WEST VIRGINIA CODE: §27-6A-3

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

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

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

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

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

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order. The term of this commitment under this subsection may not exceed 90 days from the time of entry into the facility except as otherwise provided by subsection (g) of this section.

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

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

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

(2) If, at the end of the maximum period for inpatient competency restoration treatment as provided in this subsection, the court finds that the defendant has not attained competency and is not substantially likely to attain competency in the foreseeable future, the defendant shall be released to the least restrictive setting upon any conditions the court determines to be appropriate and the charges against him or her held in abeyance for the maximum sentence he or she could have received for the offense and the defendant released unless civil commitment proceedings have been initiated pursuant to §27-5-1 *et seq*. of this code.

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Notwithstanding anything in this article to the contrary, the court, in its discretion, may continue its oversight of the individual and the court's jurisdiction over the individual: *Provided*, That notwithstanding any provision of this article to the contrary, an individual may not be released as provided in this subsection until the court reviews and approves a recent dangerousness risk assessment of the individual and the chief medical officer's recommended release plan for the individual based on the needs of the individual and the public. The court shall order the discharge of the individual if it finds by a preponderance of the evidence that the individual has recovered from his or her mental illness and that he or she no longer creates a substantial risk of bodily injury to another person.

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

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

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

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

(k) A mental health facility not operated by the state is not obligated to admit or treat a

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defendant under this section except as otherwise provided by §27-2A-1(b)(4) and §27-5-9 of this code.

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

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