

Not Guilty By Reason of Insanity Reference Guide

What Is Not Guilty By Reason Of Insanity (NGRI)?

[R.C. 2901.01(A)(14)]

A person is “not guilty by reason of insanity” relative to a charge of an offense only if the person proves, by a preponderance of the evidence and in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person’s acts.

A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged. [R.C. 2943.03]

A diagnosis of mental illness or intellectual disability, alone, is not sufficient for a finding of NGRI. There must be a connection between the behavior of the offense and the inability to know the wrongfulness of the behavior as a product of the underlying mental disease or defect.

What Does Not Constitute A Defense Of NGRI?

[R.C. 2945.391]

Proof that a person’s reason, at the time of the commission of an offense, was so impaired that the person did not have the ability to refrain from doing the person’s act or acts, does not constitute a defense.

Competency to Stand Trial and NGRI are separate and independent issues in a case. While both issues may be raised in the same case and the court can request joint evaluations, if both issues are raised the trial court will likely want to resolve the competency issue prior to resolving the NGRI issue. If only one issue is present in a case, then that is the only evaluation that needs to be conducted. The issue of NGRI may be raised only if a defendant enters a plea of not guilty by reason of insanity and enters that plea in writing.

How Is Competency Different From a Not Guilty By Reason Of Insanity Plea?

Competency to stand trial is a determination by the judge about a defendant’s present mental condition and about the defendant’s capacity to understand the proceedings and assist in the defendant’s own defense. [R.C. 2945.37(G)]

A plea of not guilty by reason of insanity (NGRI) asserts an affirmative defense regarding the defendant’s mental condition at the time of the offense and focuses on the defendant’s knowledge of the wrongfulness of the defendant’s actions at that time.

[R.C. 2901.01(A)(14)]

Entering A Not Guilty By Reason Of Insanity Plea

Who may raise NGRI? [R.C. 2901.01(A)(14)]

Only the defense may enter a plea of NGRI, and the plea must be made before the commencement of trial.¹ The plea must be made in writing by either the defendant or defense counsel.²

Who has the burden to prove NGRI? [R.C. 2901.05]

The defendant has the burden to prove NGRI by a preponderance of the evidence.

May a juvenile enter an NGRI plea?

No. No provision for an insanity plea exists in Ohio R. Juv. P. 29.³

Evaluations For NGRI [R.c. 2945.371]

If a defendant enters a plea of not guilty by reason of insanity, the court may order one or more evaluations of the defendant's mental condition at the time of the offense charged.

Who conducts the evaluation? [R.C. 2945.371]

If the court orders an evaluation, it must be conducted by an "examiner" as defined by R.C. 2945.37(A)(2) of the court's choosing. The examiner must be a qualified psychiatrist or clinical psychologist or be one employed by the Department of Mental Health and Addiction Services (OMHAS) to conduct such examinations.

[Administrative Code 5122-32-01(M)(3)]

Postdoctoral fellows may participate in the preparation of the report and may co-sign reports on which they have made significant contributions. No examiner may co-sign a report prepared by a postdoctoral psychology fellow without having personally participated in the evaluation of the examinee.

What is the time frame and format for the evaluation?

[R.C. 2945.371(G) and (H)]

An examiner must send a report to the court within 30 days after the court orders the evaluation. The evaluation may be conducted through electronic means.

1 R.C. 2943.03 and Ohio R. Crim. P. 11(H)

2 Ohio R. Crim. P. 11(A)

3 *In re Chambers*, 116 Ohio App.3d 312 (3rd Dist. 1996)

What must be included in the evaluation report?
[R.C. 2945.371(H)]

The report must include all of the following:

1. The examiner's findings;
2. The facts in reasonable detail on which the findings are based;
3. If the evaluation was ordered to determine the defendant's mental condition at the time of the offense charged, the examiner's findings as to whether the defendant, at the time of the offense charged, did not know, as a result of a severe mental disease or defect, the wrongfulness of the acts charged.

Can statements made to examiners during NGRI evaluations or hearings be used against the defendant? [R.C. 2945.371(K)]

Statements made by the defendant during evaluations or hearings cannot be used to determine guilt.

Who pays the cost of the evaluation? [R.C. 2945.371(L)]

Examiners are paid a reasonable amount. Costs are borne by the court and may be taxed as costs in the case.⁴

What about a second opinion? [R.C. 2945.371 (B)]

If the court orders more than one evaluation under division (A) of this section, the prosecutor and the defendant may recommend to the court an examiner whom each prefers to perform one of the evaluations. If a defendant enters a plea of not guilty by reason of insanity and if the court does not designate an examiner recommended by the defendant, the court must inform the defendant that the defendant may undergo an independent expert evaluation and that, if the defendant is indigent and unable to pay for an independent expert evaluation, it will be arranged for the defendant at public expense.

Levels of Movement¹ and Forensic Status

Once a defendant has been committed to an OMHAS facility, depending on the defendant's forensic status, various levels of movement are permitted within the facility:

Level 1 – Restricted to unit placement

Level 2 – Supervised on-grounds movement

Level 3 – Unsupervised on-grounds movement

Level 4 – Supervised off-grounds movement

Level 5 – Unsupervised off-grounds movement

Trial Visit – Unsupervised community contact with expectation to return

Conditional Release – Treatment in community for a period of time, not to exceed maximum term of imprisonment for most serious offense.

Medical Movement - Emergency and non-emergency.

1 See Appendix D <https://mha.ohio.gov/static/AboutUs/MediaCenter/PublicationsandFactSheets/ohio-forensic-manual.pdf>. For more guidance, contact OMHAS Director of Forensic Services, Lisa Gordish, PsyD, lisa.gordish@mha.ohio.gov.

4 Department of Mental Health and Addiction Services (OHMAS) has been funding NGRI evaluations in common-pleas courts.

NGRI Verdict By Jury Or Judge

What happens once the trier of fact finds the defendant NGRI?
[R.C. 2945.40(A)]

The court must conduct a full hearing within 10 days of the verdict finding NGRI.

What is the purpose of the full hearing within 10 days?
[R.C. 2945.40(A)]

To determine whether the person found NGRI is a person with a mental illness subject to court order or a person with an intellectual disability subject to institutionalization by court order. (See Sidebar)

What happens if the court does not conduct the hearing within 10 days? [R.C. 2945.40(B)]

The person who was found NGRI is to immediately be discharged. However, in *State v. Pollock*, 2002-Ohio-102 (2nd Dist. 2002) the court held that the time limits are directory, not mandatory, regarding R.C. 2945.40(B).

May the hearing be continued? [R.C. 2945.40(B)]

Yes. If the continuance is granted upon motion of the defendant, then any period of time is allowed. If the continuance is granted for good cause, then the delay may be no longer than 10 days.

May the court order temporary detention prior to the 10-day hearing? [R.C. 2945.40(A)]

Yes. Prior to the hearing, if the trial court has probable cause to believe that the person is a person with a mental illness subject to court order or a person with an intellectual disability subject to institutionalization by court order, then the court may order temporary detention up to 10 days or until the hearing, whichever is earlier.

Where is the defendant detained while awaiting the 10-day hearing? [R.C. 2945.40(A)]

Any person detained under a temporary order of detention must be held in a suitable facility, taking into consideration the place and type of confinement prior to and during trial.

Levels of Movement and Forensic Status, Continued...

Hospitals may move an individual from level one to level two with an attending psychiatrist's order. Approval of levels 3-5 and Conditional Release may be changed only by court order.
(R.C. 2945.401 (D) (1))

Forensic Status (Available level of movement)

Jail Transfers and police holds - (Level 1).

Competency/Sanity Evaluation [R.C. 2945.371(H) (3) and (4)] - (Level 1).

Incompetent, restorable [R.C. 2945.38(B)] - (Levels 1 and 2)

Incompetent, unrestorable, probate court jurisdiction [R.C. 2945.38(H) (4)] - (Levels 1-5)

Maintain Competency [R.C. 2945.38(A)] - (Levels 1 and 2)

Incompetent, unrestorable, criminal court jurisdiction [R.C. 2945.39(A)] - (Levels 1-5)

Not Guilty by Reason of Insanity [R.C. 2945.40] - (Levels 1-5)

Mentally ill probationer or parolee [R.C. 2967.22 and Chapter 5122] - (Levels 1-5)

What are a defendant's rights at hearings regarding commitment terminations or changes? [R.C. 2945.40(C)(1)-(5)]

Defendant has a right:

- to attend hearings
- to counsel
- to independent expert evaluation
- to subpoena witnesses and documents
- to present evidence on his/her behalf
- to cross-examine witnesses
- to testify or not be compelled to testify
- to have copies of any relevant medical or mental-health document in the custody of the state, unless release of such a document would create substantial risk of harm to any person.

What are the requirements for the hearing that the trial court must hold? [R.C. 2945.40(D)]

The hearing must be open to the public.

The hearing must be conducted in accordance with the rules of civil procedure

The court must make and maintain a full transcript and record of the proceedings

What evidence may the court consider at the full hearing? [R.C. 2945.40(D)]

All relevant evidence, including but not limited to:

- Any psychiatric, psychological, or medical testimony or reports
- Acts constituting the offense for which the defendant found NGRI
- Any history of the defendant that is relevant to his or her ability to conform to the law

What findings must the court make at the full hearing? [R.C. 2945.40(E)]

If there is no clear and convincing evidence that the defendant is a person with a mental illness subject to court order or a person with an intellectual disability subject to institutionalization by court order, then the court shall discharge the defendant.

Role of the Forensic Monitor

R.C. 2945.402 refers to actions that “the monitor” will conduct. OAC 5119.29 requires OhioMHAS in conjunction with boards of alcohol, drug addiction, and mental health services and community mental health boards to develop a coordinated system for tracking and monitoring persons found NGRI and granted Conditional Release and persons found Incompetent to Stand Trial and granted Conditional Release.

Each county ADAMH Board has designated a Forensic Monitor to monitor the compliance of a person on conditional release with the conditions of their release. The Forensic Monitor acts as a liaison between the court, hospital, outpatient treatment provider, and the individual. The Forensic Monitor notifies the court of any violation of the conditional release plan.

It is important for the Court to inform the Forensic Monitor of any defendant being placed on Conditional Release to the community directly without hospitalization as early in this process as possible. The Forensic Monitor must meet with the defendant and design the Conditional Release Plan prior to the hearing where the least restrictive placement is determined to be the community.

The Forensic Monitor may remind the Court to complete “Form 95” in accordance with Sup. R. 95.

[R.C. 2945.40(F)]

If clear and convincing evidence is presented that the defendant is a person with a mental illness subject to court order or person with an intellectual disability subject to institutionalization by court order, then the court shall commit the person.

Where shall the court commit the defendant found NGRI and also to be a person with a mental illness subject to court order? [R.C. 2945.40(F)]

Either to the department of mental health and addiction services for treatment in a hospital, facility, or agency as determined clinically appropriate by the department of mental health and addiction services or to another medical or psychiatric facility, as appropriate.

Where shall the court commit the defendant found NGRI and also found to be a person with an intellectual disability subject to institutionalization by court order? [R.C. 2945.40(F)]

A facility operated by the department of developmental disabilities or another facility, as appropriate.

What factors shall the court consider in placement? [R.C. 2945.40(F)]

- Extent to which the person is a danger to the person and to others
- The need for security
- Type of crime involved

In weighing these factors, the court must give preference to protecting public safety.

Where can the court commit the defendant? [R.C. 2945.40(F)]

The least restrictive alternative available that is consistent with public safety and the welfare of the person.

Prior to making a placement determination, courts can request that an examiner conduct a least restrictive setting evaluation to assist in determining placement pursuant to R.C. 2945.40(F).

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NGRI Commitment

What are the reporting requirements once the court commits a defendant? [R.C. 2945.401(C)]

Facility of commitment must report in writing to the trial court whether the defendant remains a person with a mental illness subject to court order or a person with an intellectual disability subject to institutionalization by court order.

[R.C. 5122.311]

The hospital, agency, or facility where the defendant has been committed must notify the Office of the Attorney General of the identity of the defendant. The notification must be submitted using the [Notification Form for Records Checks](#).

How often must the report be made? [R.C. 2945.401(C)]

After the initial 6 months of treatment and every 2 years after the first report.

What must the court do after receiving the report?

[R.C. 2945.401(C)]

Within 30 days hold a hearing on the continued commitment or any changes in the condition of the commitment.

May the defendant request a change of conditions of confinement? [R.C. 2945.401(C)]

Yes. The trial court must conduct a hearing on that request if six months or more have elapsed since the most recent hearing conducted.

Does the trial court have continuing jurisdiction?

[R.C. 2945.401(A)]

Yes. NGRI defendant remains subject to the jurisdiction of the trial court until final termination of the commitment.

May the court release a defendant on conditional release?

[R.C. 2945.402(E)(1)]

Yes. If the court does approve conditional release, the court must report the approval and information pertaining to the release to the local law-enforcement agency. [See [Rules of Superintendence for the Courts of Ohio, Sup. R. 95](#), which supplies the form for reporting.]

Relevant Case Law

State v. Stutler, Ohio St.3d, 2022-Ohio-2792. Following a finding of NGRI and commitment, unless the state proves by clear and convincing evidence that the recommended changes to commitment conditions would result in a threat to public safety or to any person, the trial court does not have discretion to deny the requested change.

State v. Curry, 45 Ohio St.3d 109 (1989). A plea of not guilty by reason of insanity may be a defense to any crime regardless of the requisite mens rea. Thus, an insanity defense may be entered in cases requiring proof that the defendant's conduct be purposeful, knowing, reckless, or negligent because criminal intent or lack thereof is not the focus of the insanity question.

State v. Foster, 2014-Ohio-530 (2nd Dist.). Counsel was not ineffective in failing to pursue an insanity defense, as an insanity defense would have conflicted with defendant's defense strategy of pleading not guilty and denying all allegations regarding her behavior.

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What happens when the defendant is granted conditional release? [R.C. 2945.402]

The court may set any conditions on the release with respect to the treatment, evaluation, counseling, or control of the defendant that the court considers necessary to protect the public and the welfare of the defendant. [See sidebar. Forensic Monitors work with the court to assist with designing a Conditional Release Plan.]

A conditional release is a commitment. The R.C. 2945.401 hearings still apply.

Monitor must notify the trial court immediately of any violation of terms of conditional release. Court may order defendant detained and then hold a hearing within 10 days to determine if conditional release should be modified or terminated.

Courts should be aware that the notification requirements in R.C. 5122.311 are still applicable to defendants who have been conditionally released. The hospital, agency, or facility where the defendant has been committed must notify the Office of the Attorney General of the identity of the defendant. The notification must be submitted using the [Notification Form for Records Checks](#).

What happens if the defendant violates the terms of conditional release? [R.C. 2945.402(A)]

Trial court may revoke conditional release and reinstitutionalize the defendant if the conditions have not been satisfied.

[R.C. 2945.402(C)]

The Forensic Monitor must notify the trial court immediately of a violation of terms of conditional release. The court may order the defendant detained and then hold a hearing within 10 days to determine if conditional release should be modified or terminated.

[R.C. 2945.402 (D)]

If the Court finds by a preponderance of the evidence that the defendant violated the terms of the conditional release, the court may continue, modify, or terminate the conditional release.

Relevant Case Law, *Continued...*

State v. Tuomala, 104 Ohio St.3d 93, 2004-Ohio-6239.

The amount of time a person found not guilty by reason of insanity may be subject to court-ordered commitment is not reduced by the period of time spent in pretrial custody. R.C. 2967.191, which mandates the reduction of a prison term for prisoners convicted and sentenced, does not apply to a person found not guilty by reason of insanity because such a person is never convicted of an offense or sentenced to a period of confinement as a prisoner. Therefore, a person who is found not guilty by reason of insanity and subsequently deemed a mentally ill person subject to court-ordered hospitalization is not eligible for a reduction of the term of the court-ordered commitment at a behavioral health facility for pretrial time spent in detention.

State v. Swiger, 2013-Ohio-3519 (9th Dist.). A plea of not guilty by reason of insanity may be a defense to strict-liability offenses. A trial court erred by refusing to give a not guilty by reason of insanity instruction solely because the underlying criminal offenses were strict-liability offenses.

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Termination of Commitment

How long may a defendant be committed after an NGRI finding? [R.C. 2945.401(J)(1)]

The earlier of:

Defendant no longer a person with a mental illness subject to court order or a person with an intellectual disability subject to institutionalization by court order, as determined by trial court

Expiration of the maximum prison term⁵ or term of imprisonment that the defendant could have received if the defendant had been convicted of the most serious offense with which the defendant was found not guilty by reason of insanity.

Who has the burden of proof in hearings regarding terminating or changing a commitment pursuant to R.C. 2945.401(C) or R.C. 2945.401 (D)(1)? [R.C. 2945.401(G)]

In each instance, the prosecutor has the burden of proof as follows:

Recommendation of termination of commitment:

To maintain the court's jurisdiction, the prosecutor must show by clear and convincing evidence that the defendant remains a person with a mental illness or intellectually disabled person subject to court order.

Recommendation to a less restrictive status:

The prosecutor must show by clear and convincing evidence that the proposed changes represent a threat to public safety or a threat to the safety of any person.

What if a defendant still needs treatment after termination of commitment? [R.C. 2945.401(A)]

If terminated due to expiration of maximum prison term, the prosecutor or the court may file an affidavit for the civil commitment of the defendant.

Relevant Case Law, *Continued...*

State v. Ware, 44 Ohio App. 3d 201 (1st Dist. 1988). When a defendant is simultaneously found guilty of one or more counts of an indictment but not guilty by reason of insanity of the remaining counts of the indictment, the court may not postpone or stay the hearing on hospitalization or institutionalization that is mandated by R.C. 2945.40(A) pending the defendant's release. Instead, R.C. 2945.40(A) requires that the hearing be held first in order to accomplish the legislative purpose of treating mentally ill defendants who are found not guilty by reason of insanity, before or in lieu of punishment. See also *State v. Bailey*, 2010-Ohio-6155 (8th Dist.).

State v. Davis, 2014-Ohio-90 (10th Dist.). Where criminal defendant was found competent to stand trial, trial counsel was not ineffective because he acceded to the inmate's directive to forgo a not guilty by reason of insanity defense, as counsel's professional obligation was to abide by the client's wishes.

State v. Tenace, 121 Ohio App. 3d 702 (6th Dist. 1997). Trial court erred in permitting defense counsel, over defendant's objection, to withdraw defendant's plea of not guilty by reason of insanity and proceed on a plea of not guilty.

⁵ *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6239.

Person with a Mental Illness Subject to Court Order:

A “person with a mental illness subject to court order” is defined by R.C. 5122.01 (B) as a person with a mental illness who, because of the person’s illness: (ANY of the following apply)

- (1) Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;
- (2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;
- (3) Represents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person’s basic physical needs because of the person’s mental illness and that appropriate provision for those needs cannot be made immediately available in the community;
- (4) Would benefit from treatment for the person’s mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or the person;
- (5)(a) Would benefit from treatment as manifested by evidence of behavior that indicates **ALL** of the following:
 - (i) The person is unlikely to survive safely in the community without supervision, based on a clinical determination.
 - (ii) The person has a history of lack of compliance with treatment for mental illness and **ONE** of the following applies:
 - (I) At least twice within the thirty-six months prior to the filing of an affidavit seeking court-ordered treatment of the person under section 5122.111 of the Revised Code, the lack of compliance has been a significant factor in necessitating hospitalization in a hospital or receipt of services in a forensic or other mental health unit of a correctional facility, provided that the thirty-six-month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the thirty-six-month period.

Person With an Intellectual Disability Subject to Institutionalization by Court Order:

A “person with an intellectual disability subject to institutionalization by court order” is defined by R.C. 5123.01 (O) as “a person eighteen years of age or older with at least a moderate level of intellectual disability and in relation to whom, because of the person’s disability, either of the following conditions exists:

The person represents a very substantial risk of physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person’s most basic physical needs and that provision for those needs is not available in the community.

The person needs and is susceptible to significant rehabilitation in an institution.”

(II) Within the forty-eight months prior to the filing of an affidavit seeking court-ordered treatment of the person under section [5122.111](#) of the Revised Code, the lack of compliance resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others, provided that the forty-eight-month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the forty-eight-month period.

(iii) The person, as a result of the person's mental illness, is unlikely to voluntarily participate in necessary treatment.

(iv) In view of the person's treatment history and current behavior, the person is in need of treatment in order to prevent a relapse or deterioration that would be likely to result in substantial risk of serious harm to the person or others.

(b) An individual who meets only the criteria described in division (B)(5)(a) of this section is not subject to hospitalization.