

## HB0167S01 compared with HB0167

~~deleted text~~ shows text that was in HB0167 but was deleted in HB0167S01.

inserted text shows text that was not in HB0167 but was inserted into HB0167S01.

**DISCLAIMER:** This document is provided to assist you in your comparison of the two bills. Sometimes this automated comparison will NOT be completely accurate. Therefore, you need to read the actual bills. This automatically generated document could contain inaccuracies caused by: limitations of the compare program; bad input data; or other causes.

Representative Carol Spackman Moss proposes the following substitute bill:

### INSANITY DEFENSE AMENDMENTS

2020 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Carol Spackman Moss**

Senate Sponsor: \_\_\_\_\_

---

#### LONG TITLE

##### General Description:

This bill modifies provisions relating to the criminal defense of not guilty by reason of insanity.

##### Highlighted Provisions:

This bill:

- ▶ modifies the circumstances under which a defendant may plead not guilty to a ~~criminal offense~~ first degree or capital felony by reason of insanity;
- ▶ places the burden of proof on a defendant asserting a defense of not guilty by reason of insanity to a first degree or capital felony charge;
- ▶ modifies provisions relating to supervision, assessment, and release of a defendant committed to the Department of Human Services after being found not guilty of a criminal offense by reason of insanity;

## HB0167S01 compared with HB0167

- ▶ provides that a judge presiding over the prosecution of an individual asserting the defense of not guilty by reason of insanity may exercise discretion in ordering the Department of Health to conduct a mental examination of the defendant; and
- ▶ makes technical changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

AMENDS:

76-2-305, as last amended by Laws of Utah 2016, Chapter 115

77-16a-301, as last amended by Laws of Utah 2019, Chapter 312

77-16a-304, as last amended by Laws of Utah 2011, Chapter 366

77-16a-305, as last amended by Laws of Utah 1993, Chapter 285

77-16a-306, as last amended by Laws of Utah 2011, Chapter 366

---

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 76-2-305 is amended to read:

**76-2-305. Mental illness -- Use as a defense -- Burden of proof -- Influence of alcohol or other substance voluntarily consumed -- Definition.**

~~[(1)(a) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.]~~

(1) As used in this section:

(a) "Intellectual disability" means a significant subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested prior to age 22.

(b) (i) "Mental illness" means a mental disease or defect that substantially impairs an individual's mental, emotional, or behavioral functioning, and may include a mental disease or defect caused by a congenital condition, injury, or physical or mental disease.

(ii) "Mental illness" includes an intellectual disability.

## HB0167S01 compared with HB0167

(iii) "Mental illness" does not include an antisocial personality disorder as defined in the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

~~{}~~~~{}~~~~c~~~~{}~~ "Wrongfulness" means legal wrongfulness or moral wrongfulness.

(2) (a) It is a defense to a ~~{prosecution under any statute}~~ first degree or ~~{ordinance}~~ capital felony charge that the defendant, as a result of mental illness, ~~{lacked the mental state required as an element of the offense charged.}~~ was unable to appreciate the nature and quality or the wrongfulness of the defendant's actions.

(b) It is a defense to a criminal charge that is not a first degree or capital felony that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.

~~{b}~~3 A defendant asserting the defense described in Subsection (2)(a) has the burden of pleading and proving by clear and convincing evidence the facts necessary to entitle the defendant to be found not guilty under this section.

~~{b}~~ ~~{3}~~4 Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony under Section 76-3-207 and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide offense under Section 76-5-205.5.

~~{2}~~ ~~{4}~~5 ~~[The defense {} defined in this section]~~ Each defense described in Subsection ~~(2)~~~~{a}~~ includes the defenses known as "insanity" and "diminished mental capacity."

~~{3}~~ ~~A person~~ ~~{5}~~6 A defendant who asserts a defense of insanity or diminished mental capacity, and who is under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense is not excused from criminal responsibility on the basis of mental illness if the alcohol or substance caused~~[, triggered,]~~ or substantially contributed to ~~[the {} mental illness.]~~~~{}~~;

(a) the defendant's inability to appreciate the nature and quality or the wrongfulness of the defendant's actions as described in Subsection (2)(a); or

(b) the defendant lacking the mental state required as an element of the offense charged as described in Subsection (2)(b).

~~{4}~~ ~~As used in this section:~~

## HB0167S01 compared with HB0167

~~[(a) "Intellectual disability" means a significant subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested prior to age 22.]~~

~~[(b) (i) "Mental illness" means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of injury, or a residual effect of a physical or mental disease and includes, but is not limited to, intellectual disability.]~~

~~[(ii) "Mental illness" does not mean an abnormality manifested primarily by repeated criminal conduct.]~~

### Section 2. Section 77-16a-301 is amended to read:

#### **77-16a-301. Mental examination of defendant.**

(1) (a) When the court receives notice that a defendant intends to claim that the defendant is not guilty by reason of insanity or that the defendant had diminished mental capacity, or that the defendant intends to assert special mitigation under Subsection 76-5-205.5(2)(a), the court ~~shall~~ may order the department to examine the defendant and investigate the defendant's mental condition.

(b) The person or organization directed by the department to conduct the examination shall testify at the request of the court or either party in a proceeding in which the testimony is otherwise admissible.

(c) Pending trial, unless the court or the executive director directs otherwise, the defendant shall be retained in the same custody or status the defendant was in at the time the examination was ordered.

(2) (a) The defendant shall be available and shall fully cooperate in the examination by the department and other independent examiners for the defense and the prosecuting attorney.

(b) If the defendant fails to be available and to fully cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant is barred from presenting expert testimony relating to the defendant's defense of mental illness at the trial of the case.

(c) The department shall complete the examination within 30 days after the court's order, and shall prepare and provide to the court prosecutor and defense counsel a written report concerning the condition of the defendant.

## HB0167S01 compared with HB0167

(3) Within 10 days after receipt of the report described in Subsection (2)(c) from the department, but not later than five days before the trial of the case, or at any other time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal of the defense of mental illness, which shall contain the names of witnesses the prosecuting attorney proposes to call in rebuttal.

(4) The report of another independent examiner is admissible as evidence upon stipulation of the prosecution and defense.

(5) (a) This section does not prevent a party from producing other testimony as to the mental condition of the defendant. ~~(f)~~

(b) An expert witness who is not appointed by the court is not entitled to compensation under Subsection (7).

(6) This section does not require the admission of evidence not otherwise admissible.

(7) (a) The department shall pay the expenses of an examination ordered by the court under this section.

(b) The department shall charge the county where the prosecution is commenced for travel expenses associated with an examination incurred by a defendant.

(c) The department shall charge the entity commencing the prosecution for an examination of a defendant charged with a violation of a municipal or county ordinance.

Section ~~(2)~~3. Section **77-16a-304** is amended to read:

### **77-16a-304. Review after commitment.**

(1) (a) The executive director, or the executive director's designee, shall establish a review team of at least three ~~[qualified staff members]~~ licensed mental health professionals to review the defendant's mental condition at least every ~~[six]~~ 12 months.

(b) When establishing a review team under this Subsection (1), the executive director shall take into account best practices for assessing the defendant's risk of violence.

~~(b)~~ (c) The review team described in ~~[Subsection (1)(a)]~~ this Subsection (1) shall include:

- (i) at least one forensic psychiatrist or forensic psychologist; and
- (ii) if the defendant has an intellectual disability, at least one staff member who is a designated intellectual disability professional.

(2) If the review team described in Subsection (1) finds that the defendant has

## HB0167S01 compared with HB0167

recovered from the defendant's mental illness, or, that the defendant [~~still has a~~] has not recovered from the defendant's mental illness but does not present a substantial danger to self or others, the executive director, or the executive director's designee, shall:

(a) notify the court that committed the defendant that the defendant is a candidate for discharge; and

(b) provide the court with a report stating the facts that form the basis for the recommendation.

(3) (a) The court shall conduct a hearing within [~~10 business~~] 30 days after [~~receipt of the executive director's, or the executive director's designee's, notification~~] the day on which the court receives the notification described in Subsection (2).

(b) The court clerk shall provide notice of the date and time of the hearing to:

(i) the prosecuting attorney;

(ii) the defendant's attorney; and

(iii) any victim of the crime for which the defendant was found not guilty by reason of insanity.

(4) (a) The court shall order that the defendant be discharged from commitment in accordance with Section 77-16a-306 if the court finds that the defendant:

(i) [~~no longer has a~~] has recovered from mental illness; or

(ii) has [~~a~~] not recovered from mental illness, but is no longer [~~presents~~] a substantial danger to self or others.

(b) The court shall order the [~~person~~] defendant conditionally released in accordance with Section 77-16a-305 if the court finds that the defendant:

(i) has a mental illness;

(ii) is a substantial danger to self or others; and

(iii) can be [~~controlled~~] adequately controlled if conditionally released with proper care, medication, supervision, and treatment as a condition of release.

(c) The court shall order that the commitment be continued if the court finds that the defendant:

(i) has not recovered from the defendant's mental illness;

(ii) is a substantial danger to self or others; and

(iii) cannot be adequately [~~be~~] controlled if conditionally released [~~on supervision~~]

## HB0167S01 compared with HB0167

with proper care, medication, supervision, and treatment as a condition of release.

(d) (i) [~~Except as provided in Subsection (4)(d)(ii), the~~] The court may not discharge a defendant whose mental illness is in remission as a result of medication or hospitalization if it can be determined within reasonable medical probability that, without continued medication or hospitalization, the defendant's mental illness will reoccur, making the defendant a substantial danger to self or others.

(ii) Notwithstanding Subsection (4)(d)(i), the defendant described in Subsection (4)(d)(i) may be a candidate for conditional release, in accordance with Section 77-16a-305.

Section ~~3~~4. Section **77-16a-305** is amended to read:

### **77-16a-305. Conditional release.**

(1) If the review team described in Subsection 77-16a-304(1) finds that a defendant is not eligible for discharge[;] in accordance with [~~Section~~] Subsection 77-16a-304(4)(a), but that [~~his~~] the defendant's mental illness and dangerousness can be adequately controlled with proper care, medication, supervision, and treatment, as described in Subsection 77-16a-304(4)(b), if [~~he~~] the defendant is conditionally released, the review team shall prepare a report and notify the executive director, or [~~his~~] the executive director's designee, that the defendant is a candidate for conditional release.

(2) [~~The~~] Upon receipt of the report described in Subsection (1), the executive director, or [~~his~~] the executive director's designee, shall prepare a conditional release plan[~~, listing~~] that:

(a) describes the type of care [~~and treatment that the individual needs and recommending~~], supervision, medication, and treatment the defendant needs, taking into account best practices for assessing the defendant's risk of violence; and

(b) recommends a treatment provider.

(3) The executive director, or [~~his~~] the executive director's designee, shall provide the court, the defendant's attorney, and the prosecuting attorney with a copy of the report issued by the review team under Subsection (1), and the conditional release plan described in Subsection (2).

(4) (a) The court shall conduct a hearing on the issue of conditional release within 30 days after [~~receipt of those documents~~] the day on which the court receives the documents described in Subsection (3).

[~~(4)~~] (b) The court ~~may~~shall order that [~~a~~] the defendant be conditionally

## HB0167S01 compared with HB0167

released ~~[if it]~~ in accordance with the defendant's conditional release plan if the court finds that, even though the defendant presents a substantial danger to ~~[himself]~~ self or others, ~~[he]~~ the defendant can be adequately controlled with proper care, supervision, medication, and treatment that is available and provided for in the defendant's conditional release plan.

(5) (a) The department may provide ~~[treatment]~~ the care, supervision, medication, and treatment described in Subsection (4)(b) in accordance with the defendant's conditional release plan or contract with a local mental health authority or other public or private provider to provide the care, supervision, medication, and treatment~~[for a defendant who is conditionally released under this section]~~.

(b) A local mental health authority, or other public or private provider that provides care, supervision, medication, and treatment to a defendant who is conditionally released under this section shall immediately notify the executive director, or the executive director's designee, upon learning the defendant is not compliant with the defendant's conditional release plan.

(6) (a) If the department receives notice or otherwise finds that the defendant is not compliant with the defendant's conditional release plan, the department may issue an order temporarily revoking the defendant's conditional release and requiring the defendant to immediately submit to the custody of the department.

(b) (i) Temporary revocation of a defendant's conditional release under Subsection (6)(a) is effective for seven business days after the day on which the defendant is taken into the custody of the department, unless otherwise ordered by the court.

(ii) A peace officer is authorized to take a defendant whose conditional release is temporarily revoked under Subsection (6)(a) into physical custody and transport the defendant to the custody of the department.

(c) Upon temporary revocation of a defendant's conditional release, the executive director, or the executive director's designee, shall immediately provide the court, the defendant's attorney, and the prosecuting attorney with written notice of the:

(i) temporary revocation; and

(ii) reason for the temporary revocation.

(7) Before the day on which the court conducts the hearing described in Subsection (8)(a), the review team described in Section 77-16a-304 shall review the mental condition of the defendant and provide a report to the court that describes whether the defendant remains a



## HB0167S01 compared with HB0167

candidate for conditional release under Subsection (1).

(8) (a) The court shall conduct an initial hearing within seven business days after the day on which the defendant is taken into the custody of the department and reach an initial determination regarding whether the defendant is a substantial danger to self or others, taking into consideration:

(i) the report described in Subsection (7); and

(ii) arguments or evidence presented by the parties.

(b) If the court determines at the initial hearing described in Subsection (8)(a) that the defendant is not a substantial danger to self or others, the defendant may be released on the defendant's current release plan.

(c) (i) If the court determines at the initial hearing described in Subsection (8)(a) that the defendant is a substantial danger to self or others, the court shall order:

(A) the defendant detained; and

(B) the executive director, or the executive director's designee, to establish a review team that meets the requirements described in Subsection 77-16a-304(1) to review the defendant's mental condition within 30 days after the day on which the court sends notice of the order.

(ii) Upon completion of the review described in Subsection (8)(c)(i)(B), the defendant shall be subject to the review and court proceedings described in Section 77-16a-304.

(d) The court shall order that the defendant be conditionally released in accordance with the defendant's conditional release plan if the court finds that, even though the defendant presents a substantial danger to self or others, the defendant can be adequately controlled with supervision and treatment that is available and provided for in the defendant's conditional release plan.

(9) The court clerk shall provide notice of the initial hearing described in Subsection (8)(a) in accordance with Subsection 77-16a-304(3).

Section ~~{4}~~5. Section **77-16a-306** is amended to read:

**77-16a-306. Continuing review -- Discharge.**

~~{1}~~ Each (1) (a) An entity that provides treatment for a defendant committed to the custody of the department as not guilty by reason of insanity under this part shall review the status of each defendant at least once every ~~[six]~~ 12 months.

## HB0167S01 compared with HB0167

(b) If the treatment provider described in Subsection (1)(a) or a treatment provider providing treatment to a conditionally released defendant under Section 77-16a-305 finds that a defendant has recovered from the defendant's mental illness~~[, or, if]~~ or that the defendant has a mental illness~~;~~ but no longer presents a substantial danger to self or others, [it] the treatment provider shall notify the executive director of [its] the treatment provider's findings.

(2) (a) Upon receipt of the notification [under] described in Subsection (1), the executive director shall designate a review team, in accordance with Section 77-16a-304, to evaluate the defendant.

(b) If ~~[that]~~ the review team described in Subsection (2)(a) concurs with the treatment provider's assessment, the executive director shall notify the court, the defendant's attorney, ~~[and]~~ the prosecuting attorney, and the victims that the defendant is a candidate for discharge.

(c) The court shall conduct a hearing, in accordance with Section 77-16a-302, within ~~[10 business]~~ 30 days after ~~[receipt of that notice]~~ the day on which the court receives the notice described in Subsection (2)(b).

(3) (a) The court may not discharge ~~[an individual]~~ a defendant whose mental illness is in remission as a result of medication or hospitalization if it can be determined within reasonable medical probability that, without continued medication or hospitalization, the defendant's mental illness will reoccur, making the defendant a substantial danger to self or others.

(b) Notwithstanding Subsection (3)(a), the defendant described in Subsection (3)(a) may be a candidate for conditional release in accordance with Section 77-16a-305.