

Recent Changes in Procedures for Mental Health Evaluations for Criminal Defendants

By Eddie Hixon, Assistant Attorney General, Alabama Dept. of Mental Health

The Alabama Dept. of Mental Health is in the process of refining processes and reducing completion time for court-ordered mental evaluations for defendants. Recent federal litigation has caused changes in Department procedures to handle the flow of defendants and to reduce evaluation “wait time” for defendants in jails and in the custody of the Department. Most evaluations will continue to be completed on an outpatient basis for defendants in jails. The Department will also continue inpatient evaluations for those defendants in the custody of Department facilities.

The Department is updating its list of available forensic practitioners to help in this process. Practitioners may be psychiatrists or psychologists, but will have forensic training and credentials. The two-year goal is to reduce the time from court order to evaluation to 30 days. The Department is currently adding 25 more beds to Taylor Hardin in the next year and about 50 additional community forensic beds.

Summary of *Hunter, et al v. Beshear (Alabama Dept. of Mental Health)* Class Action Settlement

CLASS MEMBERS: Persons charged with a crime, detained in jail, awaiting mental evaluation or competency restoration (a) committed to DMH for inpatient evaluation; or (b) ordered to competency restoration if found incompetent.

TIMELINE FOR EVALUATIONS PER CONSENT DECREE:

Outpatient Evaluations for Incarcerated Defendants

- 12 months after settlement approval, DMH shall have 45 days from receipt of order to perform evaluation.
- Forensic evaluators shall have an additional 45 days from evaluation to submit report to court.
- 24 months after settlement approval, DMH shall have 30 days from receipt of order to perform evaluation.
- Forensic evaluators shall have an additional 30 days from evaluation to submit report to court.

Inpatient Evaluations for Incarcerated Defendants (Defendants going to Taylor Hardin Secure Medical Facility for Evaluation or Competency Restoration Training)

- 12 months after settlement approval, DMH shall have 45 days from receipt of order to perform evaluation (or admit a defendant to Taylor Hardin for competency restoration).

- Forensic evaluators shall have an additional 45 days from evaluation to submit report to court.
- 24 months after settlement approval, DMH shall have 30 days from receipt of order to perform evaluation (or admit a defendant to Taylor Hardin for competency restoration).
- Forensic evaluators shall have 30 days from evaluation to submit report to court.

ADDITIONAL FORENSIC BEDS:

Hospital Forensic Beds (49 total)

- 24 additional beds within 12 months of settlement approval (completed 2017).
- 25 additional beds within 24 months of settlement approval.

Community Forensic Beds (52 total)

- Comprised of group homes with no more than 16 beds each.
- 25 additional beds within 12 months of settlement approval (to include 5 that will accommodate registered sex offenders).
- 32 additional beds within 24 months of settlement approval.

SUBSTANTIAL COMPLIANCE:

- 12 months after settlement approval – 80%.
- 24 months after settlement approval – 88%.

MONITORING FOR 3 YEARS – ADAP IS MONITOR

EMERGENCY TREATMENT PROCEDURES:

- Upon notification to DMH of mental health emergency involving class member, ADAP will be notified within 48 hours.
- DMH will perform an assessment of class member within 4 business days.
- If deemed emergency after assessment then early admission to DMH within 7 days.

PROCEDURE FOR SUICIDAL CLASS MEMBERS:

- DMH to notify ADAP within 24 hours of DMH notification – ADAP to notify appropriate Sheriff/Jail official/ADOC facility.

Revised Procedures regarding Mental Health Evaluations

1. Plea of *not guilty by reason of mental disease or defect* in Circuit Court or motion for mental evaluation of defendant. Evaluations may be ordered to determine incompetency to stand trial (IST), mental state at the time of the offense (MSO), or both. Municipal and District Courts do not have jurisdiction to order mental evaluations. See Rule 11.9, *A.R.Crim.P.*
2. Motions for mental evaluations should be based on evidence, not conjecture as to a defendant's mental state.

Rule 11.3, *A.R.Crim.P.* states:

“GROUNDS FOR APPOINTMENT. *If the circuit court determines that reasonable grounds for an examination exist*, it shall either appoint a psychiatrist or psychologist to examine the defendant and to testify regarding the defendant's mental condition, or order that an examination be conducted by a psychiatrist or psychologist appointed by the commissioner of the Department of Mental Health.”

The Committee Comments to Rule 11.3 further state:

“Under this rule, *the trial court continues to act as a "screening agent" for mental examination requests*, and the determination of whether a mental evaluation is required is left to the discretion of the trial court. *Reese v. State*, 549 So.2d 148 (Ala.Crim.App. 1989), overruled in part on other grounds, *Huntley v. State*, 627 So.2d 1013 (Ala. 1992).

3. The Circuit Clerk shall forward the order for mental evaluation to DMH's Forensic Outpatient Program (FOP). FOP will log in the order for internal tracking.
4. FOP shall send information requests to the District Attorney and to the defense attorney.
5. The District Attorney sends case information and discovery to FOP.
6. The defense attorney sends a completed Defense Attorney Packet to FOP.
7. The defense attorney obtains records releases from defendant and is responsible for sending records requests to defendant's treatment providers.
8. Once the defendant's requested records are received, the defense attorney shall forward the records to FOP.

9. FOP shall electronically scan and transmit the file to Jefferson Blount St. Clair Mental Health Authority (JBS) for assignment to a forensic evaluator.
10. Forensic evaluators shall schedule outpatient evaluations according to each evaluator's caseload, travel schedule, and availability.
11. Completed evaluation reports are returned to FOP for dissemination to the Court and parties.

Practical Considerations for Attorneys Representing Mentally Ill Defendants

Pre-Trial Considerations

Bond:

1. Evidence shows that mentally ill defendants tend to decompensate while in jail, as many do not have access to regular treatment or mental health medications.
2. DMH supports the argument to allow defendants to be released on bond with mental health treatment as a condition, reportable to the court at regular status hearings.
3. The advantage to the State is:
 - a) The defendant is not a strain on county jailers;
 - b) It is easier and faster to coordinate outpatient evaluation since defendants can make their own appointments;
 - c) Defendants receive regular medications and psychiatric treatment;
 - d) Defendants will create current treatment records that may be used to rebut the findings of a later evaluation, if necessary;
 - e) Lower incidence of IST/NGRI.

Exploration of Alternatives to NGRI Adjudication:

1. Plea agreements on low-level crimes where evaluations are ordered (i.e. vehicle burglary, possession cases, etc. that would result in probation under the guidelines).
2. Diversionary programs such as mental health court or pre-trial diversion with mental health treatment as a condition of completion.

3. Civil commitment in lieu of prosecution for low-level offenses (many probate judges will not civilly commit with pending charges, thus dismissal must come first, unless a probate judge accepts jurisdiction from Circuit Court for the purpose of commitment. The Circuit Court case is stayed pending discharge from DMH).

Considerations Prior to Requesting a Mental Evaluation

1. Cases may take longer to resolve. A mentally incompetent defendant may remain with ADMH for months or years before being restored to competency.

Rule 11.1, *A.R.Crim.P.* states: “A defendant is mentally incompetent to stand trial or to be sentenced for an offense if that defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant.”

If a court finds a defendant is incompetent, the court shall make an order committing the defendant to the Department. ***The defendant must remain until competency is restored. Only when competency is restored, may the prosecution be resumed.***

2. Are there records/materials in existence that provide information about a defendant’s mental health history? Rule 11.2, *A.R.Crim.P.* allows motions for *competency* and for *mental states at the time of the offense* to be made by the (1) defendant, (2) state, or (3) court on its own motion. Rule 11.2 further requires such motion shall “***state facts upon which the mental examination is sought.***”
3. If records/materials exist, can defense counsel obtain those records in a timely manner to provide to the forensic practitioner?
4. Is the offense minor? Courts maintain quarterly contact over an NGRI defendant for an indefinite period. A defendant adjudicated NGRI will likely remain on court-ordered conditions for years, possibly as a result of a practical flaw in the Alabama Rules of Criminal Procedure.

For example, P.W. was found NGRI in 2001 for a minor property offense. She was released from all of her court-ordered conditions in 2017. Had P.W. pleaded guilty initially, she would have likely been released well before 2017. While she escaped a felony conviction on her record, she was under the court’s jurisdiction for about 16 years. If she pleaded guilty, she would have likely received mental health treatment as part of her conditions of probation, if known to the court. (The Department agrees there may be a need for ethical consideration in determining whether or not to request evaluation or plead a defendant NGRI).

Post-Adjudication & Conditional Release

1. **Not every defendant must be committed to Taylor Hardin after a finding of NGRI.** ADMH has forensic providers for group homes, supervised apartments, and other living plans that may be more appropriate depending on the required level of care.
2. If committed to the Department, only the court may authorize release to a forensic provider. §15-16-62, *Code of Alabama 1975*.
3. Courts may issue orders of conditional release for defendants to reside in forensic provider settings.
4. §15-16-68, *Code of Alabama 1975* sets forth some of the common, standard court-imposed conditions of release:

Court-imposed conditions for release.

The conditions that the court may impose upon release, if necessary and appropriate, include, the following:

- (1) That the defendant take medication as prescribed by doctors in the department or in a regional or community mental health facility, or by some other doctor whose care the defendant is in;
 - (2) That the defendant submit to treatment and accept care from a duly authorized outpatient facility such as a regional or community mental health facility;
 - (3) That the defendant submit to mental or medical evaluation or testing as prescribed by the department, by a regional or community mental health facility, or by other appropriate person or facility;
 - (4) That the defendant submit to periodic or random drug testing designed to ensure that he is taking any prescribed drugs and avoiding any prescribed drugs including alcohol;
 - (5) That the defendant avoid specified activities, persons, or places that may be detrimental to his condition;
 - (6) Any other appropriate condition that is necessary to prevent the defendant from posing a real and present threat of substantial harm to himself or to others while he is at large.
5. Defendants may be returned to the Department upon violations of court-imposed conditions of release. §15-16-70, *Code of Alabama 1975* allows for revocation of conditional release and return to the Department, if the court perceives non-compliance with court-imposed conditions. This is a subjective standard, whereby courts may differ in degree of flexibility in reinstating conditions after hearing.

6. Modification of release conditions or order to return for further treatment require notice to ADMH in advance. §15-16-63, *Code of Alabama 1975*.

Final Notes

- Please enlist DMH for help on cases after adjudication of NGRI to find appropriate placement for defendant, such as a forensic group home provider versus Taylor Hardin.
- Also, in cases where the court may need some direction on the best options for a defendant, please contact us and let us provide direction, sample orders, etc. at any stage in the proceedings.
- **The Legal Division of Alabama Department of Mental Health is available to answer questions or help identify eligible resources. Please do not hesitate to contact the Legal Division about your NGRI cases: PH (334) 242-3038**

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