Summary of Chapter 353 (2006 Session), HB 795: Procedures After A Finding Of Incompetent To Stand Trial.

George Lipman, July 2006

Highlight summary:

Chapter 353 (2006), HB 795, modified procedures after a defendant is found incompetent to stand trial. § 3-106, § 3-107 and § 3-108 of the Criminal Procedure Article were substantially rewritten. A mechanism is established for converting a defendant's status from a criminal commitment to a general civil commitment when it is unlikely that the defendant will regain competency in the foreseeable future.

Highlights include periodic review of a defendant's status. Provisions were crafted for the dismissal of charges when a defendant has remained incompetent for a fixed time period or when the court determines that resumption of the criminal proceedings would be unjust because so much time has passed since the defendant was found incompetent to stand trial. A mechanism was created for hospitalizing an incompetent defendant on pretrial release if that defendant becomes dangerous. Notably, supplemental Health Department reports containing detailed aftercare plans are required to minimize a defendant's return to dangerousness or incompetence.

Basics of competence hearings remain unchanged, § 3-104, § 3-101(f):[1]

Chapter 353 made only modest changes to Criminal Procedure § 3-104 regarding the scope of competency determinations. The statutory test for competence to stand trial is unchanged. Constitutional due process requires that a defendant facing criminal charges possess a "rational as well as a factual understanding of the proceeding and sufficient present ability to consult with his attorney with a reasonable degree of rational understanding." **Dusky v. United States**, 362 U.S. 402 (1960**)**. The longstanding Maryland statutory test wasn't changed. §3-101 (f) states:

> "Incompetent to stand trial" means not able:
> (1) to understand the nature or object of the proceedings; or
> (2) to assist in one's defense.

Also remaining unchanged is the burden of proof. Once the issue of competency is at issue, the burden of persuasion is on the State to prove beyond a

[1] All statutory references are to Title 3 of the Maryland Criminal Procedure Article unless otherwise noted.

reasonable doubt that the defendant is able to understand the nature and object of the proceedings and to assist in his defense. [2]

The defendant, defense counsel, the State, or the court on its own initiative may raise the issue of the defendant's competence. Language clarifies that competency may be raised at any time prior to trial, during trial or through sentencing. § 3-104 (c) now reads that competency may be raised "at any time before final judgement".[3]

Periodic review, § 3-106:

Significantly, Chapter 353 codified periodic review hearings and conferences. While the court may hold a review hearing or a conference at any time, a mandated hearing to determine whether the defendant continues to meet the criteria for commitment shall be held "every year from the date of commitment." A hearing shall also be held when the parties or the Department present changed circumstances. §§ 3-106(c) (1) (ii) and (iii) require hearings:

> Within 30 days after the filing of a motion by the State's Attorney or counsel for the defendant setting forth new facts or circumstances relevant to the determination and within 30 days after receiving a report from the Health Department stating opinions, facts, or circumstances that had not been previously presented to the court and are relevant to the determination.

Criminal commitment upon a finding of incompetence and dangerousness lasting until the defendant either becomes competent, is no longer dangerous, or not likely to become competent, §3-106:

Chapter 353 maintains the requirement of an incompetent defendant's present dangerousness as a predicate to that defendant's criminal commitment by the trial court to a mental hospital or Developmental Disabilities Administration facility. However, the 2006 Session revisions defined the duration of this criminal commitment as: (1) the attainment of competency to stand trial, (2) present lack of dangerousness, or (3) the absence of a substantial likelihood that the defendant will become competent to stand trial in the foreseeable future. The operative language of § 3-106(a) reads:

> If after a hearing, the court finds that the defendant is incompetent to stand trial and, because of mental retardation or a mental disorder, is a danger to self or the person or property of another, the court may order the defendant to the facility that the Health Department designates until the court finds that: (1) the defendant

[2] See **Raithel v. State,** 280 Md. 291(1977).

[3] Violations of probation hearings also were specifically listed in 3-104 (a) as a proceeding during which competency to stand trial may become at issue.

> no longer is incompetent to stand trial; (2) the defendant no longer, because of mental retardation or a mental disorder, is a danger to self or the person or property of others; or (3) there is not a substantial likelihood that the defendant will become competent to stand trial in the foreseeable future.

Of course, the criminal trial may proceed if the defendant has regained competency. However, revised §3-106 details the procedures: (1) for a defendant who remains incompetent but is released under pretrial release conditions ***or*** (2) the general civil commitment of a dangerous incompetent defendant who is not likely to regain competency.

General civil commitment when a dangerous and incompetent defendant is not likely to regain competency, §3-106:

Continuing an incompetent defendant's commitment in a mental institution through procedures that flow from criminal pretrial detention *may* raise constitutional concerns when the defendant is not likely to regain competency.[4] In any event, revised § 3-106 requires that the State shoulder the burden of persuasion to prove by clear and convincing evidence that an incompetent defendant meets the criteria for general civil commitment when there is not a substantial likelihood that the defendant will become competent in the foreseeable future. § 3-106 (d) states:

> At a competency hearing under subsection (c) of this section, if the court finds that the defendant is incompetent and is not likely to become competent in the foreseeable future, the court shall:
>
> > (1) Civilly commit the defendant as an inpatient in a medical facility that the Health Department designates provided the court finds by clear and convincing evidence that:
> >
> > > i. the defendant has a mental disorder;
> > > ii. inpatient care is necessary for the defendant;
> > > iii. the defendant presents a danger to the life or safety of self or others;
> > > iv. the defendant is unable or unwilling to be voluntarily committed to a medical facility: and
> > > v. there is no less restrictive form of intervention that is consistent with the welfare and safety of the defendant; or
> >
> > (2) Order the confinement of the defendant for 21 days as a resident in a Developmental Administration Facility for the

[4] See **Jackson v. Indiana,** 406 U.S. 715 (1972).

> initiation of admission proceedings under § 7-503 of the Health General Article provided the court finds that the defendant, because of mental retardation, is a danger to self or others.

The 2006 enactment, thus, mandates a judicial determination of a mentally ill and permanently incompetent defendant's need for commitment as tested by standards identical to those for the civil commitment of mentally disordered individuals who are not charged with a crime. Dangerous defendants suffering from mental retardation who are not likely to become competent in the foreseeable future are to be confined for up to 21 days for the initiation of Developmental Disabilities Administration admission procedures.

Of note: the administrative procedures governing review of the defendant's general civil commitment apply when the mentally disordered or disabled defendant returns to the hospital after the trial court's civil commitment. The defendant may be released through the Health Department's administrative procedures if the Department determines that the defendant is no longer dangerous.

Pretrial release of an incompetent but not dangerous defendant, §3-106:

§ 3-106 (f) addresses incompetent but not dangerous defendants released on recognizance or bail.[5] Mandatory review hearings are required yearly and upon the motion of the State's Attorney or defense counsel. At any time, the court may hold a hearing on its own initiative. Release conditions may be added or modified.

Hopefully, the supplemental report provisions of § 3-108 may provide workable pretrial conditions that might impede recurring dangerousness. However if the released defendant becomes dangerous and is not likely to regain competency in the foreseeable future, the general civil commitment provisions of § 3- 106 (d) apply for judicially initiated general civil commitment.[6]

Departmental reports, § 3-108:

The Health Department is required to report to the court regarding the status of a defendant found to be incompetent to stand trial: (1) every six months from the date of commitment, and (2) whenever the Department determines that the defendant is no longer incompetent, no longer dangerous or there is not a

[5] Of course a non-dangerous but incompetent defendant may not be confined involuntarily in a mental hospital.

[6] The criminal commitment remains in effect if an incompetent released defendant becomes dangerous but it appears likely that he may regain competence.

substantial likelihood that the defendant will become competent to stand trial in the foreseeable future.

Supplemental Departmental report regarding services, § 3-108:

§ 3-108 (a) (2) requires that the Department include a supplemental report that provides a plan for services to facilitate the defendant remaining competent or not dangerous "if services are necessary to maintain the defendant safely in the community, to maintain competence or to restore competence." If appropriate, the plan shall include:

1. Mental health treatment including providers of care;
2. Vocational, rehabilitative or support services;
3. Housing;
4. Case management services;
5. Alcohol or substance abuse treatment; and
6. Other clinical services.

If the report recommends community placement, Section 3-108 (a) (4) also requires the inclusion of the location and date of the recommended placement and service provider specifics. Similar service plan provisions apply for developmentally disabled defendants.

These detailed supplemental reports should assist in fashioning pretrial release conditions for incompetent but not dangerous defendants. These services may provide the basis for negotiated stet and probation conditions for competent defendants.

Protection from use of incriminating statements, § 3-105, § 3-108:

Preparation of the detailed supplemental services report may require that a defendant discuss facts with potential incriminating effect. Thus, §§ 3-108 (a) (7) and (8) prohibit use of these reports or the defendant's statements during examination to prove guilt or to enhance a sentence:

> (7) A statement made by the defendant in the course of any examination for a report under this section is not admissible as evidence in any criminal proceeding for the purpose of proving the commission of a criminal offense or to enhance the sentence of a defendant.
>
> (8) A report prepared under this section is not admissible in a criminal proceeding for the purpose of proving the commission of a criminal offense or to enhance the sentence of the defendant.

Likewise, § 3-105 governing examinations prior to a hearing in which competency is to be determined was amended to prohibit the use incriminating statements to prove guilt or to enhance punishment However, statements contained a competency examination report may be used to impeach. § 3-105 (d) (4) and (5) state:

> (4) A statement made by the defendant in the course of an examination under this section is not admissible in a criminal proceeding for the purpose of proving the commission of a criminal offense or to enhance the sentence of the defendant.
>
> (5) Except for the purpose of impeaching the testimony of the defendant, a report prepared as the result of an examination under this section is not admissible in a criminal proceeding for the purpose of proving the commission of a criminal offense or to enhance the sentence of a defendant.

Dismissal of charges, § 3-107:

§ 3-107 establishes the time after the finding of incompetence when the Court shall dismiss charges against a defendant "whether or not the defendant is confined and unless the state petitions the court for extraordinary cause to extend the time." The time for dismissal of a capital offense is after the expiration of 10 years. It is the lesser of 5 years or the maximum sentence for crimes of violence under Criminal law § 14-101 and felonies.

Charges shall be dismissed after the expiration of three years or the maximum sentence for other than capital offenses, crimes of violence or felonies. A further catchall is added which allows a court to dismiss charges without prejudice if the court "considers that resuming the criminal proceeding would be unjust because so much time has passed since the defendant was found incompetent to stand trial."

Victim notification

In addition to conforming preexisting victim notification requirements to the numerous 2006 changes, Chapter 353 through amendments to Criminal Procedure §3-123 (1) requires that designated victims receive notification from the Health Department if civilly committed persons whose charges have been dismissed through §3-107: are released, die, escape, are recaptured or are transferred to another facility.