

1989 Senate Bill 458

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1989 WISCONSIN ACT 334

AN ACT to amend 51.20 (16) (j), 971.165 (1) (c) 3 and 977.05 (4) (j); to repeal and recreate 971.17; and to create 51.30 (4) (b) 8m and 146.82 (2) (c) of the statutes, relating to: commitment, conditional release and discharge of persons acquitted of criminal charges by reason of mental disease or defect.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

PREFATORY NOTE: This bill was drafted by the judicial council insanity defense committee, whose members are listed in the last paragraph of this NOTE.

Its purpose is to revise the procedures for commitment and release of persons found not guilty of crimes by reason of mental disease or defect. Present law on this subject is a confusing blend of judicial decisions, a 1969 enactment patterned on the model penal code, and portions of the mental health act. See ss. 51.20 (16) and 971.17, stats.; *State v. Field*, 118 Wis. 2d 269 (1984); *State v. R.A.R.*, 147 Wis. 2d 218 (Ct. App., 1988); *State v. C.A.J.*, 148 Wis. 2d 137 (Ct. App., 1988); and *State ex rel. Helmer v. Cullen*, 149 Wis. 2d 161 (Ct. App., 1989).

The bill clarifies that commitment may take either of 2 forms: inpatient care in a state mental health institute or conditional release under supervision in the community. The standard for determining which form the commitment shall take is whether conditional release would pose a significant risk of bodily harm to the released person or others, or of serious property damage. The state bears the burden of proof by clear and convincing evidence. Factors are specified to guide the court's discretion in this matter.

The bill specifies that the maximum commitment period is two-thirds of the maximum sentence which could be imposed if the defendant had been convicted of the crime, unless the maximum sentence is life, in which case the maximum commitment period is also life.

Present law allows insanity acquittees to petition for reexamination every 120 days, and to demand a 6-person jury. Under this bill, a petition for conditional release may not be filed unless at least 6 months have elapsed since the last such petition was denied, or unless the director of the mental health institute approves the petition. Under this bill, there is no right to jury trial on the issue of conditional release.

The bill specifies the procedures for examination by physicians or other experts and for hearings on commitment, conditional release and termination of conditional release. It applies to acquittals by reason of mental disease or defect for crimes committed on or after January 1, 1991.

The judicial council insanity defense committee consisted of Judge Peter G. Pappas, Chair, Judge Richard S. Brown, Judge Thomas P. Doherty, Frederick A. Fosdal, M.D., Judge Mark A. Frankel, Dianne Greenley, James D. Jeffries, Jack Longert, Terry Schnapp, Professor David E. Schultz and Michael Yovovich.

SECTION 1. 51.20 (16) (j) of the statutes is amended to read:

51.20 (16) (j) This subsection applies to petitions for reexamination which that are filed under ~~chs. ch.~~ 971, but not s. 971.17, and ch. 975, except that the petitions shall be filed with the committing court.

SECTION 2. 51.30 (4) (b) 8m of the statutes is created to read:

51.30 (4) (b) 8m. To appropriate examiners and facilities in accordance with s. 971.17 (2) (e), (4) (c) and (7) (c). The recipient of any information from the records shall keep the information confidential except as necessary to comply with s. 971.17.

SECTION 3. 146.82 (2) (c) of the statutes is created to read:

146.82 (2) (c) Notwithstanding sub. (1), patient health care records shall be released to appropriate examiners and facilities in accordance with s. 971.17 (2) (e), (4) (c) and (7) (c). The recipient of any information from the records shall keep the information confidential except as necessary to comply with s. 971.17.

SECTION 4. 971.165 (1) (c) 3. of the statutes is amended to read:

971.165 (1) (c) 3. If an appellate court reverses a judgment as to the 2nd plea but not as to the first plea and remands for further proceedings, or if the trial court vacates the judgment as to the 2nd plea but not as to the first plea, the 2nd plea may be determined by a different jury drawn for this purpose.

SECTION 5. 971.17 of the statutes, as affected by 1989 Wisconsin Act 31, is repealed and recreated to read:

971.17 Commitment of persons found not guilty by reason of mental disease or mental defect. (1) **COMMITMENT PERIOD.** When a defendant is found not guilty by reason of mental disease or mental defect, the court shall commit the person to the department of health and social services for a specified period not exceeding two-thirds of the maximum term of imprisonment that could be imposed under s. 973.15 (2) against an offender convicted of the same crime or crimes, including imprisonment authorized by ss. 161.48, 939.62, 939.621, 939.63, 939.64, 939.641 and 939.645 and other penalty enhancement statutes, as applicable, subject to the credit provisions of s. 973.155. If the maximum term of imprisonment is life, the commitment period specified by the court may be life, subject to termination under sub. (5).

(2) **INVESTIGATION AND EXAMINATION.** (a) The court shall enter an initial commitment order under this section pursuant to a hearing held as soon as practicable after the judgment of not guilty by reason of mental disease or mental defect is entered. If the court lacks sufficient information to make the determination required by sub. (3) immediately after trial, it may adjourn the hearing and order a predisposition investigation using the procedure in s. 972.15 or a supplementary mental examination or both, to assist the court in framing the commitment order.

(b) If a supplementary mental examination is ordered under par. (a), the court may appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the person. In lieu thereof, the court may commit the person to an appropriate mental health facility for the period specified in par. (c), which shall count as days spent in custody under s. 973.155.

(c) An examiner shall complete an inpatient examination under par. (b) and file the report within 15 days after the examination is ordered unless, for good cause, the examiner cannot complete the examination and requests an extension. In that case, the court may allow one 15-day extension of the examination period. An examiner shall complete an outpatient examination and file the report of examination within 15 days after the examination is ordered.

(d) If the court orders an inpatient examination under par. (b), it shall arrange for the transportation of the person to the examining facility within a reasonable time after the examination is ordered and for the person to be

returned to the jail or court within a reasonable time after the examination has been completed.

(e) The examiner appointed under par. (b) shall personally observe and examine the person. The examiner or facility shall have access to the person's past or present treatment records, as defined in s. 51.30 (1) (b), and patient health care records under ss. 146.81 to 146.83. If the examiner believes that the person is appropriate for conditional release, the examiner shall report on the type of treatment and services that the person may need while in the community on conditional release.

(f) The costs of an examination ordered under par. (a) shall be paid by the county upon the order of the court as part of the costs of the action.

(g) Within 10 days after the examiner's report is filed under par. (c), the court shall hold a hearing to determine whether commitment shall take the form of institutional care or conditional release.

(3) **COMMITMENT ORDER.** (a) An order for commitment under this section shall specify either institutional care or conditional release. The court shall order institutional care if it finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage. If the court does not make this finding, it shall order conditional release. In determining whether commitment shall be for institutional care or conditional release, the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

(b) If the state proves by clear and convincing evidence that the person is not competent to refuse medication or treatment for the person's mental condition, under the standard specified in s. 971.16 (2), the court shall issue, as part of the commitment order, an order that the person is not competent to refuse medication or treatment for the person's mental condition and that whoever administers the medication or treatment to the person shall observe appropriate medical standards.

(c) If the court order specifies institutional care, the department of health and social services shall place the person in an institution under s. 51.37 (3) that the department considers appropriate in light of the rehabilitative services required by the person and the protection of public safety. If the person is not subject to a court order determining the person to be not competent to refuse medication or treatment for the person's mental condition and if the institution in which the person is placed determines that the person should be subject to such a court order, the institution may file with the court, with notice to the person and his or her counsel and the district

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attorney, a motion for a hearing, under the standard specified in s. 971.16 (2), on whether the person is not competent to refuse medication or treatment. A report on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the person needs medication or treatment and that the person is not competent to refuse medication or treatment, based on an examination of the person by a licensed physician. Within 10 days after a motion is filed under this paragraph, the court shall determine the person's competency to refuse medication or treatment for the person's mental condition. At the request of the person, his or her counsel or the district attorney, the hearing may be postponed, but in no case may the postponed hearing be held more than 20 days after a motion is filed under this paragraph. If the district attorney, the person and his or her counsel waive their respective opportunities to present other evidence on the issue, the court shall determine the person's competency to refuse medication or treatment on the basis of the report accompanying the motion. In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. Upon consent of all parties and approval by the court for good cause shown, testimony may be received into the record of the hearing by telephone or live audiovisual means. If the state proves by evidence that is clear and convincing that the person is not competent to refuse medication or treatment, under the standard specified in s. 971.16 (2), the court shall order that the person is not competent to refuse medication or treatment for the person's mental condition and that whoever administers the medication or treatment to the person shall observe appropriate medical standards.

(d) If the court finds that the person is appropriate for conditional release, the department and the county department under s. 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The plan shall address the person's need, if any, for supervision, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 14 days after the court finding that the person is appropriate for conditional release, unless the county department, department of health and social services and person to be released request additional time to develop the plan. The county department of the person's county of residence may arrange for another county to prepare the plan if the individual will be living in another county.

(e) An order for conditional release places the person in the custody of the department of health and social services. A conditionally released person is subject to the conditions set by the court and to the control of the

department of corrections under rules established for the supervision of parolees. Before a person is conditionally released by the court under this subsection, the court shall so notify the municipal police department and county sheriff for the area where the person will be residing. The notification requirement does not apply if a municipal department or county sheriff submits to the court a written statement waiving the right to be notified. If the department of corrections alleges that a released person has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked, he or she may be taken into custody under the rules of the department of corrections. The department of corrections shall submit a statement showing probable cause for the detention to the committing court, the department of health and social services and the regional office of the state public defender responsible for handling cases in the county where the committing court is located within 48 hours after the detention. Upon receiving this statement, the department of health and social services shall forthwith petition the committing court to revoke its order for conditional release. The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person. Pending the revocation hearing, the department of corrections may detain the person in a jail or in a hospital, center or facility specified by s. 51.15 (2). The state has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked. If the court determines after hearing that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked, it may revoke the order for conditional release and order that the released person be placed in an appropriate institution under s. 51.37 (3) until the expiration of the commitment or until again conditionally released under this section.

(4) PETITION FOR CONDITIONAL RELEASE. (a) Any person who is committed for institutional care may petition the committing court to modify its order by authorizing conditional release if at least 6 months have elapsed since the initial commitment order was entered, the most recent release petition was denied or the most recent order for conditional release was revoked. The director of the facility at which the person is placed may file a petition under this paragraph on the person's behalf at any time.

(b) If the person files a timely petition without counsel, the court shall serve a copy of the petition on the district attorney and, subject to sub. (7) (b), refer the matter to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j). If the person petitions through counsel, his or her attorney shall serve the district attorney.

(c) Within 20 days after receipt of the petition, the court shall appoint one or more examiners having the

specialized knowledge determined by the court to be appropriate, who shall examine the person and furnish a written report of the examination to the court within 30 days after appointment. The examiners shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records, as defined in s. 51.30 (1) (b), and patient health care records under ss. 146.81 to 146.83. If any such examiner believes that the person is appropriate for conditional release, the examiner shall report on the type of treatment and services that the person may need while in the community on conditional release.

(d) The court, without a jury, shall hear the petition within 30 days after the report of the court-appointed examiner is filed with the court, unless the petitioner waives this time limit. Upon consent of all parties and approval by the court for good cause shown, the court may receive testimony into the record of a hearing under this paragraph by telephone or live audiovisual means. Expenses of proceedings under this subsection shall be paid as provided under s. 51.20 (18). The court shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released. In making this determination, the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

(e) If the court finds that the person is appropriate for conditional release, the department and the county department under s. 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The plan shall address the person's need, if any, for supervision, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 14 days after the court finding that the person is appropriate for conditional release, unless the county department, department of health and social services and person to be released request additional time to develop the plan. The county department of the person's county of residence may arrange for another county to prepare the plan if the individual will be living in another county.

(5) PETITION FOR TERMINATION. A person on conditional release, or the department of health and social services on his or her behalf, may petition the committing court to terminate the order of commitment. If the person

files a timely petition without counsel, the court shall serve a copy of the petition on the district attorney and, subject to sub. (7) (b), refer the matter to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j). If the person petitions through counsel, his or her attorney shall serve the district attorney. The petition shall be determined as promptly as practicable by the court without a jury. The court shall terminate the order of commitment unless it finds by clear and convincing evidence that further supervision is necessary to prevent a significant risk of bodily harm to the person or to others or of serious property damage. In making this determination, the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and current mental condition, the person's behavior while on conditional release, and plans for the person's living arrangements, support, treatment and other required services after termination of the commitment order. A petition under this subsection may not be filed unless at least 6 months have elapsed since the person was last placed on conditional release or since the most recent petition under this subsection was denied.

(6) EXPIRATION OF COMMITMENT ORDER. (a) At least 60 days prior to the expiration of a commitment order under sub. (1), the department of health and social services shall notify all of the following:

1. The court that committed the person.
2. The district attorney of the county in which the commitment order was entered.
3. The appropriate county department under s. 51.42 or 51.437.

(b) Upon the expiration of a commitment order under sub. (1), the court shall discharge the person, subject to the right of the department of health and social services or the appropriate county department under s. 51.42 or 51.437 to proceed against the person under ch. 51 or 55. If none of those departments proceeds against the person under ch. 51 or 55, the court may order the proceeding.

(7) HEARINGS AND RIGHTS. (a) The committing court shall conduct all hearings under this section. The person shall be given reasonable notice of the time and place of each such hearing. The court may designate additional persons to receive these notices.

(b) Without limitation by enumeration, at any hearing under this section, the person has the right to:

1. Counsel. If the person claims or appears to be indigent, the court shall refer the person to the authority for indigency determinations under s. 977.07 (1).
2. Remain silent.
3. Present and cross-examine witnesses.
4. Have the hearing recorded by a court reporter.

(c) Whenever the person wishes to be examined by a physician or other expert of his or her choice, the procedure under s. 971.16 (3) shall apply. Upon motion of an indigent person, the court shall appoint a qualified and

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available examiner for the person at public expense. Examiners for the person or the district attorney shall have reasonable access to the person for purposes of examination, and to the person's past and present treatment records, as defined in s. 51.30 (1) (b), and patient health care records under ss. 146.81 to 146.83.

(8) **APPLICABILITY.** This section governs the commitment, release and discharge of persons adjudicated not guilty by reason of mental disease or mental defect for offenses committed on or after January 1, 1991. The commitment, release and discharge of persons adjudicated not guilty by reason of mental disease or mental defect for offenses committed prior to January 1, 1991, shall be governed by s. 971.17, 1987 stats., as affected by 1989 Wisconsin Act 31.

SECTION 6. 977.05 (4) (j) of the statutes is amended

to read:

977.05 (4) (j) At the request of any person determined by the state public defender to be indigent or upon referral of any court, prosecute a writ of error, appeal, action or proceeding for habeas corpus or other postconviction or post-commitment remedy or attack the conditions of confinement on behalf of the person before any court, if the state public defender determines the case should be pursued. The state public defender must pursue the case of any indigent person entitled to counsel under s. 971.17 (7) (b) 1.

SECTION 7. Initial applicability. This act first applies to prosecutions for offenses committed on the effective date of this SECTION.

SECTION 8. Effective date. This act takes effect on January 1, 1991.