

LFC Requester:	Sanchez, Scott
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original **Amendment** _____
Correction _____ **Substitute** _____

Date 1/29/24
Bill No: HB 233

Sponsor: Tara L. Lujan and Gerald Ortiz y Pino
Short Title: Criminal Competency Determination

Agency Name and Code Number: AOC 218
Person Writing: Celina Jones
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
None	None	Rec.	General

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
Unknown	Unknown	Unknown	Rec.	General

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Unknown	Unknown	Unknown	Unknown	Rec.	General

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: Duplicates HB 233.

Duplicates/Relates to Appropriation in the General Appropriation Act: None.

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 16 amends, repeals and enacts statutory sections within Chapter 31, Article 9 NMSA 1978, to address competency in criminal proceedings, as follows:

- **Section 1**, governing determination of competency and raising the issue: repeals the current Section 31-9-1 NMSA 1978 and enacts a new Section 31-9-1 to require a case to be suspended whenever one of the parties or the court has a good-faith basis for concern relating to a defendant’s competence. Upon suspension, the issue may be resolved with a competency evaluation pursuant to Section 31-9-1.1 NMSA 1978 or, prior to or instead of ordering a competency evaluation, the court may:
 - (1) Order the defendant be assessed for diversion to a treatment program, by agreement of the parties or at the court’s discretion, if such programs are available in a reasonable time to the jurisdiction of the court; or
 - (2) Refer the defendant for an assessment to determine if the defendant is a candidate for civil commitment or assisted outpatient treatment (AOT) pursuant to the Assisted Outpatient Treatment Act (AOTA), if agreed to by the parties.

The SB 16 amendment provides the following specifics:

- In misdemeanor cases, a defendant may be ordered to participate in a diversion to treatment program for no longer than 6 months. When a defendant in a misdemeanor case is diverted to treatment, the case shall not transfer to district court.
- In nonviolent felony cases, the court may order or the parties may agree, that the defendant be assessed for participation in an available diversion to treatment program for no longer than 18 months. Upon completion of the program, a defendant’s charges shall be dismissed. A defendant shall not be required to undergo a competency evaluation for the case while the defendant is participating in a diversion to treatment program.
- If a defendant who has been assigned to a diversion to treatment program refuses or is unable to comply with court-ordered treatment, the court may, in the interest of justice, dismiss the charges pending against the defendant or, if the parties agree, make a referral to determine if the defendant is eligible for the civil commitment process or AOT pursuant to the AOTA.
- **Section 2**, governing determination of competency, evaluation and determination: amends Section 31-9-1.1 NMSA 1978 to require a hearing be held by the district

court on the same day regarding the issue of competency and dangerousness of an incarcerated defendant charged with a felony, within a reasonable time, but in no event later than 30 days after notification to the court of completion of the diagnostic evaluation. Specifies what competency evaluations are required to include.

- **Section 3**, governing determination of competency, competency restoration programs, commitment: repeals the current Section 31-9-1.2 NMSA 1978 and enacts a new Section 31-9-1.2 to, upon holding a hearing on the same day re: competency and dangerousness, permit the court to dismiss a criminal case without prejudice in the interest of justice or stay the case and refer the defendant to a competency restoration program if one exists and is available to the referring jurisdiction within a reasonable time period from the date of referral. SB 16 requires the court to order treatment in the least restrictive setting consistent with the goal of restoration of competency and permits the court to refer the defendant to:
 - An outpatient competency restoration program required to report to the court every 30 days re: the defendant's status, participation in the program and possible changes to necessary level of care, and required to notify the court immediately if outpatient services are terminated due to a mental health condition or behavior or for any other reason. Under SB 16, a defendant will only be eligible for outpatient competency restoration if the court finds that the placement will not pose an unreasonable risk to the health and safety of the defendant, any person or the community; or
 - An inpatient competency restoration program.

If a criminal case is dismissed, the court, city attorney, county attorney, district attorney and anyone else authorized by law may refer for assessment to civil commitment proceedings under the Mental Health and Developmental Disabilities Code, and the court is permitted to order the defendant confined for a maximum of 7 days to facilitate the filing of an order referring the defendant for an assessment to determine eligibility for civil commitment. SB 16 requires the court to hold a hearing on the same day to determine whether a defendant charged with a felony is incompetent to proceed in the criminal case, and, if the court make a specific finding that the defendant is dangerous, the court may order the defendant to a competency program. A defendant so committed shall be provided with treatment available to involuntarily committed persons, and:

(1) the defendant shall be detained by the Department of Health in a secure, locked facility until completion of treatment; (2) upon defendant's completion of treatment and the submission of a final report to the state, defense counsel and the court, the court shall enter an order to transport the defendant to the appropriate county detention facility, if applicable; and (3) upon release, the committing facility shall forward a discharge plan and treatment documents to the receiving provider or facility, if applicable.

Under SB 16, the defendant is required to be admitted to an inpatient or outpatient facility designated for the treatment of defendants who are incompetent to stand trial and dangerous, within 30 days of receipt of the court's order of commitment of an incompetent defendant. If,

- **Section 4**, governing determination of competency, 90-day review, reports and continuing treatment: amends Section 31-9-1.3 NMSA 1978 to require the treatment supervisor, within 30 days of an incompetent defendant's admission to an inpatient or outpatient facility to undergo competency restoration treatment, to file with the district court, the state and the defense an initial assessment and treatment plan and a

report on the defendant's amenability to treatment to render the defendant competent to proceed in a criminal case or to proceed with diversion, if available; an assessment of the facility's capacity to provide appropriate treatment for the defendant; and an opinion as to the probability of the defendant attaining competency within a period of 9 months from the date of admission.

- **Section 5**, governing determination of competency and incompetent defendants: amends Section 31-9-1.4 NMSA 1978 to permit the Department of Health, the state, the family or the health care provider, in addition to the district court, to refer the defendant to the district attorney for an assessment of whether the defendant is eligible for civil commitment.
- **Section 6**, governing determination of competency, evidentiary hearing: amends Section 31-9-1.5 NMSA 1978 provide that if the defendant is not committed pursuant to Sections 31-9-1 through 31-9-1.5 NMSA 1978 or if the court finds upon its two-year review hearing that the defendant is no longer dangerous, the defendant shall be released with a treatment plan and case management services in place.
- **Section 7**, governing hearing to determine developmental or intellectual disability: amends Section 31-9-1.6 NMSA 1978 to remove the subsection defining "developmental or intellectual disability."
- **Section 8**: enacts a new section to define the following terms as used in Chapter 31, Article 9 NMSA 1978: "competency restoration program"; "dangerous"; "developmental or intellectual disability"; "discharge plan"; "diversion to treatment program"; "medical needs"; "nonviolent felony"; "outpatient competency restoration"; "provisional diagnosis"; "reasonable time"; "treatment program"; and "violent felony".
- **Section 9**, governing mental examination: provides that where the defendant is determined to be indigent, the state shall pay for the costs of the examination from funds available to the court.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SB 16 extends the role of the courts in the competency determination and restoration process. However, most of the cost of outpatient restoration would likely be borne by HSD.

SIGNIFICANT ISSUES

- 1) According to the National Alliance on Mental Illness (NAMI),

Community-based competency restoration is a promising practice that allows some defendants, who may not require hospital level care, to receive competency restoration services while living in the community, instead of an institutional setting like a jail or hospital. This model has shown to be [less expensive](#) than traditional competency restoration services and has favorable restoration rates. More importantly, it allows some defendants to remain in the community where they can continue to receive support from friends and family and connect with community mental health services to support long-term recovery. By allowing those who do not

require hospital level care to stay in their community, these programs also help to reserve institutional based care for people with the most significant needs.

Many states allow community-based competency restoration — [16 states](#) have formal community-based competency restoration programs and [35](#) state mental health agencies report that they pay for these services. Unfortunately, institutional-based competency restoration remains the norm in many places.

Expanding community-based competency restoration services is a key strategy to prevent prolonged and unnecessary incarceration, and an alternative to more restrictive institutional based services. Community-based competency restoration can help individuals involved in the criminal justice system to focus on fostering recovery and community connections.

See, *Community-Based Competency Restoration*, at <https://www.nami.org/Advocacy/Policy-Priorities/Supporting-Community-Inclusion-and-Non-Discrimination/Community-Based-Competency-Restoration>. See also *Jail Diversion for Misdemeanors Can Be a First Step to Improve the Competency to Stand Trial Process*, Kehinde A. Obikoya, *The Journal of the American Academy of Psychiatry and the Law*, December 2021 at <https://jaapl.org/content/49/4/473>, for a listing of the states with community-based competency restoration programs, etc., noting, “These programs are more cost-effective than inpatient CST restoration, have favorable CST restoration rates, allow the quicker return of defendants found not competent to stand trial to the community, enable treatment engagement with community mental health services, and appear to have favorable psychiatric outcomes.**11,-,14** “

Obikoya also reports that a second strategy adopted by some states is to create jail-based competency restoration (JBCR) treatment programs as an alternative to hospital-based treatment, and noting that, “JBCR programs have been successful in lowering costs compared with inpatient CST restoration, reducing the pressure on inpatient forensic hospital beds, cutting jail wait times for defendants found not competent to stand trial, and thereby reducing time to CST restoration in many cases.**11·13·14** “

- 2) The question of how and whether to treat to competency, whether through community-based competency restoration or through involuntary commitment, is a huge and complicated societal issue. On the one end of the spectrum is the need to develop community support and resources for competency restoration within the community, while on the other end is the issue of forcing people into treatment who don't want it.

The New York Times notes that, in an effort to interrupt the cycle of mentally ill defendants being shunted into the criminal justice system, only to return to homelessness upon their release,

... many communities are expanding involuntary treatment, a practice the country repudiated decades ago. Patient rights groups warn that forced treatment alone will never work — that in the absence of a robust social support system, it only feeds people with mental illness back into the circuit of catch-and-release. Better to persuade them to accept treatment.

See, *The Man in Room 117*, Ellen Barry, January 28, 2024, New York Times at <https://www.nytimes.com/2024/01/28/health/schizophrenia-treatment-family.html>, noting, further, that an ideological shift toward involuntary psychiatric treatment is occurring.

- 3) The processes detailed and required by SB 16 will require a significant investment of resources in both:
 - a. The community, as community-based competency restoration supports and facilities will need to be developed, bolstered and maintained; and
 - b. The courts, whose role in the competency determination in the case of diversion, the competency process is expanded by SB 16.

- 4) Under SB 16, the courts will continue to be involved in the competency determination and competency restoration process, but additionally will have the alternative option of diverting cases to treatment early in the case and prior to beginning the competency process, pursuant to the following statutory sections:
 - Section 31-9-1 NMSA 1978, permitting the court to order the defendant's assessment for diversion to a treatment program or refer the defendant for assessment to determine if the defendant is a candidate for civil commitment or AOT
 - Section 31-19-1.1 NMSA 1978, requiring a hearing on competency and dangerousness of an incarcerated defendant charged with a felony
 - Section 31-19-1.2 NMSA 1978, permitting the court to dismiss a criminal case without prejudice of state the case and refer the defendant to a competency restoration program, and requiring the court to order treatment in the least restrictive setting consistent with the goal of restoration of competency. Permitting the court to order a defendant confined to facilitate the filing of an order referring the defendant for an assessment to determine eligibility for civil commitment, and requiring the court to hold a hearing on the same day to determine whether a defendant charged with a felony is incompetent to proceed in the criminal case.
 - Section 31-19-1.3 NMSA 1978, requiring the court to be the recipient of a defendant's treatment supervisor's report.
 - Section 31-9-1.4 NMSA 1978, permitting the district court to refer the defendant to the District Attorney for an assessment of whether the defendant is eligible for civil commitment.
 - Section 31-9-1.5 NMSA 1978, relating to finding made by the court in a two-year review hearing;
 - Section 31-9-1.6 NMSA 1978, relating to a hearing to determine developmental or intellectual disability.

- 5) With **diversion**, at arraignment a court would connect a defendant with services. Subsequently, the case would be dismissed without requiring the defendant to await on any of the competency process and the potential associated delays. Instead of prolonged involvement with the courts, the defendant is connected to services, such as housing.

- 6) Conversely, **community competency restoration** occurs after the defendant is found incompetent and dangerous. If the judge finds it appropriate, the judge does not need to involuntarily commit the defendant. The judge can order that the defendant try to attain

competency outside of the State hospital. Community competency restoration would not require more court time, but will require the executive branch to create and fund this type of program.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

See “Fiscal Implications,” above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Duplicates HB 233.

TECHNICAL ISSUES: There are a number of technical issues that affect the substance of the bill. AOC strongly recommends the following changes:

Page 2, Line 2 – strike “suspended” and replace with “stayed”

Page 2, Line 3 – after “and the” add “court shall order a competency evaluation and the”

Page 2, Line 4 – after “prior to” add “,”

Page 2, Line 6 – strike “order that” and replace with “if the parties agree,”

Page 2, Line 6 – strike “assess for” and replace with “may”

Page 2, Line 7 – strike “suitability to”

Page 2, Line 7 – strike “either by”

Page 2, Line 8 – strike “agreement of the parties or at the courts discretion”

Page 2, Line 11 – add after (2) “if agreed to by the parties”

Page 2, Line 11 – strike “for an assessment”

Page 2, Line 14 – strike “if agreed to by the parties” and replace with “If the parties agree they shall file a stipulated petition requesting defendant be considered for Assisted Outpatient Treatment”

Page 2, Line 17 – after “six months” add “when a defendant is diverted to treatment in a”

Page 2, Line 17 – after “misdemeanor case” add “in Magistrate Court”

Page 2, Line 17 – strike “when a defendant”

Page 2, Line 18 – strike “is diverted to treatment”

Page 2, Line 19 – after “district court” add “a misdemeanor case in the Metropolitan Court, shall remain within the jurisdiction of the Metropolitan Court regardless of whether the defendant is diverted to a treatment program”

Page 2, Line 20 – strike “the court may order”

Page 2, Line 21 – strike “or”

Page 2, Line 21 – after “may agree” add “with approval of the Court”

Page 2, Line 21 – strike “assessed” and replace with “referred”

Page 2, Line 23 – strike “Upon completion of the”

Page 2, Line 24 – strike “program, a”

Page 2, Line 24 – after “dismissed” add “after the time period for completion of the diversion program has elapsed”

Page 3, Line 3 – strike section D “If a...Assisted Outpatient Treatment Act.” (line 3 – 10)

Page 3, Line 21 – strike “district”

Page 3, Line 21 – Capitalize “Court”

Page 3, Line 24 – Capitalize “Court”

Page 4, Line 20 – after “dangerous” add “. If the defendant is found competent, the case shall be scheduled for trial or any other type of hearing the Court deems appropriate. If the defendant is determined to be incompetent and not dangerous,”

Page 4, Line 21 – strike “may” and replace with “shall”

Page 4, Line 21 – strike “in the”

Page 4, Line 22 – strike “interest of justice...date of” (line 22 – 25)

Page 5, Line 1 – strike “referral”

Page 5, Line 1 – before “the Court shall” add “If the defendant is determined by the Court to be incompetent and dangerous,”

Page 5, Line 1 – Capitalize “Court”

Page 5, Line 23 – strike “residential” and replace with “hospital”

Page 6, Line 1 – strike “if” and capitalize “The”

Page 6, Line 1 – strike “is initially” replace with “may be”

Page 6, Line 9 – strike “and” and replace with “or”

Page 6, Line 9 – after “refer” strike “for”

Page 6, Line 10 – before “assessment” add “the defendant for eligibility determination for”

Page 6, Line 10 – strike “assessment to”

Page 6, Line 15 – after “...civil commitment.” Insert “Section 4. Section 31-9-1.2 NMSA 1978 (being laws 1988, chapter 107, section 3 and Laws 1988, chapter 108, Section 3, as amended) is repealed and new Section 319-1.2 NMSA 1978 is enacted to read: “31-9-1.2 [NEW MATERIAL] DETERMINATION OF COMPETENC - - DETERMINATION OF DANGEROUSNES - - COMPETENCY RESTORATION PROGRAMM - - COMMITMENT - - REPORT”

Page 6, Line 15 – Change “C” to “A”

Page 6, Line 19 – after “competency” add “restoration”

Page 6, Line 19 – after “program” add “If the defendant is ineligible for outpatient competency restoration, the defendant shall be committed and”

Page 6, Line 20 – strike “so”

Page 6, Line 22 – after “(1)” add “if”

Page 6, Line 22 – after “defendant” add “is committed to the state hospital, the defendant”

Page 7, Line 2 – strike “treatment” and replace with “competency restoration”

Page 7, Line 9 – Change “D” to “B”

Page 7, Line 17 – Change “E” to “C”

Page 8, Line 6 – after “Section” change “4” to “5”

Page 8, Line 13 – after “restoration” strike “treatment”

Page 8, Line 13 – after “the” strike “treatment” and replace with “competency restoration”

Page 8, Line 17 – after “case” strike “or to proceed with”

Page 8, Line 18 – strike “diversion, if available”

Page 8, Line 19 – strike “treatment” and add “competency restoration”

Page 8, Line 24 – strike “treatment” and add “competency restoration”

Page 9, Line 5 – strike “under treatment”

Page 11, Line 1- strike “treatment” and add “competency restoration”

Page 11, Line 16 – after “Section” change “5” to “6”

Page 13, Line 2 – after “Section” change “6” to “7”

Page 16, Line 21 – after “Section” change “7” to “8”
Page 18, Line 14 – after “Section” change “8” to “9”
Page 20, Line 17 – after “Section” change “9” to “10”

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS