shall, within 10 business days of the date of the

30 completion of any evaluation, provide to the court of record a written, signed report of his or her  
31 opinion on the issue of criminal responsibility, and if ordered, on diminished capacity. The court  
32 may extend the 10-day period for filing the report if a qualified forensic evaluator shows good  
33 cause to extend the period, but in no event may the period exceed 30 days. If there are no  
34 objections by the state or defense counsel, the court may, by order, dismiss the requirement for  
35 a written report if the qualified forensic evaluator's opinion may otherwise be made known to the  
36 court and interested parties.

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

49 (e) If the verdict in a criminal trial is a judgment of not guilty by reason of mental illness,  
50 the court shall determine on the record the offense or offenses of which the acquittee could have  
51 otherwise been convicted, and the maximum sentence he or she could have received. The  
52 acquittee shall remain under the court's jurisdiction until the expiration of the maximum sentence  
53 or until discharged by the court. ~~The court shall commit the acquittee to a mental health facility~~  
54 ~~designated by the department that is the least restrictive environment to manage the acquittee~~  
55 ~~and that will allow for the protection of the public. Notice of the maximum sentence period with~~

56 ~~end date shall be provided to the mental health facility.~~ The court shall order a qualified forensic  
57 evaluator to conduct a dangerousness evaluation to include dangerousness risk factors to be  
58 completed within 30 days of admission to the mental health facility and a report rendered to the  
59 court within 10 business days of the completion of the evaluation. The dangerousness evaluation  
60 shall be performed consistent with the department's program standards and requirements for  
61 such evaluations. The medical director of the mental health facility shall provide the court a written  
62 clinical summary report of the defendant's condition at least annually during the time of the court's  
63 jurisdiction. The court's jurisdiction continues an additional 10 days beyond any expiration to allow  
64 civil commitment proceedings to be instituted by the prosecutor pursuant to §27-5-1 *et seq.* of this  
65 code. The defendant shall then be immediately released from the facility unless civilly committed.

66 (f) In addition to any court-ordered evaluations completed pursuant to §27-6A-2, §27-6A-  
67 3, and §27-6A-4 of this code, the defendant or the state has the right to an evaluation or  
68 evaluations by a forensic evaluator or evaluators of his or her choice and at his or her expense.

69 (g) The court shall place persons acquitted under subsection (e) of this section in the  
70 temporary custody of the department for evaluation to determine if the acquittee may be released  
71 with or without conditions or if the acquittee requires commitment. The court may authorize that  
72 the evaluation be conducted on an outpatient basis. If the court authorizes an outpatient  
73 evaluation, the department shall determine, on the basis of all information available, whether the  
74 evaluation shall be conducted on an outpatient basis or whether the acquittee shall be confined  
75 in a hospital for evaluation. If the court does not authorize an outpatient evaluation, the acquittee  
76 shall be confined in a hospital for evaluation. If an acquittee who is being evaluated on an  
77 outpatient basis fails to comply with the evaluation, the department shall petition the court for an  
78 order to confine the acquittee in a hospital for the evaluation. A copy of the petition shall be sent  
79 to the acquittee's attorney and the prosecutor of the acquittee's case. The evaluation shall be  
80 conducted by a qualified clinical evaluator skilled in the diagnosis of mental illness and intellectual  
81 disability and qualified by training and experience to perform the evaluations. The evaluator shall

82 determine whether the acquittee currently has mental illness or intellectual disability and shall  
83 assess the acquittee and report on his or her condition and need for hospitalization with respect  
84 to the factors set forth in §27-6A-5(b) of this code. The evaluator shall conduct an examination  
85 and report his or her findings separately within 30 days of the department's assumption of custody  
86 of the acquittee. Copies of the report shall be sent to the acquittee's attorney, the prosecuting  
87 attorney for the jurisdiction where the person was acquitted, and the comprehensive community  
88 mental health center designated by the department. If the evaluator recommends conditional  
89 release or release without conditions, the court shall extend the evaluation period to permit the  
90 department and the comprehensive community mental health center or licensed behavioral health  
91 provider to jointly prepare a conditional release or discharge plan, as applicable, prior to the  
92 hearing.

93 (g) (h) A mental health facility not operated by the state is not required to admit or treat a  
94 defendant or acquittee under this section except as otherwise provided by §27-2A-1(b)(4) and  
95 §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) ~~If, at any time prior to the expiration of the court's jurisdiction, the chief medical officer~~  
2 ~~or responsible official of the mental health facility to which an acquittee has been ordered pursuant~~  
3 ~~to subsection (e), section four of this article believes that the acquittee is not mentally ill or does~~  
4 ~~not have significant dangerousness risk factors associated with mental illness, he or she shall file~~  
5 ~~with the court of record notice of the belief and shall submit evidence in support of the belief to~~  
6 ~~include a forensic evaluation dangerousness report conducted in like manner as said subsection~~  
7 ~~and recommendations for treatment, including medications, that reduce or eliminate the~~  
8 ~~dangerousness risk factors associated with mental illness. The court of record shall hold a hearing~~  
9 ~~within thirty days of receipt of the notice to consider evidence as to whether the acquittee shall be~~  
10 ~~released from the mental health facility to a less restrictive environment. Notice of the hearing~~

11 ~~shall be made available to the prosecuting attorney responsible for the charges brought against~~  
12 ~~the acquitee at trial, the acquitee and his or her counsel and the mental health facility. If upon~~  
13 ~~consideration of the evidence the court determines that an acquitee may be released from a~~  
14 ~~mental health facility to a less restrictive setting, the court shall order, within fifteen days of the~~  
15 ~~hearing, the acquitee be released upon terms and conditions, if any, the court considers~~  
16 ~~appropriate for the safety of the community and the well-being of the acquitee. Any terms and~~  
17 ~~conditions imposed by the court must be protective and therapeutic in nature, not punitive. When~~  
18 ~~a defendant's dangerousness risk factors associated with mental illness are reduced or eliminated~~  
19 ~~as a result of any treatment, the court, in its discretion, may make the continuance of appropriate~~  
20 ~~treatment, including medications, a condition of the defendant's release from inpatient~~  
21 ~~hospitalization. The court shall maintain jurisdiction of the defendant in accordance with said~~  
22 ~~subsection. Upon notice that an acquitee released on the condition that he or she continues~~  
23 ~~appropriate treatment does not continue his or her treatment, the prosecuting attorney responsible~~  
24 ~~for the charges brought against the acquitee at trial shall, by motion, cause the court to reconsider~~  
25 ~~the acquitee's release and upon a showing that the acquitee is in violation of the conditions of his~~  
26 ~~or her release, the court may reorder the acquitee to a mental health facility designated by the~~  
27 ~~department which is the least restrictive setting appropriate to manage the acquitee and protect~~  
28 ~~the public.~~

29 ~~(b) No later than thirty days prior to the release from a mental health facility or other~~  
30 ~~management setting of an acquitee because of the expiration of the court's jurisdiction as set in~~  
31 ~~accordance with subsection (e), section four of this article, if the acquitee's physician,~~  
32 ~~psychologist, chief medical officer or other responsible party is of the opinion that the acquitee's~~  
33 ~~mental illness renders the acquitee to be likely to cause serious harm to self or others, the~~  
34 ~~supervising physician, psychologist, chief medical officer or other responsible party shall notify~~  
35 ~~the court of record who shall promptly notify the prosecuting attorney in the county of the court~~  
36 ~~having jurisdiction of the opinion and the basis for the opinion. Following notification, the~~

37 ~~prosecuting attorney may file, within ten days, a civil commitment application against the acquittee~~  
38 ~~pursuant to article five of this chapter~~

39 (a) Upon receipt of the evaluation report as provided in §27-6A-4(e) of this code, and, if  
40 applicable, a conditional release or discharge plan, the court shall schedule the matter for hearing  
41 to determine the appropriate disposition of the acquittee. The hearing shall be conducted within  
42 30 days receipt of the evaluation report. The circuit court may, sua sponte or upon motion, order  
43 that an independent dangerousness evaluation by an independent qualified forensic evaluator be  
44 performed to aid in its consideration of the proposed placement and supervision of the acquittee.  
45 The dangerousness evaluation shall be paid for by the department and shall be performed  
46 consistent with the department's program standards and requirements for the evaluations. As an  
47 alternative to ordering an independent dangerousness assessment, the court may avail itself of  
48 the services of the Dangerousness Assessment Review Board established in §27-6A-12 of this  
49 code. Except as otherwise ordered by the court, the attorney who represented the defendant at  
50 the criminal proceedings shall represent the acquittee through the proceedings pursuant to this  
51 section. The matter may be continued on motion of either party for good cause shown. The  
52 acquittee shall be provided with adequate notice of the hearing, of the right to be present at the  
53 hearing, of the right to assistance of counsel in preparation for and during the hearing, and the  
54 right to introduce evidence and cross-examine witnesses at the hearing. The hearing is a civil  
55 proceeding.

56 (b) At the conclusion of the hearing, the court cannot commit the acquittee to a mental  
57 health facility or state hospital unless it finds by clear and convincing evidence that the acquittee  
58 has a mental illness or an intellectual disability, and that because of the nature or severity of  
59 acquittee's condition, the acquittee cannot be treated on an outpatient basis and requires inpatient  
60 management. The decision of the court shall be based upon consideration of the following factors:

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

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

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

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

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

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

84           (e) The court shall order that any person, acquitted by reason of mental illness and  
85 committed pursuant to this section, who is sentenced to a term of incarceration for any other  
86 offense in the same proceeding or in any proceeding conducted prior to the proceeding in which  
87 the person is acquitted by reason of mental illness, complete any sentence imposed for the other

88 offense prior to being placed in the custody of the department until released from commitment  
89 pursuant to §27-1-1 et seq. of this code. The court shall order that any acquittee by reason of  
90 mental illness and committed pursuant to this section who is sentenced to a term of incarceration  
91 in any proceeding conducted during the period of commitment be transferred to the custody of  
92 the correctional facility where he or she is to serve his or her sentence, and, upon completion of  
93 his or her sentence, that person shall be placed in the custody of the department until released  
94 from commitment pursuant to §27-1-1 et seq of this code.

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

108 (g) The comprehensive community mental health center or licensed behavioral health  
109 provider designated by the department shall implement the court's conditional release orders and  
110 shall submit written reports to the court on the acquittee's progress and adjustment in the  
111 community no less frequently than every six months. An acquittee's conditional release shall not  
112 be revoked solely because of his or her voluntary admission to a state hospital.

113 (h) If at any time the court that conditionally released an acquittee pursuant to subsection  
114 (f) of this section finds reasonable cause exists to believe that an acquittee on conditional release  
115 has violated the conditions of his or her release or is no longer a proper subject for conditional  
116 release based on application of the criteria for conditional release and requires inpatient  
117 hospitalization, it may order an evaluation of the acquittee by a qualified forensic evaluator. If the  
118 court, based on the evaluation and after hearing evidence on the issue, finds by a preponderance  
119 of the evidence that an acquittee on conditional release has violated the conditions of his or her  
120 release or is no longer a proper subject for conditional release based on application of the criteria  
121 for conditional release and has a mental illness or an intellectual disability and requires inpatient  
122 hospitalization, the court may revoke the acquittee's conditional release and order him or her  
123 returned to the custody of the department.

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

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

133 (k) The court may modify the conditions of release or remove the conditions placed on  
134 release pursuant to subsection (f) of this section upon petition by the comprehensive community  
135 mental health center or licensed behavioral health provider, the prosecuting attorney, the  
136 acquittee, or upon its own motion based upon the report of the comprehensive community mental  
137 health center or behavioral health provider: *Provided*, That the acquittee may petition no more  
138 frequently than annually and only six months after the conditional release order is entered. Upon

139 petition, the court shall require the comprehensive community mental health center or behavioral  
140 health provider to provide a report on the acquittee's progress while on conditional release.

141 (l) As it considers appropriate and based on the report from the comprehensive community  
142 mental health center or behavioral health provider and any other evidence provided to it, the court  
143 may issue a proposed order for modification or removal of conditions. The court shall provide  
144 notice of the order, and their right to object to it, within 10 days of its issuance, to the acquittee,  
145 the comprehensive community mental health center or behavioral health provider, and the  
146 prosecuting attorney for the committing jurisdiction and for the jurisdiction where the acquittee is  
147 residing on conditional release. The proposed order shall become final if no objection is filed within  
148 10 days of its issuance. If an objection is filed, the court shall conduct a hearing at which the  
149 acquittee, the prosecuting attorney, and the comprehensive community mental health center or  
150 behavioral health provider have an opportunity to present evidence challenging the proposed  
151 order. At the conclusion of the hearing, the court shall issue an order specifying conditions of  
152 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(f)(d) or §27-6A-3(h)(f) shall be immediately released from the  
14 facility 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.